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

Advance Staffing Corporation,
Petitioner,

v

MTT Docket No. 362124
Assessment No. P769536

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

On June 11, 2010, the parties filed Cross-Motions for Summary Disposition and Respondent filed a Brief in Opposition to Petitioner's Motion for Summary Disposition on June 25, 2010. Oral Arguments were heard on July 13, 2010. Petitioner disputes an assessment of Single Business Tax (SBT) for tax years 2003, 2004 and 2005, arguing that Respondent improperly assessed tax based on its erroneous determination that employees of a third-party employee staffing company were employees of Petitioner. Petitioner asserts that the employment organization was required to withhold federal income tax and therefore the associated payroll should not be included in Petitioner's payroll add-back. Respondent contends that Petitioner had sole authority to reassign or terminate employees, and therefore, had control over the employees making it the employer. The Tribunal disagrees. Petitioner was not the employer and therefore the payroll may not be added to Petitioner's SBT tax base. The assessment is cancelled.

BACKGROUND

Petitioner, Advance Staffing Corporation, is engaged in the business of providing temporary workers to its customers. On October 23, 2002, Petitioner entered into a Services Agreement with a third-party, employee leasing company, Advanced Leasing LLC ("Leasing") to provide staffing services to Petitioner and its customers. Respondent, Michigan Department of Treasury, audited Petitioner's SBT returns for tax years 2003, 2004 and 2005, determining that Petitioner was deemed to be the employer pursuant to MCL 208.5(2).

On February 12, 2008, Respondent issued a Bill for Taxes Due (Intent to Assess) No. P769536. The assessment for SBT was in the amount of $26,256.00, plus interest of $7,092.20 for 2003, $28,047.00, plus interest of $6,157.75 for 2004, and 23,847.00, plus interest of $3,718.58 for 2005. Statutory interest continues to accrue and penalties were not assessed. Petitioner requested, and Respondent granted, an informal conference with the Hearings Division, which was held on July 30, 2008, to appeal the assessment. The Hearing Referee concluded that the assessment of tax was proper. On March 31, 2009, Respondent issued its Decision and Order of Determination, accepting the recommendation of the Hearing Referee and determined that the Intent to Assess No. P769536 should be assessed as originally determined, with interest to be computed in accordance with 1941 PA 122. Petitioner filed this appeal with the Tribunal on

May 1, 2009. A Prehearing Conference was held at the Tribunal on April 6, 2010, to schedule the adjudication of this case at which time the parties indicated their intentions to file cross motions for summary disposition.

JOINT STIPULATED FACTS

The parties have stipulated to the following facts and the Tribunal finds:

1. Petitioner is a Michigan corporation, filed November 28, 1984.
2. Petitioner has maintained its business location at 35245 Schoolcraft Road, Livonia, Michigan, since 1997.
3. Respondent conducted a single business tax (SBT) audit of Petitioner.
4. The audit period is January 1, 2003, through December 31, 2005.
5. The assessment at issue is P769536.
6. Petitioner's sole shareholder is Paul G. VanBuhler.
7. Petitioner is in the business of providing temporary workers to its customers.
8. On October 23, 2002, Petitioner and Advanced Leasing LLC, a Michigan Limited Liability Company, filed October 21, 2002, entered into a Service Agreement.
9. Leasing is in the business of leasing employees to customers.
10. In 2003, 2004, and 2005, Petitioner was the employer of three employees, those being the officers of the corporation.
11. Petitioner withheld applicable taxes and filed Forms W-2 for those employees.
12. Respondent received and accepted income tax withholding of Petitioner for those three employees.
13. Leasing's sole member was Matthew Graye.
14. Matthew Graye was an employee of Petitioner and received a W-2 from Petitioner in 2002.
15. Leasing's initial business location from October 7, 2002 through November 30, 2003, was 3719 High Crest, Brighton, Michigan. This was Matthew Graye's personal residence.
16. Leasing's business location from December 1, 2003 through December 31, 2004, was located at 22302 Pontiac Trail, South Lyon, Michigan, pursuant to a Property Lease dated November 13, 2003, with RHB Development, LLC.
17. Leasing's business location since January 1, 2005, has been at 35245 Schoolcraft Road, Livonia, Michigan. There are multiple businesses that maintain their offices at 35245 Schoolcraft Road, Livonia, Michigan, in addition to Petitioner and Leasing.
18. Leasing retained ADP, a national payroll service, for administration and payment of payroll and withholding for its workers.
19. Leasing withheld applicable taxes and filed Forms W-2 for its workers.
20. Leasing paid applicable business taxes associated with its workers.
21. Petitioner was only one of Leasing's customers.
22. From 2003 through 2006, Petitioner's revenues represented a smaller percentage of Leasing's total sales: 97% in 2003, 95% in 2004, 88% in 2005 and 86.5% in 2006.

