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

Detroit Edison Company,
Petitioner,

v

MTT Docket Nos. 319829, 319830, 319831, 319832, 319833, 319834, 319840, 319841, 319842, 319844, 319845, 319847, 319848, 319869 and 319911.

City of Detroit and School District of the City of Detroit,
Respondents.

Tribunal Judge Presiding
Patricia L. Halm

ORDER GRANTING PETITIONER'S MOTION FOR RECONSIDERATION

ORDER GRANTING RESPONDENTS' MOTION FOR EXTENSION OF TIME

ORDER GRANTING PETITIONER'S MOTION FOR PARTIAL SUMMARY DISPOSITION REGARDING INTEREST AND PENALTY PURSUANT TO MCR 2.116(C)(10)

ORDER DISMISSING PETITIONER'S CLAIM AS TO THE 2005 DETROIT PUBLIC SCHOOL TAX

On July 13, 2007, Petitioner filed a Motion requesting that the Tribunal reconsider its June 26, 2007 Order dismissing this case. In support of its Motion, Petitioner contends that:

a. "The Order dismissed Petitioner's petition, holding that the May 31, 2007 Tribunal decision dismissing the separate case of *Briggs Tax Service v Detroit Public Schools*, Docket No. 319592 . . . constitutes *res judicata* in this case."

b. "[*R*]*es judicata* cannot apply because, among other reasons, Petitioner has not, in any way, been a party to the Briggs Tax Service case, and the *Briggs* Decision is under appeal and is not final."

c. "On May 31, 2007, the Tribunal issued the *Briggs* Decision, dismissing the *Briggs* petition. That decision is now on appeal to the Michigan Court of Appeals."

d. "Thereafter, on June 26, 2007 – and without the benefit of any briefing by Petitioner and/or discovery in this case – the Tribunal issued the Order dismissing this case, based

solely on its conclusion that Petitioner's claims are barred by *res judicata* because of the *Briggs* Decision."

e. "Under Michigan law, *res judicata* bars a subsequent action between the **same parties**, and only when the facts or evidence essential to the action are identical to those essential to the prior action."

f. "Here, none of the elements – let alone all of the elements – of *res judicata* can be met."

g. "[R]es judicata is also not applicable because the *Briggs* decision is not a final decision on the merits."

h. "[A]lthough this case shares some of the same operative facts and issues as in the *Briggs Tax Service*, these case[s] are not the same. Among other things, this case involves an entirely different taxpayer, with additional and/or different factual and legal issues."

i. "For example, the parties in *Briggs* stipulated that refunds for the 2005 tax year were moot. Petitioner here makes no stipulation. In addition, Petitioner also did not pay the disputed millage until the voters approved the millage in November of 2005, resulting in a claim by the City for interest and penalties on the tax arising from approximately September 2005 until the voters approved the millage. Petitioner claims interest and penalties cannot be charged upon a tax unauthorized by voters."

On July 27, 2007, Respondent Detroit Public School District[1] of the City of Detroit filed a response to the Motion. In its response, Respondent contends that:

a. "Petitioner makes a vague, broadly stated claim that its case raises different facts and issues than those considered in *Briggs* . . . Petitioner's motion . . . identifies no real differences, nor does it identify any issues concerning which it would have sought discovery."

b. "[T]he Petitioner in *Briggs* included a claim that the City for the tax years 2002 – 2005 wrongly billed and collected the tax at issue. . . . Petitioner in this case also challenges the authority of the City to collect the same tax for the same tax years. Thus, Petitioner's claims in this case are included among those raised in Briggs."

c. "[*R*]*es judicata* bars all claims which 'could have been raised' in the first case, and Petitioner's collection related claims 'could have been,' and were in fact, raised by Briggs as the functional representative of other taxpayers."

