

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Charles T. Russell,
Petitioner,

MTT Docket No. 431417

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
B. D. Copping

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Charles T. Russell, appeals Respondent's determination that Petitioner is liable as an officer under MCL 205.27a(5) for American Concrete Sawing, Inc.'s (ACS) failure to file or pay monthly withholding taxes relating to the 05/08, 09/08, 12/08, 04/09, 06/09, 07/09, and 08/09 tax periods. Through these seven individual assessments, Respondent asserts that Petitioner is liable in the aggregate amount of \$23,035.26. The sole question is whether Petitioner was a responsible corporate officer of ACS, who is individually and severally liable for the subject taxes.

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that Petitioner is not liable for Assessment Nos. Q438778, Q557102, and R418203 relating to the 2008 tax periods. Petitioner is, however, liable

for Assessment Nos. R294767, R425634, R530592, and R406603 relating to the 2009 tax periods. The assessments, as determined by the Tribunal, are as follows:

Assmt	Period	Type	Tax	Penalty	Interest*	Total
Q438778	05/08	WTH	\$0.00	\$0.00	\$0.00	\$0.00
Q557102	09/08	WTH	\$0.00	\$0.00	\$0.00	\$0.00
R418203	12/08	WTH	\$0.00	\$0.00	\$0.00	\$0.00
R294767	04/09	WTH	\$849.42	\$0.00	\$69.40	\$918.82
R425634	06/09	WTH	\$1,930.20	\$482.55	\$211.79	\$2,624.54
R530592	07/09	WTH	\$2,991.86	\$747.96	\$316.31	\$4,056.13
R406603	08/09	WTH	\$1,742.26	\$435.55	\$177.29	\$2,355.10

*Statutory interest to be determined pursuant to MCL 205.23(2).

BACKGROUND

In 1995, Petitioner formed ACS with John Segasser and Page Scott to provide concrete sawing services. Petitioner held the title of President, John Segasser was Vice President, and Page Scott was Secretary and Treasurer.

Petitioner was a 50% shareholder in the company, and Mr. Segasser and Mr. Scott were each 25% shareholders.

On November 14, 2011, Respondent issued the following assessments against Petitioner, as a responsible corporate officer under MCL 205.27a(5), regarding the failure of ACS to remit Michigan payroll withholding tax:

Assmt	Period	Type	Tax	Penalty	Interest*	Total
Q438778	05/08	WTH	\$630.88	\$0.00	\$26.81	\$657.69
Q557102	09/08	WTH	\$2,363.38	\$590.81	\$372.45	\$3,326.64
R418203	12/08	WTH	\$6,581.09	\$1,645.26	\$869.99	\$9,096.34
R294767	04/09	WTH	\$849.42	\$0.00	\$69.40	\$918.82
R425634	06/09	WTH	\$1,930.20	\$482.55	\$211.79	\$2,624.54
R530592	07/09	WTH	\$2,991.86	\$747.96	\$316.31	\$4,056.13
R406603	08/09	WTH	\$1,742.26	\$435.55	\$177.29	\$2,355.10
Total			\$17,089.09	\$3,902.13	\$2,044.04	\$23,035.26

*Statutory interest to be determined pursuant to MCL 205.23(2).

On December 5, 2011, Petitioner filed this appeal with the Tribunal.

Respondent filed its answer to Petitioner's appeal on December 27, 2011.

Petitioner filed a Motion to Amend the Petition, along with an Amended Petition, on August 28, 2012. The Motion to Amend the Petition was granted by the Tribunal on September 26, 2012. On October 8, 2012, Respondent filed its Response to Petitioner's Amended Petition. A hearing was held on October 8, 2012. Lewis R. Thumm, Attorney, appeared on behalf of Petitioner. Julius O. Curling, Assistant Attorney General, appeared on behalf of Respondent. At the hearing, Petitioner filed a Trial Brief, which was admitted without objection.