PETITIONER'S CONTENTIONS

Petitioner moves for summary disposition against Respondent pursuant to MCR 2.116(C)(9) and (10), and requests that the Tribunal "exercise its authority to reverse Respondent's Decision and Order of Determination dated March 31, 2009, because MCL 205.5(2) deems the entity required to withhold for federal income tax purposes as the employer." [1]

Petitioner contends that the assessment is erroneous because it "was not the employer of its workers as defined in Section 3401(d) of the Internal Revenue Code ("IRC"); and therefore, not the employer as defined in MCL 208.5(2)."[2] Petitioner alleges that "Advance Leasing, LLC, a Michigan limited liability company, was the employer under IRC Section 3401(d), and therefore under MCL 208.5(2)." (P p. 2) Petitioner further asserts that its shared control over the workers with Leasing does not alter the definition of employer under IRC Section 3401(d), and that pursuant to MCL 205.5(2), Leasing "shall prima facie be deemed an employer" as the "person required to withhold for federal income tax purposes."[3] Petitioner argues that Respondent has failed to rebut the statutory presumption of MCL 208.5(2) with substantial evidence as defined by *Jozwiak*. (PMB p. 7)

Petitioner contends that Leasing constituted a professional employer organization as defined in MCL 208.4(4), and that Respondent erred in determining that Petitioner's entire payments to Leasing constituted compensation to be included in Petitioner's SBT base under MCL 208.9(5). Petitioner argues that during the years at issue, it did not have control of the payment of wages for services provided by the individuals performing services. (P p. 4) Petitioner alleges that Leasing was responsible for oversight and control of its payroll from its own account, tax withholding and processing, employee benefits, maintenance of unemployment and disability insurance, evaluation of employee performance, employee discipline, as well as ongoing recruitment, employment and termination of Leasing's employees to meet the needs of its customers.

Petitioner asserts that Leasing had customers in addition to Petitioner, to which it leased employees and was in control of the payment of wages from its own accounts for all workers. (P p. 4) During the years at issue, Petitioner contends that Leasing maintained the right of direction and control of its employees' work, although shared with its respective customers. It alleges that Leasing was solely responsible for payment of wages and employment taxes of the employees. It was also solely responsible for reporting, collecting and depositing state and federal unemployment taxes for the employees. Petitioner contends that Leasing retained the right to hire, assign and/or terminate its employees or reassign its employees among its various customers.

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[1] Petitioner's Brief in Support of Motion for Summary Disposition (PMB) p. 2
[2] Petition (P), p. 2
[3] P p. 2 and PMB p. 6, citing *Jozwiak v Northern Michigan Hospitals, Inc.*, 231 Mich App 203 (1998)

In support of its position, Petitioner brought forth an Affidavit of Matthew M. Graye, the sole member and manager of Leasing. In that Affidavit, Mr. Graye avowed to the following, in relevant part:

> The undersigned, being first duly sworn, states:
>
> * * * *

5. The purpose of [Leasing] is to engage in the business of employee leasing…[and] is responsible for the "human relations" component of a customer's business, including payroll, tax withholding and processing, employee benefits, maintaining proper insurance, evaluation of employee performance, employee discipline, and ongoing recruitment, employment and termination of [Leasing's] work force to meet the needs of its customers.
6. [Leasing] is ultimately responsible for discipline of employees and the termination of their employment.
7. Since its inception [Leasing] is required to, and does, remit unemployment insurance contributions to the Michigan Unemployment Insurance Agency and [Leasing] is charged for any benefits properly payable to terminated employees under the law.
8. Since its inception [Leasing] is required to, and does, withhold all applicable federal income and social security taxes as the employer of its employees.
9. Since its inception [Leasing] is required to, and does, withhold all applicable state income taxes as the employer of its employees.
10. [Leasing] retains all rights as an employer over its employees, to hire and/or terminate employees.
11. [Leasing] is required to, and does, maintain workers compensation insurance over the employees, as required by Michigan law.
12. Recognizing the needs and concerns of [Leasing's] customers, [Leasing] has agreed to provide customers with advance notice of pending changes of personnel