[1] Sometimes referred to herein as "DPS."

d. "Petitioner asserts . . . in its motion that Petitioner would not have stipulated, as Briggs did, to the mootness of the 2005 tax year. *Res judicata* relates to claims that could have been made, not strategies or arguments that might have been used or not used."

e. "Petitioner also asserts that it has an additional claim against interest and penalties charged by Detroit for Petitioner's late payment of the 2005 tax. However that claim is being raised for the first time in Petitioner's motion, and was not included in its Petition which was dismissed by the Tribunal's Order."

f. "Petitioner claims that *res judicata* and *collateral estoppel* do not apply because the parties are different in this case than they were in the *Briggs* case . . . That claim of error fails because the parties need not be the "same" for *res judicata* to apply. *Res judicata* can also apply when there is 'privity' between the parties, such that the plaintiff or petitioner in the first suit can be held to have adequately represented the interest of the plaintiff or petitioner in the second suit. This privity requirement has been met in this case."

g. "For purposes of applying *res judicata*, parties are in privity, if there is: 'a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.' *Phinisee v Rogers*, 229 Mich App 547, 554-555; 582 NE2d 852 (1998) (emphasis added)."

h. "The test for privity has also been stated as to include: '. . . mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right.' *Sloan v Madison Heights*, 425 Mich 288, 295; 389 NW2d 418(1986) . . . ."

i. The relationship described in the rule quoted from *Sloan* and *Peterson* is the mutual relationship both parties have to the same right or an identity of interest. When that exists, the first party can be viewed as representing the rights of the party in the second matter. In this case Briggs and the present Petitioner claim that the school operating tax is illegal."

Having given due consideration to the Motion, the response and the case file, the Tribunal finds that Petitioner's Motion for Reconsideration must be granted. To fully understand the Tribunal's position, a brief summary of what has transpired thus far in this case is necessary.

As an initial matter, the Tribunal must determine if it has jurisdiction over Petitioner's claim for a refund of interest and penalty paid to Respondents. Respondents argue that the issue

of penalties and interest is not before the Tribunal because Petitioner did not raise this issue in its Petition.

This appeal concerns the 2005 summer tax bill issued by the City of Detroit. While it is not exactly clear what date the tax bill was issued, MCL 211.44a(3) provides that "[t]axes authorized to be collected shall become a lien against the property on which assessed, and due from the owner of that property on July 1." Thus, the earliest date a summer tax bill may be issued in any given year is July 1.

Pursuant to MCL 211.44a(5):

> Interest shall be added to taxes collected after September 14 at that rate imposed by section 78a on delinquent property tax levies that became a lien in the same year. The tax levied under this act that is collected with the city taxes shall be subject to the same penalties, interest, and collection charges as city taxes and shall be returned as delinquent to the county treasurer in the same manner and with the same interest, penalties, and fees as city taxes.

In other words, interest and penalties may not be assessed on *authorized* taxes until September 15, 2005. Because the 2005 summer tax bill issued by the City of Detroit included DPS's *unauthorized* tax, Respondents were without the authority to assess interest and penalty on that *unauthorized* tax.

Moreover, in this case, the Petition was filed on August 17, 2005. Therefore, the issue of interest and penalties could not have been raised in the Petition as interest and penalties could not have been assessed, if *authorized*, for approximately another month; the issue arose after the Petition was filed and while this appeal was pending. The earliest that Petitioner would have been aware that interest and penalties had been assessed would have been when it paid the *authorized* millage on January 15, 2006.

It appears that Respondents are suggesting that Petitioner was required to file another Petition appealing the interest and penalties after the interest and penalties were paid. The Tribunal disagrees and finds that this would not have been a good use of administrative time and resources as Petitioner's appeal of the 2005 tax was still pending. The Tribunal finds the addition of interest and penalty to Petitioner's tax bill to be an arithmetic error or mistake pursuant to MCL 205.735. For this reason, the Tribunal finds that it has jurisdiction over this issue.

