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

Total Armored Car Service, Inc,
Petitioner,

v

MTT Docket No. 16-003017

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
David B. Marmon

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

At issue in this appeal are Michigan Business Tax assessments UO33953 for March 2010, wherein Respondent assessed tax in the amount of $3,062 plus interest in the amount of $748.22, and no penalty, and UO33954, for March, 2011 in which $143,209 in tax plus $28,908.96 in interest and no penalty was assessed. Petitioner contends no money is owed for either assessment.

On April 10, 2017, Respondent filed a motion requesting that the Tribunal enter summary disposition in its favor in the above-captioned case. More specifically, Respondent contends that as a matter of law, Respondent properly reduced the amount of materials and supplies Petitioner claimed on its MBT returns; that Respondent properly disallowed Petitioner's reduction from gross receipts in an agency capacity, because no such agency existed, and that Respondent properly reduced Petitioner's compensation credit.

On May 8, 2017, Petitioner filed a response to the Motion. In its response, Petitioner contends that summary disposition is improper because there are several issues of material fact. Specifically, Petitioner contends that it and seven other persons/entities for which it filed a

combined MBT return are an affiliated group, which has an unspecified effect on its MBT liability. Petitioner also contends that it is a question of fact whether or not Petitioner is an agent, and therefore allowed to exclude from gross receipts, amounts it collects for owner-operator truckers. Petitioner also contends that it is an issue of fact as to whether the compensation credit is based on where the employee performed services, or his or her physical location. Finally, Petitioner contends that the deduction for materials and supplies includes items not included in inventory or depreciable property.

On May 12, 2017, in response to Petitioner's Brief, the Tribunal ordered supplemental briefs on the issue of unitary business group filing. Petitioner filed its Brief *titled Petitioner's Supplemental Brief Explaining the Theory of, the Applicability and specific Tax Consequences to the Assessments at Issue Concerning La Belle Management, Inc v Department of Treasury* on June 1, 2017. ("Petitioner's Supplemental Brief"). Respondent filed its response titled *Respondent's Response to Petitioner's Supplemental Brief* on June 23, 2017.

The Tribunal has reviewed the Motion, Response, supplemental briefs, and the evidence submitted and finds that granting Respondent's Motion for Summary Disposition is warranted at this time.

RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends that there is no issue of material fact, and as a matter of law, it properly reduced Petitioner's Materials and Supplies deduction under MCL 208.1113(6)(c) from gross income for transportation services. Said services are not materials and supplies.

Respondent also contends that it properly included as a matter of law, income received from funds collected from General Motors, which Petitioner pays over to independent truckers.

While Petitioner claims it qualifies as an agent, and that these funds are therefore exempt, Respondent argues that an agent under state law is under the control of a principal, and Petitioner is not controlled by independent truckers with whom it has contracted.

Respondent further contends that it properly calculated the compensation credit under MCL 208.1403(2) on the basis of where employees' work was performed, rather than based upon where the employees reside. In support, it argues that its administrative interpretation can only be overruled for cogent reasons, and that Petitioner has no cogent reason to have Respondent's interpretation overruled.

Finally, as to the consolidated return issue under *LaBelle Management v Treasury,*[1] Respondent characterizes this issue as "litigation by chaos." Respondent contends that it was not properly pled in the pleadings; Petitioner has not properly explained how *LaBelle* impacts the assessments at issue, nor is it properly before the Tribunal because unlike *LaBelle*, no standalone return was filed. Respondent further contends that under the state's constitution, Respondent is charged with making an initial determination regarding the accuracy of a return, which was never filed, and thus never determined. Additionally, the result of considering this count will be that the tax consequences for other members of the group who may or may not be parties here will have confidential information disclosed, and will have rights adjudicated without exhausting administrative remedies, or paying uncontested portions.

PETITIONER'S CONTENTIONS

In support of its response, Petitioner contends that Petitioner, Total Armored Car Services, Inc., filed a 2008, 2009, 2010, and 2011 Michigan Business Tax Annual Return (Form

[1] *LaBelle Management Inc v Treasury*, 315 Mich App 23; 888 NW2d 260 (2016).

4567) as the designated member of a "unitary business group" [MCL 208.1117(6)] and filed a combined Michigan Business Tax return [MCL 208.1511] covering the tax periods ended March 31, 2008, March 31, 2009, March 31, 2010, and March 31, 2011, with the following other members:

Federal Armored Truck, Inc.
Allsecurity Service, Inc.
E. L. Hollingsworth & Co.
Stanton Barr
SS Airport Services, Inc.
On Time Leasing, Inc.
Barmc, LLC

Petitioner contends that while it filed as a unitary group, it was in fact not a unitary group, per *LaBelle Management v Dep't of Treasury*, and if filed as individual entities, Petitioner and the other entities, the amount owed if any, would be materially affected.