PETITIONER'S CONTENTIONS

Petitioner contends that he is not liable as a corporate officer of ACS for the assessments issued against him. Petitioner asserts that (i) he was not involved in

the day-to-day operations of ACS prior to taking over as receiver in September 2009; (ii) prior to that time Page Scott made all of the decisions as to what operating expenses were paid; (iii) Petitioner had no input on Page Scott's decisions regarding payment of ACS expenses and taxes; (iv) before taking over the business as receiver Petitioner was at the ACS location no more than two times and devoted all of his time to the management of his other business; and (v) Petitioner had the authority to sign ACS checks, but never did so during the assessment periods. (P-31, p 1; Amended Petition at 12 – 14)

Petitioner cites to *Oleski v Dep't of Treasury*, MTT Docket No. 379020 (2011), as being identical to the facts of his appeal. (P-13, p 2)

Petitioner further contends that Respondent has attached his personal state income tax refund in the amount of the ACS liability and Petitioner requests these funds be returned should he be found not liable for the assessments. (Amended Petition at 24 – 25)

PETITIONER'S ADMITTED EXHIBITS

P-1: Statement of Page Scott to the Michigan Department of Treasury

P-2: Summary of ACS cash transactions from 9-10-09 to 12-31-11

P-3: List of ACS assets sold after 9-9-09

P-4: Employee gross to net report for ACS from 9-1-09 to 11-2-09

P-5: Chase Bank Statements for ACS from 9-1-09 to 9-30-09

- P-6: Chase Bank Statements for ACS from 10-1-09 to 10-30-09
- P-7: Fifth Third Bank Statements for Charles T. Russell from 10-29-09 to 11-13-09
- P-8: Fifth Third Bank Statements for Charles T. Russell from 11-14-09 to 12-15-09
- P-9: Fifth Third Bank Statements for Charles T. Russell from 12-16-09 to 1-15-10
- P-10: Fifth Third Bank Statements for Charles T. Russell from 1-16-10 to 2-12-10
- P-11: Fifth Third Bank Statements for Charles T. Russell from 2-13-10 to 3-15-10
- P-12: Fifth Third Bank Statements for Charles T. Russell from 3-16-10 to 4-15-10
- P-13: Fifth Third Bank Statements for Charles T. Russell from 5-15-10 to 6-15-10
- P-14: Fifth Third Bank Statements for Charles T. Russell from 6-16-10 to 7-15-10
- P-15: Fifth Third Bank Statements for Charles T. Russell from 7-16-10 to 8-13-10
- P-16: Fifth Third Bank Statements for Charles T. Russell from 8-14-10 to 9-15-10
- P-17: Fifth Third Bank Statements for Charles T. Russell from 9-16-10 to 10-15-10
- P-18: Fifth Third Bank Statements for Charles T. Russell from 10-16-10 to 11-15-10
- P-19: Fifth Third Bank Statements for Charles T. Russell from 11-16-10 to 12-15-10
- P-20: Fifth Third Bank Statements for Charles T. Russell from 12-16-10 to 1-14-11
- P-21: Fifth Third Bank Statements for Charles T. Russell from 1-15-11 to 2-15-11
- P-22: Fifth Third Bank Statements for Charles T. Russell from 2-16-11 to 3-15-11
- P-23: Fifth Third Bank Statements for Charles T. Russell from 3-16-11 to 4-15-11
- P-24: Fifth Third Bank Statements for Charles T. Russell from 4-16-11 to 6-15-11

P-25: Fifth Third Bank Statements for Charles T. Russell from 7-16-10 to 8-13-10

P-26: Fifth Third Bank Statements for Charles T. Russell from 6-16-11 to 7-15-11

P-27: Check register for Fifth Third Bank for ACS from 9-10-09 to 12-31-09

P-28: Check register for Fifth Third Bank for Charles T. Russell from 10-28-09 to 12-28-09

