

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

Edward J. Gudeman,
Petitioner,

v

MTT Docket No. 319694

State of Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Rachel J. Asbury

OPINION AND JUDGMENT

INTRODUCTION

A hearing was held in the above-captioned case on March 19, 2007. The issue in this case is whether Petitioner is liable as a corporate officer of HRC4, Inc., for unpaid 1997 single business tax liability for tax year 1997. Petitioner was at different times President, CEO, and Treasurer of the corporate entity HRC4, Inc. Petitioner was represented at the hearing by E. David Brockman. Respondent was represented by Julius O. Curling, Assistant Attorney General.

Petitioner was the President and Chief Executive Officer (CEO) of HRC4, Inc., a wholly owned subsidiary of National Human Resource Committee, NHRC. Both entities were in the business of leasing employees to clients and performing administrative tasks for clients including tax return preparation and payroll. Petitioner was an original incorporator of HRC, LaborStaff4, and NHRC, which was formed as a holding company for HRC and other the subsidiaries.¹ Petitioner held the positions of shareholder, President, Treasurer, or CEO with HRC, HRC4, Inc., LaborStaff4, and NHRC from the time each of these entities was formed until his resignation and the sale of his interests in early 1998.

¹ Transcript p 20, ll 17-20

In or around 1996, NHRC's Board began to prepare for a potential public offering.² Before any public offering was made, the corporation was sold, spun-off, and ultimately filed for bankruptcy. HRC4, Inc.'s single business tax return for the 1997 tax year was never filed. Respondent assessed Petitioner as a corporate officer of HRC4, Inc. for the single business tax due plus interest and penalties for the 1997 and 1998 tax years.

Petitioner appealed the assessment and on June 1, 2005, the Michigan Department of Treasury held an informal conference. The informal conference Decision and Order determined that Petitioner was not responsible for the 1998 SBT liability, interest, and penalty of HRC4, Inc., but the assessment of HRC4, Inc.'s 1997 SBT liability to Petitioner was upheld based upon Petitioner's position as President and/or CEO of HRC4, Inc. during that year. Petitioner appealed Respondent's Decision and Order to the Michigan Tax Tribunal.

The tax, interest, and penalty due as assessed by the Michigan Department of Treasury for the 1997 SBT tax liability of HRC4, Inc. assessed against Petitioner are:

Assessment No. K395018 for Single Business Tax, Period December 1997

Tax	\$ 500,000.00
Interest*	\$ 300,797.22
Penalty	\$ 255,000.00

² Transcript p 27, l 4

TOTAL	\$1,055,797.22
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*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. Deposition of Donald B. Lifton dated January 25, 2007.
- P-2. Deposition of John W. Burcham, II dated January 25, 2007.
- P-3. Deposition of Donovan J. Miller, CPA, dated January 18, 2007.
- P-4. Deposition of Nathan A. Casper dated February 1, 2007.

Petitioner testified that he recalled becoming involved with HRC in 1990 or 1991. In 1993 or 1994 NHRC was formed and the only shareholders of HRC, Petitioner and Fred Goldenberg, “assigned...shares in the Human Resource Committee to NHRC, and in exchange...got the stock of NHRC.”³ Petitioner testified that he was listed as an officer for HRC4, Inc., which was originally formed as LaborStaff4 and became HRC4, Inc. in 1993. Petitioner believed HRC4, Inc. was not formed until “after there [were] changes of shareholders at the NHRC level, which occurred at the beginning of ’96.”⁴ Petitioner testified that at least as early as 1993 he was “CEO and Fred [was] the President” of HRC4, Inc.⁵ Petitioner testified that he signed documents as CEO of HRC4, Inc. for 1994, 1995 and 1996. As late as 1998, when a power of attorney executed by Petitioner in favor of Nanci Wolf Freedman, assigning her the right to “receive information and represent me in all Treasury matters,” was sent to the State of Michigan for HRC4, Inc., Petitioner testified to holding the title of “President, CEO” of HRC4, Inc.⁶