Petitioner also contends that it is engaged in a transportation business activity in Michigan and as such employs Michigan residents which qualifies Petitioner to claim a MBT Compensation Credit as provided in MBTA Section 403 [MCL 208.1403(2)]. Petitioner contends that Respondent improperly calculated this credit based upon where the work was performed, rather than where the employees reside.

Petitioner next contends that it is a person engaged in the business of providing transportation services and as such, Petitioner contractually engages with certain independent contractors, as their agent, to secure and obtain transportation jobs from which the payments derived thereon qualify as an allowable exclusion from gross receipts as amounts received in an agency capacity; specifically amounts received for and on behalf of persons under MBTA Section 111(1) [MCL 208.1111(1)].

Finally, Petitioner claimed a MBT deduction as "purchases from other firms" [MCL 208.1113(6)] of "material and supplies" [MCL 208.1113(6)(c)] to the extent claimed as an ordinary and necessary business expense under Section 162 of the Internal Revenue Code for federal income tax purposes; expenditures of tangible personal property not included in inventory and not a capitalized asset. Petitioner argues that intangible expenses may be deducted as materials and supplies.

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[2] In this case, Respondent moves for summary disposition under MCR 2.116(C)(10).

Summary disposition under MCR 2.116(C)(10) 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.[3] In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under (C)(10) will be denied.[4]

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.[5] The moving party bears the initial burden of

[2] See TTR 215.
[3] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).
[4] See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).
[5] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).

supporting its position by presenting its documentary evidence for the court to consider.[6] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[7] Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving 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.[8] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[9]

CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion under MCR 2.116 (C)(10) and finds that granting the Motion is warranted.

I. Materials and supplies deduction.

Respondent argues that it properly reduced the amount Petitioner deducted from its gross receipts for materials and supplies. Specifically, it claims to have reduced this deduction by disallowing a deduction from gross receipts for the performance of transportation services. Respondent further argues that the materials and supplies deduction is limited to tangible goods. Petitioner does not dispute that the items disallowed were intangibles. Per the audit,[10] the disallowed items were for "EHL Lease Agreements, Purchased Transportation, and Vehicle Rental."

This deduction from gross receipts is found under MCL 208.1113(6)(c). Subsection (6) of this statute states:

> (6) "Purchases from other firms" means all of the following:

[6] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[7] *Id.*
[8] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[9] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[10] Exhibit P-27

> (a) Inventory acquired during the tax year, including freight, shipping, delivery, or engineering charges included in the original contract price for that inventory.
>
> (b) Assets, including the costs of fabrication and installation, acquired during the tax year of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes.
>
> (c) To the extent not included in inventory or depreciable property, materials and supplies, including repair parts and fuel.

In its response, Petitioner argues that Respondent reads a limitation into the statute unsupported by the statutory language. Specifically, Petitioner cites *Plastic Surgery Associates PC v Mich Dep't of Treasury*[11] for this proposition. However, while the holding in *Plastic Surgery* disregarded Respondent's definition of materials and supplies which was limited by Respondent to depreciable items only, the Tribunal's holding nonetheless was limited to tangible items. Petitioner has provided no authority for the proposition that the phrase *materials and supplies* is broader than its plain meaning. Clearly, to be a material or a supply, an item must be a tangible good, such as rubber gloves or syringes in *Plastic Surgery*, or repair parts and fuel as referenced in the statute. Petitioner does not suggest anything analogous to these items was disallowed by Respondent in the audit. Contracts and leases for transportation services, while useful, are not items that can be kept on hand in a drawer or cabinet. While *Plastic Surgery* reasoned that materials and supplies were limited by the Internal Revenue Code phrase of "ordinary and necessary,"[12] it does not follow that materials and supplies mean *every* ordinary and necessary expense.

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[11] *Plastic Surgery Associates PC v Mich Dep't of Treasury*, __ MTT __ (Docket No. 16-000011), issued November 15, 2016.
[12] IRC, §162

Petitioner also argues that the Court of Claims decision in *Andrie v Dep't of Treasury* supports its position that payments for services or intangibles are also to be considered deductible under the MBT as materials and supplies. We disagree. After reviewing this decision, the Tribunal concludes that while the Court of Claims ruled in favor of the taxpayer on grounds similar to the Tribunal's in *Plastic Surgery Associates*, it explicitly excluded expenses for services rendered as a deduction for materials and supplies. Footnote 56 to the Court of Claims decision states:

> This is not to say that all expenses related to materials and supplies that do not fall under MCL 208.1111(1)(b) are automatically deductible under MCL 208.1113(6)(c). For example, expenses for services rendered by third parties are potentially excludable under MCL 208.1113(1)(b)(ii), *[SIC. The Court of Claims likely meant 208.1111(1)(b)(ii)*] but would not qualify as a deduction under MCL 208.1113(6)(c).

