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DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
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Dear Tax Tribunal Practitioner:

Administrative Professionals Day

April 27th is Administrative Professionals Day. The Tribunal Members and Managers would like to express our sincere thank you to our clerical, administrative and legal staff. Recognizing that Tribunal staff has experienced substantial reductions in numbers over the past two years, the Tribunal continues to promptly and correctly respond to questions from the parties and the public, scan documents, enter information into our docketing system, draft orders, and perform numerous additional tasks on a daily basis. A big thank you to Tribunal staff!

Staffing Changes at the Tribunal

After 13 years serving as the Tribunal's Assessor Member, Victoria Enyart has announced that she is leaving the Tribunal on April 22nd. During her tenure with the Tribunal, Judge Enyart has presided over numerous cases of significance and her knowledge and expertise in assessing and appraising has been appreciated by other Tribunal Members and Tribunal staff. We wish Judge Enyart well in her future endeavors.

In February, the Tribunal also said goodbye to Vicky Stelwagen, a dedicated clerical staffer, who retired after working 22 years with the Tribunal. Vicky has informed us that she intends to spend a good portion of her retirement fishing with her husband and boating on Michigan lakes.

Replacing Vicky Stelwagen as a clerical staffer at the Tribunal is Barb Reedy, who is returning to the Tribunal after a short reassignment to another section within LARA. Barb has four years of prior experience with the Tribunal and we welcome Barb's return to our staff.

GovDelivery Webpage Improvement

The Tribunal has enhanced the GovDelivery page of our website to include the main topics included in each message. We believe this will allow all users to easily and more efficiently find a specific GovDelivery message. You may also use the "CTRL + F" function to search for keywords throughout the page.

Caseload

As of today, the Court has approximately 4,000 open cases, which is the lowest inventory for the Tribunal in a number of years. For the past couple of years the Tribunal has been able to

schedule and hear virtually all Small Claims appeals within a year of their filing. Again this year, the Tribunal will have all 2015 Small Claims appeals scheduled and heard by the end of July. Further, Entire Tribunal appeals are also moving forward at a record pace. It is expected that all Entire Tribunal appeals filed in 2015 will have been placed on the Prehearing General Call by the end of July, as the Tribunal continues its efforts to provide timely resolution of all appeals.

Also, in order to more efficiently resolve cases, the Tribunal has begun assigning Entire Tribunal cases to a specific Tribunal Member or Administrative Law Judge (ALJ) at the time a case is placed on a Prehearing General Call. You can expect rulings on Motions by the assigned Tribunal Member or ALJ, rather than the Tribunal Chair, unless the Chair is the assigned adjudicator.

Michigan Supreme Court

Baruch SLS, Inc v Tittabawassee Twp, __Mich__; __NW2d__ (2016) (Docket 152047).

On April 1, 2016, the Michigan Supreme Court entered an order requiring the parties to file supplemental briefs addressing the following issues: (1) whether Wexford Medical Group v City of Cadillac, 474 Mich 192 (2006), correctly held that an institution does not qualify as a "charitable institution" under MCL 211.7o or MCL 211.9 if it offers its charity on a "discriminatory basis," (2) if so, how "discriminatory basis" should be given proper meaning; (3) the extent to which the relationship between an institution's written policies and its actual distribution of charitable resources is relevant to that definition, and (4) whether, given the foregoing, the petitioner is entitled to tax exemption.

The Tribunal in that case denied petitioner's request for exemption under MCL 211.7o because it concluded that petitioner did not satisfy the third, fifth, and sixth factors of the Wexford test. Significantly, the Tribunal found petitioner's charitable offerings discriminatory, because while petitioner purported to serve the general public and aged populations regardless of ability to pay, it did not provide any services for free and its income-based program was available only to existing residents who were eligible for Medicaid and made a minimum of 24 full monthly rent payments. The Tribunal recognized that petitioner had, on an ad-hoc basis, extended the program beyond the policy's stated maximum to as much as 40% of its resident population, but concluded that "[t]he mere process of selecting residents who will receive reduced rent requires some level of discrimination in that a choice must be made from the group petitioner purports to serve." The Court of Appeals found the remaining grounds for denial erroneous, but upheld the Tribunal's discriminatory basis ruling, reasoning that petitioner's "pay-to-play" policy did not serve any person needing the particular type of charity being offered: "[P]etitioner's only charity-based activity was the subsidizing of those in the income based program, who, at some point, had already paid for their eligibility to be there."