³ Transcript p 20, l 10

⁴ Transcript p 23, ll 18-20

⁵ Transcript p 47, ll 13-14

⁶ Transcript p 47, ll 5-14

Petitioner testified that in or around 1996, in hopes of assisting the eventuality of going public, then shareholders “[Petitioner], Fred [Goldenberg], John Burcham, and Doug Reilly agreed to let Don Lifton and David Ward come in as shareholders” of NHRC, the parent entity.⁷ Mr. Ward was regarded, at least by Petitioner, as a finance guru and the person who would offer credibility to the eventual public offering. Petitioner testified that the two new directors required new conditions as a prerequisite to their joining NHRC. Petitioner was to “relinquish any financial responsibility”⁸ related to the business, including “...everything...that had to do with the financial status or reporting responsibilities...of the company.”⁹ The new arrangement, according to Petitioner, made Mr. Ward responsible for tax matters. Petitioner further testified that “prior to Lifton and Ward” joining NHRC “everything was reviewed, [the CFO] and I would go over everything” related to tax preparation.¹⁰ Petitioner further testified that, specifically, his duties with HRC4, Inc. did not include tax preparation or oversight for the 1997 tax year.

Petitioner offered deposition testimony of Mr. Donald Lifton. Mr. Lifton stated that “I made it a requirement of my association that there be a qualified chief executive -- chief financial officer. David Ward was a suggestion.”¹¹ Mr. Lifton further stated in his deposition that “Mr. Gudeman, I believe, was the chief executive officer of the company and, as such, would have had supervisory responsibility or authority over the - Mr. Ward, the CFO, and indirectly over those people reporting to him.”¹²

⁷ Transcript p 27, ll 6-8

⁸ Transcript p 25, ll 23-24

⁹ Transcript p 26, ll 12-14

¹⁰ Transcript p 58, ll 8-10

¹¹ Lifton Deposition p 8, ll 18-21

¹² Lifton Deposition p 14, ll 6-9

Petitioner offered deposition testimony of Mr. Donovan Miller. Mr. Miller stated that his firm was hired “in early 1998 to assist in preparation of various tax returns.”¹³ At that time, he was made aware that the 1997 SBT return had not been filed. Mr. Miller listed the individuals at NHRC with whom he worked and testified in his deposition that he “had one meeting with him [Edward Gudeman] during all of that time and it definitely was not on income tax issues. I don’t remember the meeting, but I never dealt with Ed on income tax issues.”¹⁴

The deposition testimony of John W. Burcham, also offered by Petitioner, states that Petitioner is “great at the contract side of mergers and acquisitions.”¹⁵ Petitioner contends this is the expertise that he provided to NHRC, and in his capacity as a corporate officer, to HRC4, Inc.

Petitioner admitted that he signed and participated in the review of tax documents during his involvement with NHRC, and more specifically HRC4, Inc. Petitioner identified for the Tribunal HRC4, Inc. tax documents which he had signed, including State of Michigan Tax Application in 1993 and annual Sales, Use, and Withholding Tax forms for the 1993, 1994, 1995, and 1997 tax years. However, Petitioner testified that by 1997, NHRC and its subsidiaries, including HRC4, Inc., had been “hijacked” and Petitioner had been divested of any real power.¹⁶ Although Petitioner continued as President and CEO of HRC4, Inc., continued to have payroll checks issued with his signature, although a digital not handwritten version was used, and continued to be listed as a member of the NHRC Board, Petitioner testified that, after the arrival

¹³ Miller Deposition p 5, ll 7-9

¹⁴ Miller Deposition p 6, ll 21-24

¹⁵ Burcham Deposition p 12, ll 8-9

¹⁶ Transcript p 28, l 4

of Mr. Lifton and Mr. Ward, Petitioner was an officer in title only. Petitioner identified HRC4, Inc. Michigan Annual Reports for 1994, which he signed as Treasurer; for 1995, which he signed as CEO; and for 1996, which he signed as CEO. Petitioner testified that, despite this, he had no real signatory power, “had no authority to terminate anybody who was responsible for [tax] completion,” and did not even have access to the data or computer services that held tax-related information. Petitioner testified he was stripped of the powers normally associated with President or CEO when the new shareholders, Mr. Lifton and Mr. Ward, became involved with NHRC.¹⁷