The Petition states that "[t]his is a proceeding for the redetermination and refund of tax based on clerical and arithmetic errors and mistakes in tax bills issued and mailed or otherwise provided by the City of Detroit relating to Petitioner's property" for the 2002 through 2005 tax years. The facts of what transpired during those years are outlined in *Briggs Tax Service, LLC v Detroit Public Schools, et al*, 485 Mich 69; 780 NW2d 753 (2010), and will not be repeated herein. As a result of what transpired, Petitioner requested a refund of taxes and charges paid for the 2002 through 2004 tax years. Petitioner also requested that the Tribunal "declare null and void any billed but unpaid taxes illegally charged on the subject property for tax year 2005."

On August 26, 2005, Petitioner filed a Motion requesting permission to amend its Petition to voluntarily dismiss its appeal relative to the 2002, 2003 and 2004 tax years. On November 18, 2005, the Tribunal issued an Order granting Petitioner's Motion. Therefore, only the 2005 tax year is under appeal in these cases.

On March 30, 2007, Petitioner filed a Motion requesting that "this case be held in abeyance pending resolution of the pending motion for summary disposition in *Briggs Tax*

Service v Detroit Public Schools, MTT Docket No. 319592 . . . ." On May 11, 2007, the Tribunal issued an Order granting Petitioner's motion.

On May 31, 2007, the Tribunal issued an Order dismissing the *Briggs* case for lack of jurisdiction. On June 26, 2007, the Tribunal issued an Order dismissing this case, citing res judicata due to the *Briggs* Order. As discussed above, on July 13, 2007, Petitioner filed its Motion to have the Tribunal's June 26, 2007 Order reconsidered.

On January 21, 2009, Petitioner filed a Motion titled "Petitioner's Motion for Partial Summary Disposition Regarding Interest and Penalty." Petitioner filed this Motion pursuant to MCR 2.116(C)(10) and included an affidavit of Jerry Henderson, Petitioner's Property Manager, in support of the Motion. In the Motion, Petitioner states:

> In their Summer 2005 tax bills (due August 2005), Respondents assessed . . . a school operating millage that had not been approved by Detroit voters as required by law. It is undisputed that, at the time the Summer 2005 tax bills were issued, no DPS school millage was authorized and any attempted assessment of such a millage was unlawful. Petitioner did not pay the school operating millage contained in its Summer 2005 tax bills because that millage was unlawful. Subsequently, a DPS school tax millage was authorized by Detroit voters in an election held on November 8, 2005. Shortly after this election was held, Petitioners paid the millage that had been approved by the voters . . . Respondents claimed that Petitioner[] [was] liable for interest and penalty upon the illegal school millage contained in the Summer tax bills from the due date of the Summer tax bills in August 2005. Petitioner subsequently paid the assessed interest and penalty and brought this case seeking, among other things, a refund of the interest and penalty. (Petitioner's Motion, p2)

Petitioner argues that "Respondent cannot assess interest and penalty upon a taxpayer for refusal to pay an unlawful tax." (Petitioner's Motion, p4) In support of this argument, Petitioner cites *Parshall v Williams*, 33 Mich App 589; 190 NW2d 554 (1971), wherein the Court of Appeals dealt with a situation involving the City of Detroit in which the City assessed interest on

what was determined to be an unlawful tax assessment. The plaintiff/taxpayer's position was that "since the assessment before that date was unlawful, charging interest for non-payment would penalize the taxpayer for his insisting upon his right to a lawful assessment." *Id*., p594. The Court of Appeals agreed with the plaintiff/taxpayer's position and stated that "[t]axpayers should not be penalized for refusing to pay a tax which is unlawfully assessed." *Id*., p594.

Finally, Petitioner argues that, pursuant to the General Property Tax Act, a millage is assessed in the tax year after it is approved. Petitioner cites MCL 211.36(5) in support of this argument.