> when possible to make appropriate adjustments and timely complete time sensitive or time critical work projects.[4]

Petitioner brought offered evidence that "Leasing submitted a Form 518, Registration for Michigan Taxes, received by Respondent on March 12, 2003, volunteering obligation for income tax withholding, employment of 100 people subject to Michigan withholding, and payment of withholding taxes by a designated payroll service, that being ADP of Alpharetta, Georgia." (P p. 3)

At Oral Argument, Petitioner focused its line of reasoning primarily upon the fact that the SBT statute defines an employer as defined in Section 3401(d) of the Internal Revenue Code. (MCL 208.5(2)) Petitioner relies on IRC Section 3401(d)(1), asserting that "the term 'employer' means the person having control over the wages of the workers performing services if the service recipient does not have control over the payment of the wages for such services." (P p. 2) Petitioner argues that there is no question that Leasing, not Petitioner, had control over the employees' wages and therefore met its obligation as employer. Petitioner further contends that Respondent has failed to rebut the presumption afforded by MCL 208.5(2) which states "A person required to withhold for federal income tax purposes shall prima facie be deemed an employer."

Petitioner also offers its contention that in the alternative, "…the proposed adjustment [should be limited] to only the workers formerly employed by Petitioner and transferred to Leasing for so long as they were Leasing's employees…." (P p. 5)

RESPONDENT'S CONTENTIONS

Respondent disagrees with Petitioner and requests the Tribunal deny Petitioner's Motion for Summary Disposition while finding summary disposition in its favor pursuant to MCR 2.116(C)(10) and TTR 230.

As a result of its audit, Respondent determined that "[Petitioner] had remained the employer of those employees and, therefore, that compensation paid by [Petitioner] to those employees should be 'added back' to [Petitioner's] tax base in order to properly determine [Petitioner's] SBT liability."[5] Respondent presents a number of arguments in its early pleadings in support of its contention that Petitioner remained the employer of the employees it transferred to Leasing. In addition to its contention that Petitioner retained the control over the employees, Respondent's arguments included the fact that Matthew M. Graye, the owner and operator of Leasing, was "a former employee of the Petitioner. [And] Graye received a W 2 from [Petitioner] in 2002."[6] Respondent also argued that both Petitioner and Leasing were located at the same address, and that Leasing did not advertise in the Yellow Pages or the internet and therefore does not exist for public knowledge." [7]

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[4] Affidavit of Matthew M. Graye, September 9, 2008.
[5] Respondent's Brief in Support of Respondent's Motion for Summary Disposition, (RMB) p. 2
[6] Respondent's Pre-hearing Statement, (RPH) p. 2
[7] Respondent's Audit Report, p. 5

Respondent's position is this:

> Matthew M. Graye, the sole member and manager of Leasing, was an employee of Petitioner in 2002. Graye operated Leasing from Petitioner's office, had few if any employees other than those transferred from Petitioner, and did not appear to advertise or in other ways attempt to expand his business. Because the contract between [Petitioner] and Leasing provides [Petitioner] with the authority to hire and fire employees and in light of all of the circumstances here, [Petitioner] should properly be considered the employer and the compensation paid to the employees should be added back to [Petitioner's] tax base. (RMB p. 4)

At Oral Argument, Respondent stated that the real focus of this case should be on the alleged control by Petitioner to reassign and terminate employees. Respondent acknowledged that the location of Leasing's offices and whether it pursued other customers through advertising were not important to this matter. Respondent further stated that its key argument is the statement in Petitioner's Service Agreement with Leasing that requires Petitioner to consent in writing to reassignment and termination of any employees, and therefore showing proof that Petitioner was the employer.