Petitioner testified that Mr. Ward negotiated a contract with an outside accounting firm, Doeren Mayhew, for off-site electronic storage for NHRC’s, and HRC4, Inc.’s tax data. According to Petitioner, and corroborated in NHRC IT employee Nathan Caspers’ deposition testimony, this network was not accessible without the proper hardware connection and a required login and password.¹⁸ Mr. Caspers stated in his deposition that neither the hardware cable nor the login and password were available to Petitioner. Mr. Caspers further stated in his deposition testimony, that he “would have no information that would dispute” that Mr. Gudeman would have been able to sign checks as the Chief Executive Officer.¹⁹ Mr. Caspers testified that he did not discuss financial issues with Petitioner and that he had no “personal knowledge of Mr. Gudeman having the ability to print off tax returns.”²⁰

¹⁷ Transcript p 36, ll 1-2

¹⁸ Caspers Deposition p 8, ll 16-17

¹⁹ Caspers Deposition p 17, ll 15-19

²⁰ Caspers Deposition p 19, ll 24 - p 20, l 1

Petitioner testified that he did not directly participate in or have responsibility for oversight of any tax preparation for the 1997 tax year after Mr. Ward joined NHRC. Petitioner testified that he felt Mr. Ward, as CFO of the company, was in charge of tax preparation.

Petitioner testified that he knew “[tax] returns and things that should have been...done weren’t being done” but had no real power, since he was a minority shareholder having only “16-plus percent.” At that point in time, Petitioner testified that he began to look for potential investors to buy out his interest in NHRC.²¹ Petitioner recalled expressing his concerns to other board members.

RESPONDENT’S POSITION

Respondent offered the following exhibits:

1. R-1: State of Michigan tax application for HRC4, Inc. signed and dated by Petitioner as CEO (10/14/1993)
2. R-2: Power of Attorney, signed by Petitioner and granting power to a 3rd party to represent HRC4, Inc. with the Department of Treasury, signed as President and CEO (2/6/1998)
3. R-3: Annual Sales, Use, and Withholding Tax forms for 1997 tax year, signed and dated by Petitioner as President and CEO (February 1998)
4. R-4: Annual return for Sales, Use, and Withholding Taxes for tax year 1995 signed and dated by Petitioner, as CEO
5. R-5: Annual return for Sales, Use, and Withholding Taxes for tax year 1994 signed and dated by Petitioner, as CEO
6. R-6: Annual return for Sales, Use, and Withholding Taxes for tax year 1993 signed and dated by Petitioner, as CFO
7. R-7: SBT Annual Return for HRC4, Inc. for tax year illegible, signed by Petitioner as President/CEO (10/30/1997)
8. R-8: SBT Amended Return for HRC4, Inc. for 1996 tax year, signed by Petitioner as President/CEO (11/5/1997)
9. R-9: Resignation letter signed by Petitioner and dated May 15, 1998
10. R-10: Articles of Incorporation for Labor Staff 4, the predecessor to HRC4, Inc., signed and dated by Petitioner in his capacity as “incorporator” (6/07/1993)

²¹ Transcript p 39, 13

11. R-11: Certificate of amendment to articles of incorporation, changing name of Labor Staff 4 to HRC4, Inc. signed and dated by Petitioner (9/09/1993)
12. R-12: Corporation Information Update for HRC4, Inc. for 1998, signed by Petitioner as President (2/10/1998)
13. R-13: Michigan Annual Report for HRC4, Inc. for 1997, signed by Petitioner as President (4/21/1997).
14. R-14: Michigan Annual Report for 1996, signed and dated by Petitioner as CEO and Treasurer (6/03/1996)
15. R-15: Michigan Annual Report for 1995, signed and dated by Petitioner as CEO and Treasurer (4/26/1995)
16. R-16: Michigan Annual Report for 1994, signed and dated by Petitioner as Treasurer (4/22/1994)
17. R-17: Certificate of automatic dissolution for HRC4, Inc., as of 7/15/2002, from the Michigan Department of Labor and Economic Growth, dated 12/21/2005
18. R-18: Corporation Information Update for HRC4, Inc. for 1999 signed by James E. Baiers as Secretary, Petitioner is not listed in any capacity (12/2/1999)
19. R-19: Bill for Taxes Due for SBT for HRC4, Inc. for 12/1997 tax period, dated 8/02/05 and addressed to Edward J. Gudeman at 3925 Columbia Dr, Bloomfield Hills, MI, 48302.

