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

D'Agostini Land Company LLC,
Petitioner,

v

MTT Docket No. 16-000174

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H Lasher

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSTION

FINAL OPINION AND JUDGMENT

The Tribunal, having given due consideration to the file in the above-captioned case, finds:

The Tribunal issued a Proposed Order Granting Respondent's Motion for Summary Disposition ("Proposed Order") on September 28, 2016. The Proposed Order states that "[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal **in writing, by mail or by electronic filing, if available,** if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions)."

Neither party has filed exceptions to the Proposed Order.

The Administrative Law Judge ("ALJ") considered the testimony and evidence submitted and made specific findings of fact and conclusions of law. The ALJ's determination is supported on the record and by the applicable statutory and case law.

Given the above, the Tribunal adopts the Proposed Order as the Tribunal's final decision in this case.[1] The Tribunal also incorporates by reference the Conclusions of Law contained in the Proposed Order in this Final Opinion and Judgment. As a result:

The taxes, interest, and penalties, as levied by Respondent, are:

Assessment Number: UA66863

Taxes	Penalties	Interest
$132,639.00	$33,159.75	$9,333.46

The taxes, interest, and penalties, as determined by the Tribunal, are:

Assessment Number: UA66863

[1] See MCL 205.726.

Taxes	Penalties	Interest[2]
$132,639.00	$33,159.75	$9,333.46

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties as indicated herein 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 as required by this Order within 28 days of entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves the last pending claim and closes this case.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[3] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[4] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[5] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[6]

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than

2 Interest continues to accrue per 1941 PA 122. Interest shown above is current as of the date of the assessment.
[3] See TTR 261 and 257.
[4] See TTR 217 and 267.
[5] See TTR 261 and 225.
[6] See TTR 261 and 257.

21 days after the entry of the final decision, it is an "appeal by leave."[7] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[8] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[9]

By Steven H. Lasher

Entered: November 21, 2016
ejg

[7] See MCL 205.753 and MCR 7.204.
[8] See TTR 213.
[9] See TTR 217 and 267.

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

D'Agostini Land Company, LLC,
Petitioner,

v

MTT Docket No. 16-000174

Michigan Department of Treasury,
Respondent.

Administrative Law Judge Presiding
Peter M. Kopke

PROPOSED ORDER DENYING RESPONDENT'S REQUEST FOR ORAL ARGUMENT

PROPOSED ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Petitioner filed this appeal disputing the Decision and Order of Determination issued on January 8, 2016, which affirmed Respondent's disallowance of the Small Business Alternative Credit ("SBAC") and corresponding reduction of the overpayments claimed on Petitioner's Michigan Business Tax ("MBT") returns for the 2009 and 2010 tax years.

On June 30, 2016, Respondent filed a motion requesting that the Tribunal enter summary disposition in its favor and dismiss the above-captioned case. In the Motion, which was filed pursuant to MCR 2.116(C)(10), Respondent contends that it is entitled to judgment as a matter of law because there are no genuine issues of material fact with respect to Petitioner's eligibility for the SBAC.

Petitioner filed a response in opposition to Respondent's motion on July 21, 2016. In the response, Petitioner agrees that there are no genuine issues of material fact with respect to its eligibility for the SBAC. Petitioner contends, however, that it is not Respondent, but Petitioner that is entitled to judgment pursuant to MCR 2.116(I)(2).

On August 18, 2016, the Tribunal issued an Order requiring Respondent to file a response to Petitioner's Entire Unitary Business Group Disqualification argument. Respondent filed the required response on September 1, 2016, and requested oral argument on its motion. Petitioner filed a reply to Respondent's response on September 14, 2016.

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner's SBAC was properly denied because there is no genuine issue of material fact that the share of business income allocated to Eugene D'Agostini by CPD Properties, Inc. for the 2009 and 2010 tax years exceeded $180,000, and a unitary business group

("UBG") is disqualified from claiming the credit if the compensation of a partner, member, shareholder, or officer of any individual member of the UBG exceeds the disqualifiers set forth in MCL 208.1417(1)(a) and (b). Further, MCL 208.1417(9)(d) does not allow Petitioner to apply losses incurred by other members of its UBG against CPD's business income to effectively reduce Eugene D'Agostini's distributive share below the $180,000 threshold as it contends.