On March 2, 2009, Respondents filed a Motion requesting an additional 60 days in which to file their response to Petitioner's Motion for Partial Summary Disposition. Respondents state that they need the time "[i]n order to insure that all relevant facts and arguments are presented to the Tribunal for its full and informed consideration . . . ." For this reason, the Tribunal finds that Respondents have shown good cause to grant their Motion.

On April 9, 2009, Respondents filed their response in opposition to Petitioner's Motion for Partial Summary Disposition. In their response, Respondents state that they:

> . . . received timely payment from Petitioner of their Summer 2005 school operating tax bills in August 2005. Detroit Public Schools did not assess against, or collect from, Petitioners any interest, penalties or other fees in connection with any late payment of DPS Summer 2005 school operating tax bills. Detroit Public Schools is informed and believes that any late payment of Summer 2005 tax bills by Petitioners was for various taxes of Wayne County, Wayne County Community College, Wayne Regional Educational Service Agency and Huron-Clinton Metropolitan Authority, and that those governmental entities may have levied against and collected from Petitioners interest, penalties, and other fees in connection with Petitioners[‘] late payment of their Summer 2005 tax bills. (Respondents' response, p2)

Respondents filed an affidavit of Richard Kisner, CFO of the Detroit Public Schools, confirming this statement. The affidavit contains a table based on "public records maintained by the Wayne County Treasurer, that the [ ] table indicates the Summer 2005 taxes paid by Petitioner[ ], the recipients(s) of such late tax payments, and the basis, allocation and amounts of interest, payments and other fees paid to such recipient(s) in connection with such late tax payments."

Respondents' final argument is that Petitioner's (C)(10) Motion cannot be granted because:

> . . . there are genuine issues of material fact as to which Summer 2005 tax bills were late paid by Petitioners, the allocation of insufficient timely Summer 2005 tax payments made by Petitioners, and the recipient(s) of the interest, penalties and other fees paid by Petitioner in connection with their late payment of such taxes. (Respondents' Response, p3)

Instead of immediately ruling on Petitioner's Motion for Reconsideration and Motion for Partial Summary Disposition, the Tribunal decided to wait to issue its ruling until there was a final determination in *Briggs*. This occurred on March 30, 2010, with the issuance of the Michigan Supreme Court's decision in that case.

Beginning with Petitioner's Motion for Reconsideration, the Tribunal disagrees with Petitioner's position that the doctrine of *res judicata* does not apply in this case. In *Adair v State of Michigan*, 470 Mich 105; 680 NW2d 386 (2004), the Michigan Supreme Court was presented with the question of whether the doctrine of *res judicata* applied in a case involving a "Headlee"[2] claim. The Court stated that:

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[2] Const 1963, art 9, §§ 25-34.

> We consider it apparent that the people would have thought, **as with all litigation**, there would be the traditional rules that would preclude relitigation of **similar issues by similar parties**; that is, the area of law we describe formally as encompassed by the doctrine of res judicata. (Emphasis added.) *Id*., p121.

Thus, it is clear from this statement that the Court does not concur with Petitioner's argument that "[u]nder Michigan law, *res judicata* bars a subsequent action between the **same parties.**" Instead, it is enough that the parties be "similar."

The Court then cited its decision in *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569; 621 NW2d 222 (2001).

> The doctrine is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. (Citations omitted.) (*Adair*, p121)

In *Sewell*, the Court stated:

> Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not . . . Michigan's broad res judicata rule bars claims arising out of the same transaction that could have been litigated in a prior proceeding but were not. *Id*., p575-576.

To determine whether *res judicata* applies in the instant case, the first question that must be addressed is whether the prior action, *Briggs*, was decided on the merits of the case. Petitioner argues that *Briggs* was not decided on the merits because it was not a "final" decision. However, Petitioner provided no support for this theory. Even if Petitioner's theory were

correct, the Tribunal's decision in *Briggs* was upheld by the Michigan Supreme Court. Therefore, there has been a "final" decision on the merits.