Respondent offers *Mid America Mgmt Corp v Dep't of Treasury*[8] as the leading case governing whether a taxpayer is in fact the "employer" of an employee for purposes of including that employee's compensation in the SBT base. Respondent contends that "applying the *Mid America* criteria to the facts of this case, it is clear that the leased employees were employees of [Petitioner]." (MB p. 6) Respondent relies strictly on the language in paragraph 2 of the Service Agreement which states in relevant part:

> Nothing contained in this Agreement, however, will affect the right of [Leasing], in its sole discretion as employer, to hire, assign and/or terminate *its own employees* or to reassign its own employees; provided that [Leasing] will give due consideration to the hiring and placement of any applicant referred to [Leasing] by [Petitioner], and [Leasing] will give [Petitioner] 30 days prior written notice of its intent to reassign any employee then performing services to [Petitioner] or a Customer *and will not terminate or reassign such employee unless [Petitioner] consents in writing* thereto; provided that no such prior notice need be given if such reassignment or termination is due to the employee's unlawful conduct. [Emphasis added by Respondent]

Respondent asserts that "[t]he highlighted language…clearly means that, for virtually all employees at issue, [Petitioner] has sole authority to reassign or terminate the employee, and Leasing has no authority to prevent [Petitioner] from doing so." (RMB p. 7) Respondent also

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[8] *Mid America Mngt Corp v Dep't of Treasury*, 153 Mich App 446; 395 NW2d 702 (1986).

cites *Herald Wholesale*,[9] stating "the Court, in deciding that the taxpayer was not the employer, relied in part on the fact that the taxpayer did not have the right to hire or fire." (RMB p. 9)

FINDINGS OF FACT

Petitioner is a Michigan corporation whose current legal address is 35245 Schoolcraft, Livonia, Michigan. Petitioner is engaged in the business of providing temporary workers to its customers. Respondent issued Assessment P769536 assessing the following amounts for the periods ended December 31, 2003, through December 31, 2005:

Calendar Year	SBT	Interest*
2003	$26,256	$7,092.20
2004	$28,047	$6,157.75
2005	$23,847	$3,718.58
Total	$78,150	$16,968.53

*Accrued as of February 12, 2008

In October 2002, Petitioner transferred all of its employees to Leasing. Leasing was a newly created limited liability company, owned and operated by Matthew M. Graye, a former employee of Petitioner. On October 23, 2002, Petitioner entered into a Service Agreement with Leasing for the purpose of providing staffing services to Petitioner and its customers. Pursuant to the contract, Petitioner may, at its sole discretion, request services from Leasing and if the offer is accepted, "Leasing will assign **its employees** to [Petitioner] or a Customer to perform the services requested by [Leasing]."[10] [Emphasis added] The Scope of Work set forth in the Agreement provides that "Leasing will accept or refuse the offer at its sole discretion." *Id.* The Agreement also permits Leasing to "…furnish to third parties staffing services of the type contemplated hereunder."

The Service Agreement provides in relevant part:

> 2. Services
>
> a.) [Leasing] shall furnish staffing services of specific individuals. The said individuals shall be employees of [Leasing], and assigned to [Petitioner] or a Customer, when requested by [Petitioner]. **As the employer, [Leasing] will be solely responsible** for:

[9] *Herald Wholesale, Inc v Dep't of Treasury*, 262 Mich App 696; 687 NW2d 172 (2004).
[10] Service Agreement entered into between Advance Leasing LLC and Advance Staffing Corporation, on October 23, 2002. (SA) p. 1

1. maintaining all necessary personnel and payroll records for **its employees**;
2. computing, with respect to **its employees**, wages and withholding taxes for all applicable federal, state, and local taxes;
3. remitting employee withholdings and employer contributions for FICA and federal and state unemployment insurance payments to the proper governmental authorities;
4. paying net wages and fringe benefits, if any, directly to **its employees**; and
5. at the request of [Petitioner] or a Customer [of Petitioner] for any valid legal reason, removing any of **its employees** assigned to [Petitioner] or such Customer.