Exhibits R-1-6, R-9, R-10, R-11, R-14-16, and R-19 were admitted. Petitioner challenged the authenticity of the signatures on documents R-12 and R-13 and the content of documents R-7 and R-8. The objections to Exhibits R-7, R-8, R-12, and R-13 were sustained and the exhibits were not admitted. R-17 and R-18 were not admitted as they related to tax periods subsequent to the tax year at issue and after Petitioner's association with the corporation had ended.

Respondent contends that Petitioner's signatures on tax documents in years immediately prior to 1997, in his capacity as President and/or CEO of HRC4, Inc., Petitioner's signature on tax-related documents for the 1997 tax year, and absent any documented transfer of his tax related responsibility during that time, is prima facie evidence that Petitioner was a corporate officer of HRC4, Inc. and had the requisite tax-related responsibility.

On cross-examination, Petitioner testified that he was aware that a CEO was typically “the person who can make everything happen,” including having responsibility for tax preparation²² Petitioner stated that after Mr. Ward came to NHRC, Petitioner’s title of CEO was anything but typical and he did not, in fact, have power over or day-to-day responsibility relating to anything financial.

Respondent introduced exhibits signed by Petitioner, before, during, and after the 1997 tax year, which Petitioner signed as President, CEO, or both. Petitioner testified that during his tenure as shareholder and Board Member of NHRC, he signed tax forms and Michigan Annual Reports. Additionally, Petitioner testified that in February of 1998, he signed a power of attorney assigning his tax representation responsibilities to Nancy Wolf Freedman of Freedman & Areda, P.C., thus allowing Ms. Freeman to represent HRC4, Inc. with the Department of Treasury.

FINDINGS OF FACT

Petitioner was one of two members of HRC. After the formation of HRC, NHRC was formed by Petitioner and Fred Goldenberg and the two traded their HRC shares for shares of NHRC. NHRC became a holding company of which HRC was a wholly owned subsidiary. Subsequently, a second subsidiary to NHRC was formed, LaborForce4. The name of LaborForce4 was changed to HRC4, Inc. in 1993 and remained a wholly owned subsidiary of NHRC.

²² Transcript p 75, ll 3-4

HRC4, Inc.'s SBT return for 1997 was never filed and HRC4, Inc.'s SBT tax liability for 1997 was never paid. HRC4, INC. was eventually sold and declared bankrupt.

Petitioner was a corporate officer for HRC, NHRC, LaborForce4, and HRC4, Inc. Corporate documents show that Petitioner was HRC4, Inc.'s CEO in 1993, 1994, 1995, 1996, 1997, and 1998, Treasurer of HRC4, Inc. in 1994, and at all times a practicing attorney, often acting as in-house counsel on various legal matters for HRC4, Inc. related to the business. Petitioner tendered his resignation from the positions of "Director, President and CEO of National Human Resource Committee, Inc. and all its subsidiaries" by letter dated May 15, 1998.²³

In or about 1996, Mr. Lifton and Mr. Ward were added to the Board of NHRC. Although Petitioner testified that at that time he was required to relinquish all financial responsibility related to the business, including "...everything...that had to do with the financial status or reporting responsibilities...of the company"²⁴ making Mr. Ward responsible for tax matters, Petitioner offered no documentary evidence to support this contention.

The deposition testimony of Mr. Lifton explains the roles of shareholder and director that he and Mr. Ward held and that Mr. Ward served as CFO. Mr. Lifton further testified in his deposition that Mr. Gudeman, as CEO, had supervisory responsibility over Mr. Ward and others in the accounting department. Mr. Ward's status as CFO is separate and distinct from any determination of Petitioner's corporate officer status.

²³ Respondent's Exhibit 9

²⁴ Transcript p 26, ll 12-14

Mr. Miller's deposition testimony details his involvement with HRC4, Inc. and various shareholders, directors, and CFO's. Mr. Miller testified that he did not discuss income tax issues with Mr. Gudeman. This testimony, however, is not evidence of Petitioner's status as a corporate officer or whether Petitioner had tax-related control, supervision, or responsibility. Mr. Caspers, in his deposition, testified that he had no information to dispute Petitioner being able to sign checks. Even if Mr. Caspers had been able to testify from personal knowledge that Petitioner had the ability to print off tax returns, that testimony would not address the statutory standards on which Petitioner's liability is based.