Court of Appeals Decisions

City of Grand Rapids City Income Tax

Renee Leclear-Gavin v City of Grand Rapids, unpublished opinion per curiam of the Court of Appeals issued March 24, 2016 (Docket No. 324933)
Patricia Denhof v City of Grand Rapids, unpublished opinion per curiam of the Court of Appeals issued March 24, 2016 (Docket No. 324934)

Respondent appealed the Tribunal's order granting summary disposition in favor of petitioners. The issue was whether backpay and frontpay awards being paid pursuant to federal court judgments was subject to city income tax. Respondent argued that petitioners, former police officers removed from their employment after filing a sexual discrimination lawsuit, "were effectively being paid compensation for work performed in the city because the federal district court judgments were intended to place them in the same positions they would have been in but for the results of the federal litigation." And "had petitioners not been removed from the police force, they would have had to pay nonresident city income tax." Noting that the governing statute and city ordinance specifically provided for the taxation of compensation "for services rendered as an employee for work done or services performed in the city," the Court of Appeals held that by their plain language, they did not authorize the collection of taxes from petitioners. Petitioners were not working or performing services. Rather, "[t]he backpay and frontpay awards reflect compensation for work and services that the city should have allowed petitioners to render or perform but have been prohibited from doing so."

Res Judicata/Collateral Estoppel

Better Integrated Systems, Inc v Dep't of Treasury, unpublished opinion per curiam of the Court of Appeals issued March 22, 2016 (Docket No. 325001).

The Department ("Respondent") appealed from the Tribunal's granting of Summary Disposition in favor of Better Integrated Systems, Inc. ("Petitioner"). Petitioner contended that this matter was factually and legally similar to the holding in two prior cases, the *Beacon* cases,[1] and should be dismissed based upon the doctrines of res judicata, collateral estoppel, and judicial estoppel. In the *Beacon* cases, the Tribunal determined that the affidavits on record demonstrated that the Beacon Companies operated as a Payroll Service Company ("PSC") and not a Professional Employer Organization ("PEO"). Petitioner and the Beacon Companies shared an owner, the

[1] *Beacon Enterprises, Inc, v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals issued December 3, 2013 (Docket Nos. 308170 and 308171).

affidavits submitted were the same, and the language of the client service agreements ("CSA") were identical. Thus, the Tribunal found based upon the doctrines of res judicata and collateral estoppel that Respondent was prohibited from defending this action. The Court reversed and remanded holding. With respect to res judicata, the Court held that the subsequent action must be between the same parties with identical essential facts or evidence. The Court ruled that the Tribunal erred in finding that Petitioner was in privity with the Beacon Companies merely because they have the same owner, given that case law states that a corporation is a person which is separate from its owners, and that there was nothing on the record to show that Petitioner controlled the *Beacon* cases. In addition, this matter could not have been resolved with the *Beacon* cases given it was placed in abeyance. Moreover, the transactions at issue are not the same and Petitioner's interactions and operations with its clients under the CSAs are separate and distinct from those involved in the *Beacon* cases. With regard to collateral estoppel which bars relitigation of an issue, the Court held that the issue of whether the Beacon companies were PEOs or PSCs is a separate issue from whether Petitioner is a PEO or PSC. Although the Tribunal did not address judicial estoppel, the Court held that Respondent never conceded the affidavits, and as such, its defense is not inconsistent with the prior defense. On the issue of MCR 2.116(C)(10), the Court held that the Tribunal erred because there is conflicting evidence whether Petitioner was a PEO or PSC on record, and genuine issues of material fact remain. Thus, the Court determined that the Tribunal erred in granting summary disposition.

Use Tax

Total Foundations, LLC v Dep't of Treasury, unpublished opinion per curiam of the Court of Appeals issued March 22, 2016 (Docket No. 322983).