PETITIONER'S CONTENTIONS

Petitioner agrees that there is no genuine issue of material fact that the share of business income allocated to Eugene D'Agostini by CPD Properties, Inc. during the 2009 and 2010 tax years exceeded $180,000. Petitioner contends, however, that the disqualifiers set forth in MCL 208.1417(1)(a) and (b) do not apply to a UBG, and Respondent's disallowance of the SBAC was therefore improper. Even if the disqualifiers were applicable, Petitioner would be entitled to a loss adjustment from any of the five immediately preceding years of any entity in the UBG to reduce CPD's adjusted business income, which in turn would reduce Eugene D'Agostini's distributive share below the $180,000 threshold.

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition; thus the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[1]

A. Motions for Summary Disposition under MCR 2.116(C)(10).

MCR 2.116(C)(10) provides for summary disposition when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."[2] The Michigan Supreme Court, in *Quinto v Cross and Peters Co*,[3] provided the following explanation of MCR 2.116(C)(10):

> MCR 2.116 is modeled in part on Rule 56(e) of the Federal Rules of Civil Procedure . . .[T]he initial burden of production is on the moving party, and the moving party may satisfy the burden in one of two ways.
>
> First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial

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[1] See TTR 215.
[2] *Id.*
[3] *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996)(citations omitted).

> court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 361-363. (Citations omitted.)

In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied.[4]

B. Motions for Summary Disposition under MCR 2.116(I)(2).

MCR 2.116(I)(2) provides for summary disposition when "it appears to the court that the opposing party, rather than the moving party, is entitled to judgment . . . ," and as such, the court may render judgment in favor of the opposing party.[5]

CONCLUSIONS OF LAW

At issue in this case is whether the statutory disqualifiers set forth in MCL 208.1417(1)(a) and (b) are determined on an individual or unitary basis, and whether a UBG is disqualified from claiming the SBAC if one of its members is disqualified.

The Michigan Business Tax ("MBT") was a tax that was repealed by 2011 PA 39. It was imposed upon the "business income tax base" of "every taxpayer with business activity within this state . . . ."[6] Taxpayers could claim a credit against the tax, except that "[a]n individual, a partnership, a limited liability company, or a subchapter S corporation [was] disqualified if the individual, any 1 partner of the partnership, any 1 member of the limited liability company, or any 1 shareholder of the subchapter S corporation receive[d] more than $180,000.00 as a distributive share of the adjusted business income minus the loss adjustment of the individual, the partnership, the limited liability company, or the subchapter S corporation."[7] A corporation other than a subchapter S corporation was also disqualified if compensation and directors' fees of a shareholder or officer exceeded $180,000.00.[8]

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[4] *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).
[5] *Id.* See also *Washburn v Michailoff*, 240 Mich App 669; 613 NW2d 405 (2000).
[6] MCL 208.1201(1) and (2).
[7] MCL 208.1417(1)(a).
[8] MCL 208.1417(1)(b).

Respondent contends that the statutory disqualifiers are determined on an individual, entity-by-entity-basis, and that a UBG is disqualified from claiming the SBAC if one of its members is disqualified under MCL 208.1417(1)(a) or (b). This interpretation is reflected in Respondent's tax forms and published MBT guidance,[9] and though Petitioner contends that its reliance on these items is misplaced because they are not statutes or promulgated administrative rules, the Michigan Court of Appeals has held that "agency interpretations are granted 'respectful consideration,' and if persuasive, should not be overruled without 'cogent reasons.'"[10] Further, "when the law is 'doubtful or obscure,' the agency's interpretation is an aid for discerning the Legislature's intent."[11]

The Tribunal finds Respondent's interpretation of MCL 208.1417 persuasive. Indeed, the Tribunal finds untenable Petitioner's contention that the Legislature intended for a UBG to