P-29: Check register for Fifth Third Bank for Charles T. Russell from 10-30-09 to 7-29-10

P-30: ACS check registry from 1-6-10 to 11-30-10

P-31: ACS/Charles T. Russell check registry covering all of 2010

P-32: ACS/Charles T. Russell check registry covering all of 2011

P-33: International Union of Operating Engineers Collective Bargaining Contract with ACS

P-34: Operating Engineers Local 324 Health Care and Pension Plan and Trust

P-35: Agreement for installment payments of ACS delinquent payments to Operating Engineers Local 324 Health Care and Pension Plan and Trust

P-36: Pages 1 and 7 of complaint filed against Scott, Segasser, and Russell by Operating Engineers Local 324 Health Care and Pension Plan and Trust

P-37: *Operating Engineers Local 324 Funds and Trust v Nicholas Equipment LLC*, 353 F Supp 2d 851 (2004)

P-38: *Sellers v United States & Solway*, 938 F Supp 432 (1996)

P-39: Trial Brief

PETITIONER'S WITNESSES

Renee Burkhart

Renee Burkhart is an accountant and Petitioner's executive assistant. Ms. Burkhart participated in the winding up of ACS after Petitioner took over as receiver in September 2009. (Transcript, pp 16 – 17) Ms. Burkhart testified that after this time, assets were sold and receivables came in, and they paid past and current liabilities to the IRS, automatic withdrawals from the account for equipment and other purchases, worker's compensation payments, insurance payments, as well as the current and some of the back payments for state payroll taxes. (Transcript, pp 16 – 24) She further stated that ACS ran out of funds to pay the entire union settlement and the state tax liability and Petitioner paid \$27,676.75 of the total union settlement out of his own pocket. (Transcript, pp 18; P-2) She stated from September 9, 2009, forward everything was kept current and the payroll taxes were paid. (Transcript, pp 19) Ms. Burkhart testified that the intention was to pay the State of Michigan liability, but the union got to the funds first because they had already received a judgment against ACS and garnished the bank account before Petitioner took over as receiver. (Transcript, pp 20, 29)

On cross-examination, Ms. Burkhart testified that she was not familiar with ACS until 2007, when Petitioner found out there were some financial issues with

the company, e.g., the other two shareholders were using assets for personal expenses and starting up another company with ACS assets. (Transcript, pp 38 – 39) She stated that the other shareholders gave them bank statements, but she and Petitioner did not have access to checks or the checking accounts. (Transcript, pp 40 – 41) The company was still profitable at that time and no further action was taken. (Transcript, pp 41) Ms. Burkhart testified that the receivership came about after Petitioner was informed in August 2009 that ACS had lost their biggest customer and Page Scott was not showing up for work. (Transcript, pp 42) She stated that Petitioner met with his attorney, CFO, and the ACS office manager, and became aware of the company’s debts at that time. Petitioner and the other two shareholders had a meeting and they all signed off on Petitioner becoming the receiver. (Transcript, pp 42 – 43) Ms. Burkhart testified that Petitioner did sign tax returns and checks for payment of liabilities after he became receiver in September 2009, and signed ACS’s 2009 SUW return that was filed in 2010. (Transcript, pp 43 – 45)

Charles T. Russell

Mr. Russell testified that he formed ACS with John Segasser and Page Scott and provided all the capital for the start-up of the company. (Transcript, pp 57 – 58) After the initial setup of the company, he stated that he “never wrote a check out of the company” and never made any decisions. (Transcript, p 58) He testified

that he had “very little” contact with the other two shareholders and was in the ACS facility only three times until 2007. (Transcript, p 60) Mr. Russell stated that he found out in 2007 that there was “some crazy stuff going on” at ACS and he and Ms. Burkhart went to the company and pulled some information to review. They found out that the other two shareholders had started another business and bought equipment that they charged to ACS. They were also taking dividends out of the company without authorization. (Transcript, p 61) Mr. Russell testified that the business was still doing well and Mr. Segasser and Mr. Scott promised they would straighten everything out and reimburse ACS for the money that they had taken. (Transcript, p 62)