As to the second part of the test, the Tribunal finds incorrect Petitioner's position that it must have been a party in *Briggs* for *res judicata* to apply. As reiterated in several Michigan Supreme Court decisions, both actions must involve "the same parties or their privies." Since there is no disagreement that Petitioner was not a party in *Briggs*, it must be determined if Petitioner is in privity with the petitioner in *Briggs*. In addressing the question of privity, the *Adair* Court stated:

> To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. The outer limit of the doctrine traditionally requires both a "substantial identity of interests" and a "working functional relationship" in which the interests of the nonparty are presented and protected by the party in the litigation . . . If the relief sought by one plaintiff to remedy a challenged action is indistinguishable from that sought by another . . . the interests are identical.
>
> Thus, for the purposes of the second *Sewell* factor, a perfect identity of the parties is not required, only a "substantial identity of interests" that are adequately presented and protected by the first litigant. We find that the interests of the current plaintiffs were, for Headlee purposes, adequately represented by the plaintiff in *Durant I.* The taxpayer parties all have the same interest: that mandated activities are funded as they are required to be under the Headlee Amendment. These interests were presented and protected by the extensive and thorough litigation that occurred in *Durant I.* Thus, we find the current taxpayer plaintiffs are in privity with the *Durant I* plaintiffs. (Citations omitted.) *Id*., p121-123.

In *Briggs*, the petitioner requested a refund of school operating tax levied by the Detroit Public Schools against property it owns for multiple tax years, including 2005. In this case, Petitioner requests that the Tribunal "declare null and void any billed but unpaid taxes illegally charged on the subject property for tax year 2005." Thus, while stated differently, the end result

is the same: neither party wants to pay the 2005 school operating tax levied by the Detroit Public Schools against property it owns. The petitioner in *Briggs* requests a refund of the taxes; Petitioner in this case requests a release from ever having to pay the tax. Both parties claim that the tax is illegal.

Because the relief sought by Petitioner to remedy a challenged action is indistinguishable from that sought by the petitioner in *Briggs*, the Tribunal finds that there was a "substantial identity of interests" and a "working functional relationship" in which the interests of Petitioner were presented and protected by the petitioner in *Briggs*. As in *Adair*, Petitioner's interests were presented and protected by the extensive and thorough litigation that occurred in *Briggs*. This is even truer in this case as the law firm that represents Petitioner filed an amicus brief at the Michigan Supreme Court in support of the petitioner's position in *Briggs*. Given this, the Tribunal finds that Petitioner is in privity with the petitioner in *Briggs*.

The following analysis of the third part of the *res judicata* test was provided by the *Adair* Court:

> Res judicata bars every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. This Court has noted that "[r]es judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." This statement refers to what is generally called the "same evidence" test. Because there appears to be some confusion regarding the relationship between the "same transaction" test and the "same evidence" test, we take this opportunity to provide clarification.
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> The "same transaction" test and the "same evidence" test are alternative approaches used in determining the applicability of res judicata. As stated by the Illinois Supreme Court in *River Park, Inc v Highland Park*, 184 Ill 2d 290, 307-309; 234 Ill Dec 783; 703 NE2d 883 (1998) (citations omitted):
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> > Under the "same evidence" test, a second suit is barred "if the evidence needed to sustain the second suit would have sustained the first, or if the

> same facts were essential to maintain both actions." The "transactional" test provides that "the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief."
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> * * *
>
> [U]nder the same evidence test the definition of what constitutes a cause of action is narrower than under the transactional test. As explained in the Restatement (Second) of Judgments, the same evidence test is tied to the theories of relief asserted by a plaintiff, the result of which is that two claims may be part of the same transaction, yet be considered separate causes of action because the evidence needed to support the theories on which they are based differs. By contrast, the transactional approach is more pragmatic. Under this approach, a claim is viewed in "factual terms" and considered "coterminous with the transaction, regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; * * * and regardless of the variations in the evidence needed to support the theories or rights." *Id*., pp123-124.