Similarly, Mr. Burcham's deposition testimony that Petitioner was great at the contract side of mergers and acquisitions does not preclude Petitioner from having other responsibilities, specifically those related to tax matters.

Despite Petitioner's testimony that the corporate structure was altered, no evidence was presented as to any change in corporate governance or corporate responsibilities. No meeting minutes, bylaws, shareholder agreements, or documented correspondence shows either a change in Petitioner's corporate duties regarding tax preparation and ultimate tax-related responsibility, or dissent by Petitioner as to tax preparation procedures. The power of attorney signed by Petitioner in February of 1998 as a corporate officer, President and CEO, assigning the right to represent HRC4, Inc. with the Michigan Department of Treasury in tax-related matters is the only documentation of a transfer of his tax-related responsibilities. Petitioner had to have had tax-related responsibility and oversight duties to transfer those duties to another at the time the power of attorney was executed.

Respondent provided significant evidence, including Petitioner's signature on tax returns, tax-related documents, corporate documents, and negotiable instruments, to establish that Petitioner was a corporate officer of HRC4, Inc. for the tax year at issue. Respondent's evidence establishes a prima facie case supporting Petitioner's responsibility for making returns and payments.

The Tribunal finds that Petitioner was a corporate officer of HRC4, Inc. during the tax year at issue. Petitioner did not resign his position as a corporate officer or sell his shares during that year. Petitioner's testimony alone that Mr. Lifton and Mr. Ward "hijacked" the company is not sufficient to rebut the prima facie evidence presented. It is uncontested that Petitioner had tax-related responsibility prior to 1997 and the Tribunal finds that Petitioner retained tax-related responsibilities during the tax period at issue. Petitioner as officer, CEO, and shareholder, retained the responsibility for making returns and payments, although he may not have exercised that responsibility. Petitioner acknowledged awareness that required returns were not filed. The Tribunal finds that Petitioner provided insufficient documentary evidence to rebut the presumptions established by Respondent's prima facie case. It is no defense that Mr. Lifton or Mr. Ward may have also had responsibility for taxes. Respondent has authority under the statute to assess one or more responsible corporate officers.

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's signature on tax returns and company filings as President, CEO, and Treasurer as late as 1998 is prima facie evidence of his responsibility for making the returns and payments, including the 1997 SBT return of HRC4, Inc. Petitioner's participation as President and CEO required he provide oversight and be responsible for all matters relating to the company, including the SBT liability for HRC4, Inc. Petitioner testified that he was not responsible for the tax preparation or anything financial once new investors joined NHRC. However, he admitted knowledge of tax matters, returns, and payments as a member and officer of the Board of Directors. Petitioner's only evidence that he was no longer President or CEO is based upon his testimony that others had taken over responsibility for tax-related matters. Petitioner admitted that although he knew he should have done something, he did not. This does not absolve him of his responsibility. The Tribunal finds no evidence of any change in Petitioner's responsibilities prior to 1998.

Petitioner was the President and CEO of HRC4, Inc. during the time when the company failed to file its 1997 SBT annual return. Petitioner signed a power of attorney form in 1998 transferring tax-related powers to a third party. If Petitioner had the authority to delegate tax preparation, Petitioner had tax-related responsibility prior to the signing of that document.

Petitioner, who testified that he had spent long days and nights preparing HRC4, Inc.'s taxes in prior years, may have passed these day-to-day duties to someone else. But ultimately, a CEO or President oversees tax matters and is required to assure that the taxes are filed. Petitioner's claim that the company was "hijacked"²⁵ and that there truly was no power behind his title does not absolve him of that responsibility.

Respondent established a prima facie case of Petitioner's responsibility as a corporate officer for the Assessment at issue. Petitioner did not meet his burden of rebutting that presumption by a preponderance of the evidence.

The Tribunal finds that Petitioner was a corporate officer who had control or supervision of, or responsibility for, making the returns or payments and that he is personally liable for the failure of HRC4, INC. to file its single business tax returns and payments for the 1997 tax year.

Respondent's Assessment No. K395018 for Single Business Tax ending December 31, 1997 is upheld.

IT IS ORDERED that Assessment No. K395018 is AFFIRMED.

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

MICHIGAN TAX TRIBUNAL

Entered: March 19, 2008

By: Rachel J. Asbury

²⁵ Transcript p 28, 14 and p 41, 17