Nothing contained in this Agreement, however, will affect the right of [Leasing], in its sole discretion as employer, to hire, assign and/or terminate its own employees or to reassign its own employees; provided that [Leasing] will give due consideration to the hiring and placement of any applicant referred to [Leasing] by [Petitioner], and [Leasing] will give [Petitioner] 30 days prior written notice of its intent to reassign any employee then performing services to [Petitioner] or a Customer **and will not terminate or reassign such employee unless [Petitioner] consents in writing thereto**; provided that no such prior notice need be given if such reassignment or termination is due to the employee's unlawful conduct.

b.) [Leasing] agrees that its relationship with [Petitioner] is one of an independent contractor, and nothing contained in this Agreement may be construed to make [Leasing] an agent, partner or joint venturer of [Petitioner] or any Customer. . . . **[Leasing's] employees will not be deemed for any purpose to be employees of [Petitioner] or of any Customer and will not be entitled to any benefits normally accruing to employees of [Petitioner] or any Customer**. [Emphasis added] (SA pp. 1&2)

* * * *

5. Confidentiality

> …[Leasing] will ensure that **its employees** and agents, including its management, will not use or disclose any information learned during the performance of this Agreement…" [Emphasis added] (SA p. 3)
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> * * * *
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> 7. Insurance
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> a.) [Leasing] has procured, and will maintain in effect throughout the term of this Agreement, worker's compensation insurance in amounts as required by statute **covering [Leasing] employees** assigned to [Petitioner] or its Customers. If any direct claim for workers' compensation benefits or awards is asserted against [Petitioner] or any Customer **by any of said employees** or, in the event of death, by their personal representatives, then [Leasing] will indemnify and hold [Petitioner] and the Customer harmless from and against any such claim(s). [Emphasis added] (SA p. 4)

STANDARD OF REVIEW

Petitioner moves for summary disposition pursuant to MCR 2.116(C)(9). A motion brought under MCR 2.116(C)(9) seeks a determination of whether the opposing party has failed to state a valid defense to the claim asserted against it. *Glass v Goeckel,* 473 Mich 667; 703 NW2d 58 (2005), reh den 474 Mich 1201; 703 NW2d 188 (2005), cert den ___ US ___; 126 S Ct 1340; 164 L Ed 2d 54 (2006). (See also *Nicita v Detroit,* 216 Mich App 746, 750; 550 NW2d 269 (1996)). Only the pleadings are considered in a motion under MCR 2.116(C)(9). MCR 2.116(G)(5). "The well-pleaded allegations are accepted as true, and the test is whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery." *Nicita, Id.* at 750.

Both parties move for a motion for summary disposition under MCR 2.116(C)(10), which tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). 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. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547

NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. 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. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

CONCLUSIONS OF LAW

Under the Single Business Tax Act[11] in effect during the tax years at issue, employee compensation paid by an employer was taxable. MCL 208.9(1), (5). MCL 208.5(2) defines an "Employer" to mean "an employer as defined in section 3401(c) of the Internal Revenue Code. A person required to withhold for federal income tax purposes shall prima facie be deemed an employer."

The Legislature amended the statute to add MCL 208.4(4), which provides:

> (4) For tax years that begin after December 31, 2003, for purposes of determining compensation of a professional employer organization, compensation includes payments by the professional employer organization to the officers and employees of an entity whose employment operations are managed by the professional employer organization. Compensation of the entity whose employment operations are managed by a professional employer organization does not include compensation paid by the professional employer organization to the officers and employees of the entity whose employment operations are managed by the professional employer organization. As used in this subsection, "professional employer organization" means an organization that provides the management and administration of the human resources and employer risk of another entity by contractually assuming substantial employer rights, responsibilities, and risk through a professional employer agreement that establishes an employer relationship with the leased officers or employees assigned to the other entity by doing all of the following:
>
> a.) Maintaining the right of direction and control of the employees' work, although this responsibility may be shared with the other entity.
>
> b.) Paying wages and employment taxes of the employees out of its own accounts.
>
> c.) Reporting, collecting, and depositing state and federal employment taxes for the employees.
>
> d.) Retaining the right to hire and fire employees.

[11] The SBTA was repealed by 2006 PA 325.