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[9] Form 4571 (Rev. 08-09) provided special instructions for UBGs: "UBGs calculate the gross receipts and adjusted business income disqualifiers at the UBG level without eliminating intercompany Instructions for Form 4571 Michigan Business Tax (MBT) Common Credits for Small Businesses transactions. Each member of the UBG must file Form 4577 or Form 4578, whichever is applicable. The disqualifier that is based on compensation and/or share of business income attributable to an owner or officer is applied on a separate entity basis using a pro forma calculation for business income and is not a combined amount received from all members of a UBG. See the "Supplemental Instructions for Standard Members in UBGs" on page 141. A disqualifier applies to a UBG if such disqualifier applies to any member of that UBG. For example, a UBG is disqualified from taking the Small Business Alternative Credit if that UBG includes a member that is a Partnership and any one partner of that Partnership receives more than $180,000 as a distributive share of the adjusted business income minus loss adjustment of the Partnership. Similarly, the reduction percentages apply to a taxpayer that is a UBG if such reduction percentages apply to any member of that UBG. For example, the Small Business Alternative Credit of a taxpayer is reduced by 20 percent if the taxpayer is a UBG that includes a member that is a C Corporation, and the compensation and directors' fees of an officer of that member C Corporation exceed $160,000, but are less than $165,000." *Id.* The form provided similar instructions for the 2010 tax year. The Department's Michigan Business Tax FAQs further provided as follows: "C41. How is the Small Business Alternative Credit under MCL 208.1417 calculated by a taxpayer that is a unitary business group? How do the disqualifiers and percentage reducers work? The Small Business Alternative Credit "is available to any taxpayer with gross receipts that do not exceed $20,000,000.00 and with adjusted business income minus the loss adjustment that does Michigan Business Tax Frequently Asked Questions - 51 - not exceed $1,300,000.00 as adjusted annually for inflation using the Detroit consumer price index" and subject to certain additional disqualifiers. MCL 208.1417(1). Specifically, if gross receipts exceed $19,000,000, the credit is reduced "Taxpayer" is defined as "a person or a unitary business group." MCL 208.1117(5). The gross receipts and adjusted business income thresholds under MCL 207.1417(1) apply to taxpayers. Thus, for a taxpayer that is a unitary business group, the gross receipts and adjusted business income thresholds are those of the unitary business group. The disqualifiers under MCL 208.1417(1)(a) and (b) apply to a taxpayer that is a unitary business group if such disqualifiers apply to any member of that unitary business group. For example, a taxpayer that is a unitary business group is disqualified from taking the Credit under MCL 208.1417 if that unitary business group includes a member that is a partnership and any one partner of that partnership receives more than $180,000.00 as a distributive share of the adjusted business income minus loss adjustment of the partnership. Similarly, the reduction percentages under MCL 208.1417(1)(c) apply to a taxpayer that is a unitary business group if such reduction percentages apply to any member of that unitary business group. For example, the Small Business Alternative Credit of a taxpayer is reduced by 20% if the taxpayer is a unitary business group that includes a member that is a corporation and the compensation and directors' fees of an officer of that member corporation exceed $160,000.00 but are less than $165,000.00. Finally, the amounts described in MCL 208.1417(1)(a) and (b) received by an individual, partner, member, shareholder, or officer of a member of a unitary business group are not combined with similar amounts received from other members of the unitary business group for purposes of the disqualifiers and reduction percentages." *Id.*

[10] *CMS Energy Corp v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2013 (Docket No. 309172) at 4.

[11] *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103; 754 NW2d 259 (2008).

benefit from a tax credit designed for small businesses when one of its members would not qualify filing individually. The Tribunal also finds, for all of the reasons discussed below, no cogent reasons to overrule Respondent's interpretation.