Mr. Russell indicated that he did not hear from the other shareholders again until 2009. He met with them in September 2009, after reviewing the company records, and decided to dissolve the corporation. (Transcript, pp 62 – 64) He also became aware of a union contract and an agreement signed by Mr. Segasser and Mr. Scott to resolve unpaid employee benefits. (Transcript, pp 66 – 68) Mr. Russell testified that there was a lawsuit in federal court regarding employee benefits and that it included a \$136,000 claim against him personally. (Transcript, pp 65 – 66) Mr. Russell stated that he contested any personal liability for the unpaid benefits, but did settle the claim against him personally because he was not sure how the litigation would turn out and believed he might have to pay more,

including the attorney fees. (Transcript, p 68) He also settled the union claim with ACS but there was not enough left over in the account to pay the entire settlement and he paid some of this settlement personally. (Transcript, p 69) Mr. Russell stated that he did not think it would be his responsibility to pay the Michigan taxes that accrued prior to his taking over as receiver because he did not have anything to do with running the business prior to 2009. (Transcript, p 70)

On cross-examination, Mr. Russell testified that when he took over as receiver, he had knowledge of the bank accounts and receivables and had the authority to sign checks. He made decisions regarding what employees to keep and what bills would be paid going forward and paid part of the outstanding prior Michigan payroll tax debt, but there “wasn’t enough money to pay the rest.” (Transcript, pp 74 – 75)

RESPONDENT’S CONTENTIONS

Respondent contends that Petitioner is liable, as a corporate officer, for the unpaid withholding taxes of ACS for the tax periods contained in the assessments. Respondent asserts that Petitioner was in authority and had the ability and access to the funds necessary to pay the taxes and since he chose not to, he should be held personally liable for the taxes that went unpaid. (Transcript, p 86) Respondent further asserts that Petitioner “assumed responsibility and signed off on becoming the receiver” of ACS to dissolve it and “took the reins of ACS as receiver knowing

that these obligations were out there, and he didn't pay them." (Transcript, pp 86 – 87) Respondent contends that the *Oleski* case cited by Petitioner is distinguishable because the petitioner in that case never signed a return or paid a tax and was not aware of the unpaid taxes. (Transcript, p 88)

RESPONDENT'S ADMITTED EXHIBITS

- R-1: Letter from Page Scott to Michigan Department of Treasury
- R-2: ACS September 2009 Monthly Combined Return and check dated October 15, 2009, signed by Charles T. Russell
- R-3: ACS October 2009 Monthly Combined Return and check dated November 10, 2009, signed by Charles T. Russell
- R-4: ACS November 2009 Monthly Combined Return and check dated January 20, 2010
- R-5: Power of Attorney form for ACS signed by Charles T. Russell
- R-6: Articles of Incorporation for ACS dated May 2, 1994 and signed by Charles T. Russell
- R-7: ACS 1998 Corporation Information Update listing Charles T. Russell and Resident Agent and President dated March 12, 1998
- R-8: ACS 1999 Corporation Information Update listing Charles T. Russell as Resident Agent and President dated April 23, 1999
- R-9: ACS 2000 Corporation Information Update listing Charles T. Russell as Resident Agent dated March 7, 2000
- R-10: ACS 2001 Corporation Information Update listing Charles T. Russell as Resident Agent and President dated May 1, 2001