Respondent attempts to rebut the presumption that Leasing was the employer. Respondent alleges that although Leasing did, in fact, withhold tax from the employees for federal income tax purposes, and that Petitioner did assert that Leasing was required to withhold tax from the employees, "the record is devoid of evidence as to whether Leasing was 'required to withhold' that tax." (RMB p.6) This is simply not true. Petitioner's Service Agreement with Leasing is very clear evidence that "[a]s the employer, Advance Leasing will be solely responsible for. . . remitting employee withholdings and employer contributions for FICA and federal and state unemployment insurance payments to the proper governmental authorities. . . ." (SA p.1)

Respondent puts much of its focus on a single phrase in Petitioner's Service Agreement, which is: Leasing ". . . will not terminate or reassign such employee unless [Petitioner] consents in writing thereto. . . ." Respondent believes that this phrase gives Petitioner sole authority to reassign or terminate employees, thereby causing Petitioner to be the employer pursuant to MCL 208.4(4)(d). Respondent relies on this phrase despite the fact that the Agreement also states that the "individuals shall be employees of Advance Leasing" and that "[n]othing contained in this Agreement, however, will affect the right of Advance Leasing, in its sole discretion as employer, to hire, assign and/or terminate its own employees. . . ." (SA p. 1) Respondent attempts to persuade the Tribunal that the use of the words "its own employees" somehow distinguishes the employees that had previously been those of Petitioner from some other class of employees. This argument is meritless. All of Leasing's employees are "its own employees."

In response, Petitioner argues that this clause was included in the contract simply to ensure that Petitioner was aware of and prepared for any change in staffing. Petitioner stated that the clause providing that Leasing will give Petitioner 30 days prior written notice of its intent to reassign any employees was intended to give Petitioner confidence that the personnel will be available to perform the services as expected. Petitioner argues that it is a prudent term in order to maintain orderly conduct of its business and good management of its projects on behalf of its customers.

Respondent contends that the single phrase in the Agreement must be read to override the entire meaning of the contract. The goal of contract interpretation is to give effect to the intentions of the contracting parties. *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 197-198; 702 NW2d 106 (2006). When interpreting a contract we must "give the words used in the contract their plan and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins. Co.,* 473 Mich 457, 464, 703 NW2d 23 (2005). When the language of a contract is plain and unambiguous, the court must apply the contract as written. *Grosse Point Park, supra* at 198.

A thorough reading of the Service Agreement makes clear that Petitioner does NOT retain the right to reassign or terminate an employee; but rather it only has the right to consent thereto. The contract language does not provide that Petitioner may require Leasing to terminate an employee. Further, the Service Agreement does not provide that Petitioner has authority in any way to make hiring decisions. It simply states ". . . Leasing will give due consideration to the hiring and placement of any applicant referred to Advance Leasing by [Petitioner]." (SA p. 1) Clearly, Leasing has sole discretion as employer, to hire, assign and/or terminate its employees.

Given the entirety of the Service Agreement, which refers to Leasing's employees no less than eight (8) times, it is clear that Petitioner does not control the employees. Petitioner's argument that the statutory provision of MCL 208.5(2) requires a finding that Leasing is the prima facie employer because it is required to withhold federal income taxes is rebuttable. However, Respondent has failed in its attempt to persuade the Tribunal that Petitioner has retained control over the employees simply because a clause within the Services Agreement provides that Leasing may not reassign or terminate an employee unless Petitioner agrees in writing. The Tribunal notes that there are a number of other references in the Service Agreement as to Leasing being the employer yet nothing more that would indicate Petitioner has substantial employer rights, responsibility and risk.

The facts are clear and there is no genuine issue as to any material fact. Based upon the evidence, the Tribunal finds that Petitioner was not the employer and Respondent erred in its assessment of SBT based on payroll add back. Further, because the employees were in fact employees of Leasing and not Petitioner, Petitioner's alternative argument, that "the proposed adjustment [should be limited] to only the workers formerly employed by Petitioner and transferred to Leasing. . ." is moot. Therefore,

IT IS ORDERED that Petitioner's Motion for Summary Disposition is GRANTED and Assessment No. P769536 is CANCELLED.

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

This Order resolves all pending issues and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: August 5, 2010 By: Cynthia J Knoll