Petitioner's contention that Respondent's interpretation conflicts with the clear and unambiguous language of the statute is without merit because under the facts of this case, MCL 208.1417 is neither clear nor unambiguous. The Michigan Supreme Court has held that a statutory provision is ambiguous when it is "capable of being understood by reasonably well-informed persons in two different senses."[12] This includes circumstances where "application of the statute to facts renders the statute's correct application uncertain."[13] Unlike cases where the taxpayer is an individual, a partnership, a limited liability company, or a corporation, and application of the statutory disqualifiers set forth in MCL 208.1417(1)(a) and (b) is undoubtedly clear, the taxpayer in the instant appeal is a group comprised of several such persons.[14] Under these facts, the statute is capable of being understood in two different senses, and its correct application is somewhat uncertain. As Petitioner contends, the Legislature could have specifically identified a UBG comprised of one or more of the named entities as one of the persons subject to the disqualifiers if that was its intention, and in the absence of any specific reference to UBGs, the limitation language can be read as applying only to individuals, partnerships, limited liability companies, and corporations. This is particularly true given that the Legislature "is presumed to know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional."[15] That language, however,

> does not stand alone, and thus it cannot be read in a vacuum. Instead, '[i]t exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute . . . .' '[W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole.' Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. 'In seeking meaning, words and clauses will not be divorced from those which precede and those which follow.' 'It is a familiar principle of statutory construction that words grouped in a list should be given related meaning.'[16]

Moreover, "the Legislature is 'presumed to know of and legislate in harmony with existing laws'"[17] "[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute

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[12] *Peterson v Magna Corp,* 484 Mich 300, 329; 773 NW2d 564 (2009).
[13] *Detroit Hous Comm'n v Sweat,* unpublished opinion per curiam of the Court of Appeals, issued September 6, 2016 (Docket No. 323453).
[14] "Person" is defined as "an individual, firm, bank, financial institution, insurance company, limited partnership, limited liability partnership, copartnership, partnership, joint venture, association, corporation, subchapter S corporation, limited liability company, receiver, estate, trust, or any other group or combination of groups acting as a unit." MCL 208.1113(3).
[15] *Bronson Methodist Hosp v Allstate Ins Co,* 286 Mich App 219, 228; 779 NW2d 304 (2009).
[16] *GC Timmis & Co v Guardian Alarm Co,* 468 Mich 416, 421–22; 662 NW2d 710 (2003).
[17] *People v Cash,* 419 Mich 230, 241; 351 NW2d 822 (1984).

itself or a desire to clarify the correct interpretation of the original statute."[18] And as noted by Respondent, the former Single Business Tax Act ("SBTA") contained a small business credit substantially similar to the SBAC, with only minor differences in the tax rate, disqualifier amounts and gross receipts and business income limits.[19] The MBTA admittedly goes beyond a mere statutory amendment and is an entirely new act providing for a different type of tax, but consideration of the legislative history is proper nonetheless. Given the lack of any substantive change in the statutory language, the Tribunal finds no intent by the Legislature to change the meaning of the SBAC or clarify its interpretation, which was the same as it is here: If one member of a combined return breached a statutory disqualifier, the entire group was disqualified from receiving the small business tax credit.[20]

As noted by Petitioner, the SBTA did specifically provide that an affiliated group, a controlled group of corporations or an entity under common control must calculate the small business credit on a consolidated basis.[21] Petitioner contends that the Legislature could have provided similar language in the MBTA, but it did not; it simply allows a UBG to calculate the SBAC on a combined basis as one taxpayer. The Tribunal finds, however, Petitioner misinterprets the language in this subsection. It does not, as Petitioner appears to contend, specifically identify affiliated groups as being subject to the disqualifiers. It does nothing more than determine who may claim the credit, similar to MCL 208.1417(1).

Under the SBTA, separate entity filing was the default, but the Department could permit or require the filing of consolidated SBT returns by affiliated groups of United States Corporation.[22] And subsection 7 of section 36 of the SBTA extended the small business credit to affiliated groups under the specified circumstances. Under the MBTA, consolidated filing and claiming of the credit is permitted by virtue of the definition of the term "taxpayer" as used in that Act.[23]

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[18] *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009).