- R-11: ACS 2002 Corporation Information Update listing Charles T. Russell as President dated February 28, 2002
- R-12: ACS 2003 Corporation Information Update listing Charles T. Russell as Resident Agent and President dated March 20, 2003
- R-13: ACS 2008 Corporation Information Update listing Charles T. Russell as President dated June 11, 2008
- R-14: ACS 2009 Annual Return for Sales, Use, and Withholding Taxes signed by Charles T. Russell as Receiver dated February 17, 2010
- R-15: ACS 2002 SBT Schedule of Shareholders and Officers listing Charles T. Russell as an Officer and 50% Shareholder
- R-16: ACS 2004 SBT Schedule of Shareholders and Officers listing Charles T. Russell as an Officer and 50% Shareholder
- R-17: ACS 2005 SBT Schedule of Shareholders and Officers listing Charles T. Russell as an Officer and 50% Shareholder
- R-18: Final Assessments issued against ACS

FINDINGS OF FACTS

1. Petitioner was the President and 50% shareholder of American Concrete Sawing, Inc.
2. John Segasser and Page Scott were each 25% shareholders, and ran the day-to-day operations of ACS.
3. On September 9, 2009, Petitioner, John Segasser, and Page Scott signed a Unanimous Consent of Shareholders (R-1) indicating that the corporation was to be dissolved, that John Segasser was to execute a Certificate of Dissolution, and that Petitioner, Charles T. Russell, was:

[D]esignated as receiver of the assets of the corporation for the purpose of notifying known creditors; filing the certificate of dissolution; liquidating the assets of the corporation; collecting receivables;

completing work in progress and collecting payment for the work; and paying creditors according to the priorities provided by law.

4. Based on the testimony presented, ACS was dissolved on or after September 9, 2009.
5. Petitioner took over as receiver of ACS on September 9, 2009.
6. Prior to September 2009, Petitioner did not sign any checks or tax returns on behalf of ACS.
7. Petitioner signed the 2009 SUW annual return, as receiver, on February 17, 2010 [See Respondent's exhibit R-14].
8. The 2009 SUW annual return showed a balance due of \$2,554.69 [See Respondent's exhibit R-14].
9. Petitioner signed a Power of Attorney, as receiver, on August 18, 2010, authorizing the Department of Treasury and UIA to speak with Renee Burkhart regarding ACS for the 2007 – 2010 tax years.

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 and payments.

For a person to be held liable for the corporation's taxes, it must be proven based on the department's audit or investigation, that he or she was an officer of

the corporation. In addition, liability will arise only if the officer (1) has control over the making of the corporation's tax returns and payments of taxes, or (2) supervises the making of the corporation's tax returns and payments of taxes, or (3) is charged with the responsibility for making the corporation's returns and payments of taxes. *Keith v Dep't of Treasury*, 165 Mich 105; 418 NW2d 691 (1987).

Once a prima facie case is established, by producing a corporate officer's signature on a return or negotiable instrument submitted in payment of taxes, the burden of proof shifts to the corporate officer to rebut the presumption that he or she is responsible for the corporation's failure to pay tax, by producing "evidence sufficient to convince the Tribunal that the nonexistence of the presumed fact is more probable than its existence." *Penner v Dep't of Treasury*, MTT No. 358583 (2010), p 10, citing *Widmayer v Leonard*, 422 Mich 280, 287; 373 NW2d 538 (1985). The officer may offer proofs to rebut the presumption. By creating a rebuttable presumption, the statute plainly provides that a signing officer may be able to present facts proving that he did not have control over or responsibility for the corporation's failure to pay tax and, therefore, is not liable. The officer also retains the overall burden of persuasion. *Drake v Dep't of Treasury*, MTT Docket No. 204601 (1995). "Prima facie evidence" means "evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." Black's Law

Dictionary (7th ed), p 460. Therefore, judgment may be entered against the signing officer, unless he can produce persuasive evidence that he lacked control, supervision, or responsibility for making the return or payment notwithstanding his signature on a return or negotiable instrument.