The Court further stated that "this Court has accepted the validity of the broader transactional test." *Id*., p124. Thus, the "determinative question," as applied in this case, is whether Petitioner's request that the Tribunal "declare null and void any billed but unpaid taxes illegally charged on the subject property for the tax year 2005" arose from the same transaction as did the *Briggs* petitioner's request for a refund of 2005 taxes already paid. "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation,* [and] whether they form a convenient trial unit. . . . 46 Am. Jur. 2d, Judgments 533, p. 801 (emphasis added)." *Id*., p125. In other words, "[t]he test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions." *Jones v State Farm Mutual Auto Ins Co,* 202 Mich App 393, 401; 509 NW2d 829 (1993). Clearly, the factual issue in this case is identical to

that in *Briggs*; both cases involve a tax levied in the summer of 2005 without voter approval. The ultimate goal in both cases is to be relieved of payment of the tax. With this last part of the *res judicata* test having been met, the Tribunal finds that *res judicata* applies in this case.

In its Petition, Petitioner describes this proceeding as one for a "redetermination and refund of tax based on clerical and arithmetic errors and mistakes in tax bills" mailed by the City of Detroit on or about July 11, 2005. Thus, Petitioner's claim can be considered under MCL 205.735.

In granting leave to appeal in *Briggs*, the Michigan Supreme Court stated that the appeal was limited to the "issue of whether the petitioner's dispute regarding the collection of property taxes for tax years 2002, 2003, and 2004 involved a mutual mistake of fact made by the assessing officer and the taxpayer such that the three-year limitation period of MCL 211.53a applies to the petitioner's claims." *Briggs Tax Service v Detroit Public Schools, et al*, 483 Mich 1024; 765 NW2d 345 (2009). Ultimately, the Court held that DPS's action did "not constitute a 'mutual mistake of fact made by the assessing officer and the taxpayer' within the meaning of MCL 211.53a." *Briggs*, p85. While the petitioner in *Briggs* did not pursue this claim relative to the 2005 tax year, the Tribunal finds the Court's holding equally applicable to the 2005 tax year. Thus, Petitioner's claim relative to payment of the 2005 school operating tax is barred by *res judicata*.

On the other hand, the Tribunal finds that Petitioner's claim relative to the assessment of interest and penalties is not barred by *res judicata* as the petitioner in *Briggs* did not make this claim. While the underlying issue, e.g., the assessment of an illegal tax, arose from the same transaction, the assessment of interest and penalties is a transaction unique to Petitioner. The

petitioner in *Briggs* would not have been motivated to litigate a claim regarding penalties and interest as it did not apply to them. Therefore, the Tribunal finds that the third part of the *res judicata* test was not met as to the assessment of penalties and interest and that Petitioner has shown good cause to set aside the Tribunal's June 26, 2007 Order. See MCR 2.119. The Tribunal further finds that this case should be reinstated to consider Petitioner's Motion for Partial Summary Disposition.

Petitioner's Motion for Partial Summary Disposition presents the question of whether DPS may assess penalties and interest for nonpayment of tax. Respondents' response to Petitioner's Motion presents the question of how a presumed partial payment of tax is to be handled. To make an informed decision as to this argument, a review of the applicable statutory provisions is required.

First, there is no dispute that the school operating taxes levied by DPS are collected by the City of Detroit. There is also no dispute that the City levies its taxes on the summer property tax bill. Pursuant to Section 1611 of the Revised School Code:

> School taxes collected by a city shall become a lien against the property on which assessed in the same manner and on the same date as city taxes or, if the city approves the collection of school taxes on a date other than the date it collects the city taxes, on July 1. The school taxes which are collected with the city taxes shall be subject to the same penalties, interest, and collection charges as city taxes and shall be returned as delinquent to the county treasurer in the same manner and with the same interest, penalties, and fees as city taxes are returned. (MCL 380.1611(4))

Additionally, Section 44a of the General Property Tax Act provides, in pertinent part:

> (2) Before June 30 and in conformance with the procedures prescribed by this act, the taxes being collected as a summer property tax levy shall be spread in terms of millages on the assessment roll, the amount of tax levied shall be assessed in

> proportion to the taxable value, and a tax roll shall be prepared that commands the appropriate treasurer to collect on July 1 the taxes indicated as due on the tax roll.
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> (3) Taxes authorized to be collected shall become a lien against the property on which assessed, and due from the owner of that property on July 1.
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> (4) All taxes and interest imposed pursuant to this section that are unpaid before March 1 shall be returned as delinquent on March 1 and collected pursuant to this act.
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> (5) Interest shall be added to taxes collected after September 14 at that rate imposed by section 78a on delinquent property tax levies that became a lien in the same year. The tax levied under this act that is collected with the city taxes shall be subject to the same penalties, interest, and collection charges as city taxes and shall be returned as delinquent to the county treasurer in the same manner and with the same interest, penalties, and fees as city taxes. (MCL 211.44a)

Thus, taxes levied by DPS are due and payable on July 1 of the tax year at issue, and any tax not paid by September 14 of that same tax year is assessed penalties and interest.

There is also no dispute that the taxes levied by DPS and included on the July 2005 tax bill issued by the City of Detroit were unauthorized at the time the tax bill was issued. Subsequently, at a general election held on Tuesday, November 8, 2005, the DPS's electors authorized DPS to levy the millage. This approval was granted pursuant to MCL 380.1211 for a period of years beginning with the 2005-2006 school year. Under MCL 211.36, the taxes were certified for the 2005 calendar year.

According to Petitioner, it:

> . . . paid the authorized DPS school millage on or about January, 15, 2006 . . . Respondents however, assessed interest and penalty in the amount of $322,294.22 on Petitioners for the unpaid DPS school tax millage assessed in the Summer 2005 tax bills from the due date of the Summer 2005 bills (August 2005) until Petitioners paid the millage. (Petitioner's Brief, pp3-4)

Pursuant to MCL 211.44a, if the tax had been authorized, penalties and interest would not have been assessed until September 15, 2005. However, the Tribunal finds that because the tax was not authorized at the time the tax bill was issued, DPS lacked the authority to assess penalties and interest for nonpayment. Furthermore, DPS lacked the authority to assess penalties and interest until after the voters approved its millage and the county board of commissioners met and authorized the tax to be levied. (MCL 211.36)

Respondents disagree with Petitioner's statements. As previously stated, DPS claims that it:

> . . . received timely payment from Petitioner of their Summer 2005 school operating tax bills in August 2005. Detroit Public Schools did not assess against, or collect from, Petitioners any interest, penalties or other fees in connection with any late payment of DPS Summer 2005 school operating tax bills. Detroit Public Schools is informed and believes that any late payment of Summer 2005 tax bills by Petitioners was for various taxes of Wayne County, Wayne County Community College, Wayne Regional Educational Service Agency and Huron-Clinton Metropolitan Authority, and that those governmental entities may have levied against and collected from Petitioners interest, penalties, and other fees in connection with Petitioners late payment of their Summer 2005 tax bills. (Respondents' response, p2)

However, Respondents have cited no statutory authority to support their position that payment of the tax levied by DPS in August 2005 was "timely." In other words, Respondents did not cite any authority that the November 8, 2005, millage authorization was retroactive and somehow transformed the July, 2005 illegal tax into a legal tax.

Respondents also claim that:

> . . . there is a genuine issue of material fact as to which Summer 2005 tax bills were late paid by Petitioners, the allocation of insufficient timely Summer 2005 tax payments made by Petitioners, and the recipient(s) of the interest, penalties and other fees paid by Petitioners in connection with their late payment of such taxes. (Respondents' response, p3)

For these reasons, Respondents argue that Petitioner's Motion for Partial Summary Disposition under MCR 2.116(C)(10) must be denied.