[19] MCL 208.36(2) provided: "The credit provided in this section shall be taken before any other credit under this act, and is available to any person whose gross receipts do not exceed . . . $10,000,000.00 for tax years commencing after 1991, and whose adjusted business income minus the loss adjustment does not exceed $475,000.00 for tax years commencing on or after January 1, 1985, subject to the following: (a) An individual, a partnership, or a subchapter S corporation is disqualified if the individual, any 1 partner of the partnership, or any 1 shareholder of the subchapter S corporation receives more than . . . $115,000.00 for tax years commencing after December 31, 1997 as a distributive share of the adjusted business income minus the loss adjustment of the individual, the partnership, or the subchapter S corporation. (b) A corporation other than a subchapter S corporation is disqualified if either of the following occur for the respective tax year: (*i*) Compensation and director's fees of a shareholder or officer exceed . . . $115,000.00 for tax years commencing after December 31, 1997. (*ii*) The sum of the following amounts exceeds . . . $115,000.00 for tax years commencing after December 31, 1997: (A) Compensation and director's fees of a shareholder. (B) The product of the percentage of outstanding stock owned by that shareholder multiplied by the difference between the sum of business income and the adjustments provided in section 9(4)(a) and (b) minus the loss adjustment." *Id.*

[20] See RAB 1989-49 and Single Business Tax Questions & Answers, S8.

[21] "An affiliated group as defined in this act, a controlled group of corporations as defined in section 1563 of the internal revenue code and further described in 26 C.F.R. 1.414(b)-1 and 1.414(c)-1 to 1.414(c)-5, or an entity under common control as defined by the internal revenue code shall not take the credit allowed by this section unless the business activities of the entities are consolidated." MCL 208.36(7).

[22] MCL 208.77.

[23] "Taxpayer" is defined as "a person or a unitary business group liable for a tax, interest, or penalty under this act." MCL 208.1117(5). "Unitary business group" is defined as "a group of United States persons, other than a foreign operating entity, 1 of which owns or controls, directly or indirectly, more than 50% of the ownership interest with

Thus, there was no need for inclusion of the disputed language in the SBAC. Further, both statutes provided for calculation of the SBAC on a combined basis, and Petitioner has failed to establish that precludes application of the statutory disqualifiers on an individual basis; its "unitary concept" theory is largely irrelevant and unpersuasive.

As for Petitioner's contention that it is entitled to a loss adjustment, "It is a cardinal rule of statutory interpretation that a reviewing court is to give effect to the intent of the Legislature. If the language of the statute is clear, it is assumed that the Legislature intended the plainly expressed meaning, and the statute must be enforced as written."[24] The plain language of MCL 208.1417(1)(a), which is not ambiguous in this context, disqualifies a subchapter S corporation if any one shareholder of the subchapter S corporation receives more than $180,000 as a distributive share of the adjusted business income minus the loss adjustment of the subchapter S corporation.[25] The Legislature chose to modify "loss adjustment" with the phrase "of the subchapter S corporation" and

> 'It is an established principle of statutory construction that a clause is *confined to the last antecedent* unless something in the subject matter or dominant purpose of the statute requires a different interpretation.' Similarly, in 2A Sutherland, Statutory Construction (4th ed, 1984 Rev) § 47.26, pp 215-216, it is stated: 'Where a sentence contains several antecedents and several consequents they are to be read *distributively.* The words are to be applied to the subjects that seem most properly related by context and applicability.'[26]

Further, "loss adjustment" is defined as "the amount by which adjusted business income was less than zero in any of the 5 tax years immediately preceding the tax year for which eligibility for the credit under this section is being determined,"[27] and "adjusted business income" is defined as "that part of federal taxable income derived from business activity," plus compensation and directors' fees of active shareholders and officers "of a corporation"[28] Thus, the Tribunal agrees with Respondent that in order to analyze the loss adjustment, one must examine the compensation of individual shareholders and officers of individual entities.

Petitioner objects to the 25% penalty assessed, contending that it is not applicable because it prepared the return with due professional care in accordance with a reasonable interpretation of the MBTA. Petitioner also objects to the 7% interest, contending that it would only accrue from the date additional tax, if any, is found to be due. MCL 205.24(1), which states that "[i]f a taxpayer fails or refuses to file a return or pay a tax administered under this act within the time specified, the department . . . shall assess the tax against the taxpayer and notify the taxpayer of the amount of the tax. A liability for a tax administered under this act is subject to the interest

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voting rights or ownership interests that confer comparable rights to voting rights of the other United States persons, and that has business activities or operations which result in a flow of value between or among persons included in the unitary business group or has business activities or operations that are integrated with, are dependent upon, or contribute to each other." MCL 208.1117(6).