The Tribunal finds that Respondent failed to submit prima facie evidence for the 2008 tax periods assessed against Petitioner. Respondent has no signed checks or returns by Petitioner during the tax periods assessed for 2008. Petitioner's only action occurred after the company was dissolved and he took over as a receiver. Further, Petitioner's signature after he took over control of ACS relates only to the 2009 SUW annual return. There are no returns or checks in payment of taxes signed by Petitioner (in any capacity) at anytime during 2008. The Michigan Supreme Court has held that "[w]e agree that personal tax liability will not attach to corporate officers who simply have significant involvement in the financial affairs of a corporation. The involvement must be tax specific. *Livingstone v Department of Treasury*, 434 Mich 771, 780; 456 NW2d 684, 687 (1990).

In *Peterson v Department of Treasury*, 145 Mich App 445; 377 NW2d 887 (1985), it was found that "the record does not support a conclusion that petitioner was both an officer *and* responsible for the corporation's making of returns and payments of taxes during any period other than December, 1978, through

December, 1979 [tax period in which the petitioner was both an officer and made returns and payments].” Further, in *Kosanke v Dep’t of Treasury*, MTT Docket No. 332392 (2010), the Tribunal stated the issue as follows: “The threshold issue to be determined is when did Trans Industries fail to pay the taxes due and whether Petitioner was, at that time, an officer who had control or supervision of, or responsibility for, making the payments.” In the present case, there is no evidence before the Tribunal of any tax specific involvement in ACS by Petitioner for the 2008 tax periods, nor is there any evidence that Petitioner had any control over any aspect of the company or the preparation of the returns or making of payments for the 2008 tax periods contained in the assessments.

Petitioner also signed a power of attorney, as receiver, on August 18, 2010, authorizing the Department of Treasury and UIA to speak with Renee Burkhart regarding ACS for the 2007 – 2010 tax years. The mere signing of a power of attorney in 2010 does not constitute prima facie evidence of liability for the making of returns or payment of taxes for either the 2008 or 2009 tax periods at issue. Petitioner’s signature on a power of attorney is not the same as signing “returns or negotiable instruments submitted in payment of taxes” as prescribed in MCL 205.27a(5) for purposes of meeting the prima facie evidence test. That said, in certain circumstances the signing of a power of attorney may be one of many indicia that an individual is exercising control or supervision of, or responsibility

for an entity's tax function. Thus, the Tribunal finds that Petitioner's signature on the power of attorney does not establish liability as a corporate officer for the assessments at issue. As such, the Tribunal finds that Petitioner is not liable, as a corporate officer, for Assessment Nos. Q438778, Q557102, and R418203 relating to the 2008 tax year.

There is no evidence on the record or in the testimony that Petitioner had any tax specific involvement with ACS, prior to September 9, 2009. Respondent stated during the hearing that Petitioner assumed responsibility when he took over as receiver knowing that the withholding tax obligations existed and did not pay them. Given these statements, it would appear that Respondent contends that Petitioner's actions after September 9, 2009, can make him liable as a corporate officer under MCL 205.27a(5). As such, it must be determined what effect Petitioner's signature on the 2009 SUW annual return had on his liability as a corporate officer for the 2009 tax periods assessed by Respondent.

The Court of Appeals has held that:

We simply cannot agree with petitioner's assertion that MCL 205.27a(5) "does not impose liability on an officer for conduct which occurs [two] years after the returns were due." The word "due" in the first sentence of MCL 205.27a(5) refers to the type of taxes (i.e., those that are *due*) that the company has failed to pay; it does not refer to the time when personal liability attaches. Moreover, the statute states that "[t]he 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 and payments.” Despite petitioner’s argument to the contrary, the statute does not limit the type of “returns or negotiable instruments” that may be considered to those filed at the time the tax was first due.

Musser v Dep’t of Treasury, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2010 (Docket No. 293480). Therefore, Petitioner’s signature on the 2009 SUW annual return on February 17, 2010, may be considered, even though the monthly withholding payments were due prior to this date.