The Department of Treasury ("Respondent") appealed the judgment from the Court of Claims which found that Total Foundations, LLC ("Petitioner") was entitled to the industrial-processing exemption in MCL 205.94o. Petitioner installs foundations for International Transmission Company (ITC) which transmits power from generating companies to individual consumers. The foundations installed are to support the transmission towers and steel poles at substations. There is no dispute regarding ITC's exemption for the towers and poles as this is factually similar to the case of *Detroit Edison Co v Dep't of Treasury*,[2]; however, the issue of whether the foundation itself is exempt was not discussed in *Detroit Edison*. More specifically MCL 205.94o(4)(b) states that "[p]roperty that is eligible for an industrial processing exemption includes . . . foundations for machinery or equipment" while MCL 205.94o(5)(a) states "[t]angible personal property permanently affixed and becoming a structural part of real estate in this state" is not eligible. The Court of Claims held that the language under (4)(b) was more specific, and therefore, the foundation was exempt. The Court of Appeals affirmed in part and reversed and remanded in part. The Court specifically held that the more specific language test

[2] *Detroit Edison Co v Dep't of Treasury*, 303 Mich App 612; 844 NW2d 198 (2014).

applied here because there is "irreconcilable statutory tension" which is distinguishable from the section analyzed in *Detroit Edison*. Section (4)(b) specifically addresses the issue of the foundation and would be nugatory or meaningless if the Court held that section (5)(a) precluded an exemption for the foundation as a structural part of real estate. However, the Court held that the foundation is not only used to process but also to distribute electricity to consumers. As such, the case was remanded, in part, to allocate the percentage of exempt use versus nonexempt use. Therefore, the Court of Claims was correct that the property qualified for an exemption absent the allocation as required under MCL 205.94o(2).

Michigan Single Business Tax

Hudsonville Creamery and Ice Cream Company, L.L.C. v Department of Treasury

Petitioner appealed the Tribunal's order granting summary disposition in favor of Respondent. The issue was whether a carryforward of a credit earned under the SBTA was refundable as a credit under MCL 208.1437(18) of the MBTA. Noting that one of the defined components of a "general business credit" under the Internal Revenue Code is a credit carryforward, the Court of Appeals held that a credit under §1437(18) includes a credit that has been carried forward from a prior year. The Court found that this determination was supported by its decision in Ashley Capital, LLC v Dep't of Treasury, wherein it "expressly rejected the idea that a 'carryforward' should not be encompassed within the term 'credit.'" The Court further held that that the specific carryforward at issue, a brownfield redevelopment credit granted under MCL 208.38g(2), was a qualifying credit pursuant to the plain language of the statute: "That the credit carryforward may be claimed against the tax imposed under the act, i.e., may be subtracted from one's tax liability, makes it apparent that the particular carryforward at issue in this case is intended to function as a credit against liability imposed under the MBTA." As such, and inasmuch as the statute provides for a partial refund of allowed credits that exceed the tax liability, Petitioner was entitled to the refund claimed.

Michigan Business Tax

Labelle Management, Inc, LLC v Dep't of Treasury, __Mich App__; __NW2d__ (2016).

Plaintiff appealed the Court of Claims order granting summary disposition in favor of Respondent. At issue was the indirect ownership requirement of MCL 208.1117(6), which defines a "unitary business group" for purposes of the MBTA. Noting the absence of a comparable context in federal tax laws, the Court of Appeals held that the term must be construed according to its common and ordinary meaning. The Court consulted dictionary definitions and found the examples given by *New Oxford*, which defines the term in part as "not done directly; conducted through intermediaries," closer in context than other definitions. Black's Law Dictionary similarly defined "indirect possession" as "possession of a

thing through someone else, such as an agent." Consistent with these definitions, the Court held "that indirect ownership in MCL 208.1117(6) means ownership *through an intermediary*, not ownership by operation of legal fiction, as defendant urges." In further explanation, the Court reasoned that "[t]he constructive ownership rules from federal law may apply when a statute involves stock 'owned or considered as owned,' but to apply it to MCL 208.1117(6) expands the statute beyond the meaning intended by the Legislature.