[24] *Noggles v Battle Creek Wrecking, Inc*, 153 Mich App 363, 366–67; 395 NW2d 322 (1986)(citations omitted).

[25] *Id.*

[26] *Noggles v Battle Creek Wrecking, Inc*, 153 Mich App 363, 368; 395 NW2d 322 (1986)(citations omitted).

[27] MCL 208.1417(9)(d).

[28] MCL

and penalties prescribed in subsections (2) to (5)." Subsection (2) provides: "[I]f a taxpayer fails or refuses to file a return or pay a tax within the time specified for notices of intent to assess issued after February 28, 2003, a penalty of 5% of the tax *shall* be added if the failure is for not more than 2 months, with an additional 5% penalty for each additional month or fraction of a month during which the failure continues or the tax and penalty is not paid, to a maximum of 25%. In addition to the penalty, interest at the rate provided in section 23 for deficiencies in tax payments *shall* be added on the tax from the time the tax was due, until paid."[29] R 205.1013(1) of the Michigan Administrative Code also states: "Except as otherwise provided in the act, if a taxpayer fails or refuses to file a return, or fails or refuses to pay a tax administered under the act within the time specified by law, a penalty of $10.00 or 5% of the tax, whichever is greater, *shall* be added to the tax owed if the failure is for a period of not more than 1 calendar month. An additional penalty shall be added to the tax owed at the rate of 5% for each additional month or fraction of a month during which the failure continues or the tax is not paid. The maximum penalty *shall* be 50% of the tax owed."[30] A taxpayer may request waiver of the penalty if it establishes that the failure to file or pay "was due to reasonable cause and not to willful neglect."[31] "The taxpayer bears the burden of affirmatively establishing, by clear and convincing evidence, that the failure to file or failure to pay was due to reasonable cause."[32] Standing alone, being incorrectly advised by a tax advisor competent in Michigan state tax matters does not constitute reasonable cause.[33]

The Legislature's use of the word "shall" generally indicates a mandatory directive, not a "discretionary act."[34] As such, the Tribunal agrees that because the SBAC claimed by Petitioner was excessive and caused Petitioner to pay substantially less than the amount required by statute, it was required to impose both penalty and interest. Petitioner's argument regarding the timing of interest accrual lacks any legal basis, and it has failed to establish reasonable cause such that waiver of the penalty is appropriate. Petitioner's only stated reason for non-applicability of the penalty is that Petitioner prepared its return with due professional care in accordance with a reasonable interpretation of the MBTA. Even assuming the Tribunal agreed, Petitioner's actions were willful. As argued by Respondent, this is not a situation where a simple mathematical error was made or there was confusion in the area of the law. Petitioner simply disagreed with Respondent's methodology and claimed the SBAC using its own method.

JUDGMENT

Given the above, the Tribunal finds that there is no genuine issue of material fact with respect to the validity of the assessments at issue in this appeal, and Respondent is entitled to judgment as a matter of law. The share of business income allocated to Eugene D'Agostini by CPD Properties, Inc. for the 2009 and 2010 tax years exceeded $180,000, and Petitioner was therefore disqualified from claiming the SBAC under MCL 208.1417(1)(a). Therefore,

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[29] MCL 205.24(2) (emphasis added).
[30] *Id.* (emphasis added).
[31] R 205.1013(2).
[32] R 205.1013(4).
[33] See R 205.1013(8)(d).
[34] *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875 (2013).

IT IS ORDERED that Respondent's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that Final Assessment No. UA66863 is AFFIRMED.

IT IS FURTHER ORDERED that the parties have 20 days from date of entry of this POJ to notify the Tribunal in writing, by mail or by electronic filing, if available, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions). Exceptions are limited to the evidence submitted prior to or at the hearing and any matter addressed in the POJ. There is no fee for filing exceptions. The opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions. A copy of a party's written exceptions or response must be sent by mail or electronic service, if agreed upon by the parties, to the opposing party and proof must be submitted to the Tribunal that the exceptions or response were served on the opposing party.

Entered: September 28, 2016 By Peter M. Kopke
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