MCR 2.116(C)(10) provides the following ground upon which a summary disposition motion may be based: "Except as to the amount of damages, 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." The Michigan Supreme Court, in *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), 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 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).
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> 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*., pp361-363)

(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. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991). On the other hand, under MCR 2.116(I)(2), "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

The Tribunal notes that Petitioner filed its Motion for Partial Summary Disposition on January 21, 2009. Pursuant to TTR 230(1)[3]: "Written opposition, if any, to motions shall be filed within 14 days after service." On March 2, 2009, well after the 14 day response period, Respondents filed a Motion requesting additional time in which to respond to Petitioner's Motion. On April 9, 2009, 84 days later, Respondents filed their response. In spite of the fact that Respondents were given additional time to file their response, Respondent City of Detroit claims that it was unable to determine when Petitioner paid the tax bill and how the payments were allocated among the various taxing jurisdictions.

Pursuant to MCL 211.44a(4): "All taxes and interest imposed pursuant to this section that are unpaid before March 1 shall be returned as delinquent on March 1 and collected pursuant to this act." In other words, Respondent City of Detroit would have been in possession of all records of payments made prior to March 1, 2006. Given that Petitioner timely paid all of the 2005 summer tax bill but for DPS's school operating millage, and paid the authorized school millage on January 15, 2006, the Tribunal finds that Respondent City of Detroit was in

[3] TTR 230(1) was revised on October 19, 2009, to extend the time allotted for a response to 21 days after service.

possession of the documents necessary to determine how Petitioner's payments were allocated. Respondents may not now claim that there is a genuine issue of material fact when they, in fact, possessed the information necessary to resolve the issue.

Given this, the Tribunal finds that Respondent City of Detroit incorrectly allocated Petitioner's payment of its 2005 summer tax bill by first paying Respondent Detroit Public School District's unauthorized millage and then allocating the remaining balance to pay the millages authorized by the other applicable taxing jurisdictions. Instead, Respondent City of Detroit should have utilized Petitioner's initial payment to pay all of the *authorized* millages, e.g., everything but the DPS millage. If payment had been allocated in this manner, Petitioner could not have been assessed interest and penalty.

In conclusion, the Tribunal finds that there are no genuine issues of material fact and that Petitioner is entitled to judgment as a matter of law as to the issue of interest and penalties levied by Respondents on DPS's unauthorized millage and paid by Petition on January 15, 2006. Therefore,

IT IS ORDERED that Petitioner's Motion for Reconsideration is GRANTED.

IT IS FURTHER ORDERED that Respondents' Motion for an Extension of Time is GRANTED.

IT IS FURTHER ORDERED that Petitioner's request for a refund of school operating taxes paid for the 2005 tax year is DENIED.

IT IS FURTHER ORDERED that Petitioner's Motion for Partial Summary Disposition Regarding Interest and Penalty pursuant to MCR 2.116(C)(10) is GRANTED.

IT IS FURTHER ORDERED that Petitioner's claim as to the tax levied by DPS for the 2005 tax year is DISMISSED.

IT IS FURTHER ORDERED that the officer charged with refunding the affected penalties and interest shall issue a refund as required by this Order within 28 days of entry of this Order. The

refund shall also separately indicate the amount of penalties and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2004, at the rate of 2.07% for calendar year 2005, (ii) after December 31, 2005, at the rate of 3.66% for calendar year 2006, (iii) after December 31, 2006, at the rate of 5.42% for calendar year 2007, (iv) after December 31, 2007, at the rate of 5.81% for calendar year 2008, (v) after December 31, 2008, at the rate of 3.31% for calendar year 2009, (vi) after December 31, 2009, at the rate of 1.23% for calendar year 2010, and (vii) after December 31, 2010, at the rate of 1.12% for calendar year 2011.

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

MICHIGAN TAX TRIBUNAL

Entered: April 5, 2011 By: Patricia L. Halm