It must next be determined what effect, if any, the dissolution of the corporation had on Petitioner’s liability as a corporate officer. Under MCL 205.27a(5) “[t]he dissolution of a corporation . . . does not discharge an officer's, member's, manager's, or partner's liability for a prior failure of the corporation . . . to make a return or remit the tax due.” [Emphasis added]. Further, the effect of dissolution of a corporation is, according to MCL 450.1834, “[s]ubject to section 833 and except as otherwise provided by court order, a dissolved corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred.” [Emphasis added]. As such, dissolution does not terminate Petitioner’s role as an officer of ACS. See also *Turner v Hartman*, unpublished decision per curiam of the Court of Appeals, issued June 23, 2005 (Docket No. 260522). However, “[o]nce a dissolved corporation has finished

winding up its affairs, its existence is terminated and it ceases to exist for all purposes.” *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483; 776 NW2d 387 (2009). Based on the testimony and evidence presented, Petitioner did not finalize the winding up of ACS until sometime in June of 2011. (P-32; Transcript, p 37) The Tribunal finds that ACS remained in existence until Petitioner had “finished winding up its affairs” and Petitioner continued to function as its President until June of 2011. The 2009 SUW annual return signed by Petitioner related to the individual 2009 tax periods covered by Respondent’s assessments. Petitioner’s contention that *Oleski v Dep’t of Treasury*, MTT Docket No. 379020 (2011), should apply is inaccurate. The facts of the present case are not identical to *Oleski*. In *Oleski*, the petitioner never signed a return or check and was not aware of the unpaid taxes. In the present case, Petitioner became aware of the unpaid taxes in August of 2009, took over as receiver in September, and signed the 2009 SUW annual return on February 17, 2010. The Tribunal finds that Petitioner’s signature on the return is prima facie evidence of his liability as a corporate officer. Petitioner has failed to rebut the presumption that he had control over, and took responsibility for, making the returns or payments with respect to the 2009 tax year. Given this analysis, the Tribunal finds that Petitioner is liable for Assessment Nos. R294767, R425634, R530592, and R406603.

The Tribunal further finds that Petitioner’s argument contained in the Trial Brief is not persuasive. In the Trial Brief, Petitioner alleges that “ACS funds used to pay the employee trust fund are . . . encumbered along with the payroll taxes. He is not personally liable for the payroll taxes to the extent he used ACS assets for operating costs, State and Federal payroll taxes, and the contributions to the employee trust fund.” There is no provision in MCL 205.27a(5) that absolves a corporate officer from liability for the corporation’s failure to pay if funds are “encumbered” for other purposes. Petitioner has set forth no case law applicable to corporate officer liability that contains any such exemption for the payment of the taxes owed. The fact that contributions to the employee benefit trust fund were vested and had to be paid does not negate the liability of ACS to pay its other debts, including the withholding taxes that were due to the State of Michigan. ACS failed to pay the necessary withholding taxes and failed to contest the assessments for these taxes, which became final, and were then assessed against Petitioner as a corporate officer.

Given the above, the Tribunal finds that Respondent has failed to establish a prima facie case for the 2008 tax periods assessed. Assessment Nos. Q438778, Q557102, and R418203, relating to the 2008 tax periods are cancelled. Petitioner’s signature on the 2009 SUW annual return is prima facie evidence of Petitioner’s

liability for the 2009 tax periods and as Petitioner failed to rebut the presumption created by the prima facie evidence, Petitioner is liable, as a corporate officer, for the 2009 tax periods contained in Assessment Nos. R294767, R425634, R530592, and R406603.

JUDGMENT

IT IS ORDERED that Assessment Nos. Q438778, Q557102, and R418203, relating to the 2008 tax periods, are CANCELLED.

IT IS FURTHER ORDERED that Assessment Nos. R294767, R425634, R530592, and R406603, relating to the 2009 tax periods, are AFFIRMED.

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

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund within 28 days of entry of this Final Opinion and Judgment.

MICHIGAN TAX TRIBUNAL

By: B.D. Copping

Entered: December 12, 2012