As to whether or not the revenues should be excluded under MCL 208.1111(1)(b), the Tribunal discusses this issue below.

Accordingly, there is no dispute as to material facts on this issue. Rather, it is purely an issue of statutory interpretation. The Supreme Court has stated as follows regarding statutory interpretation:

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. *DiBenedetto v. West Shore Hosp.*, 461 Mich. 394, 402, 605 N.W.2d 300 (2000); *Massey v. Mandell*, 462 Mich. 375, 379–380, 614 N.W.2d 70(2000). We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. *Turner v. Auto Club Ins. Ass'n*, 448 Mich. 22, 27, 528 N.W.2d 681 (1995). Where the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto, supra* at 402, 605 N.W.2d 300. Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. *See Lansing v. Lansing Twp.*, 356 Mich. 641, 649–650, 97 N.W.2d 804 (1959).

> When parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. "The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Robinson v. Detroit,* 462 Mich. 439, 459, 613 N.W.2d 307 (2000). Similarly, we should take care to avoid a construction that renders any part of the statute surplusage or nugatory. *In re MCI, supra* at 414, 596 N.W.2d 164.[13]

In addition to the general rules of when and how to interpret a statute, the Court of Appeals has recently set forth the standard for interpreting a provision providing for a deduction.

In *Menard v Dep't of Treasury,*[14] the Court of Appeals stated:

> A "tax deduction" is a "subtraction from gross income in arriving at taxable income." *In re Request for Advisory Opinion,* 490 Mich. at 333 n. 40, 806 N.W.2d 683 (quotation marks and citation omitted). A "tax exemption" is characterized as "[i]mmunity from the obligation of paying taxes in whole or in part." *Id.* Although the two principles differ, the net effect is the same because both reduce gross income when computing taxable income. *Id.* (quotation marks and citation omitted). Taxation is the rule, and exemptions are the exception. *Ladies Literary Club v. City of Grand Rapids,* 409 Mich. 748, 754, 298 N.W.2d 422 (1980). Consequently, statutory exemptions are strictly construed against the taxpayer. *ANR Pipeline Co. v. Dep't of Treasury,* 266 Mich.App. 190, 201, 699 N.W.2d 707 (2005). Similarly, a deduction presents a matter of legislative grace, and a clear provision must be identified to allow for a particular deduction. *Id.* A deduction must be clearly expressed because the "propriety of a deduction does not turn upon general equitable considerations, such as a demonstration of effective economic and practical equivalence." *Perry Drug Stores, Inc. v. Dep't of Treasury,* 229 Mich.App. 453, 461, 582 N.W.2d 533 (1998) (citation and quotation marks omitted). The burden of proving a deduction is on the party seeking the deduction. See *Southfield Western, Inc. v. City of Southfield,* 146 Mich.App. 585, 590, 382 N.W.2d 187 (1985).

Accordingly, deductions are strictly construed. Petitioner has failed to cite any authority to expand the definition of materials and supplies to items that are not materials, and are not kept on hand as supplies. The Tribunal therefore agrees with Respondent that consistent with their plain meaning, "materials and supplies" must be *material* – that is, tangible items, rather than

[13] *Pohutski v City of Allen Park*, 465 Mich 675,683-684; 641 NW2d 219 (2002).
[14] *Menard v Dep't of Treasury*, 302 Mich App 467, 473; 838 NW2d 736 (2013)

intangibles or services. Transportation services, vehicle rental, and leases simply do not fall within the plain meaning of materials and supplies.

II. Exclusion of Funds from Gross Receipts through Agency under 208.1111(a) or (b):

The second issue raised by the parties is whether or not Respondent properly included in gross receipts, funds which Petitioner contends were received by taxpayer as an agent solely on behalf of a principal, and are excluded from the definition of gross receipts under the MBT. MCL 208.1111(1) defines gross receipts in relevant part, as follows:

> Sec. 111.(1) "Gross receipts" means the entire amount received by the taxpayer as determined by using the taxpayer's method of accounting used for federal income tax purposes, less any amount deducted as bad debt for federal income tax purposes that corresponds to items of gross receipts included in the modified gross receipts tax base for the current tax year or a past tax year phased in over a 5-year period starting with 50% of that amount in the 2008 tax year, 60% in the 2009 tax year, 60% in the 2010 tax year, 75% in the 2011 tax year, and 100% in the 2012 tax year and each tax year thereafter, from any activity whether in intrastate, interstate, or foreign commerce carried on for direct or indirect gain, benefit, or advantage to the taxpayer or to others except for the following:
>
> *(a) Proceeds from sales by a principal that the taxpayer collects in an agency capacity solely on behalf of the principal and delivers to the principal.*
>
> *(b) Amounts received by the taxpayer as an agent solely on behalf of the principal that are expended by the taxpayer for any of the following:*
>
> *(i) The performance of a service by a third party for the benefit of the principal that is required by law to be performed by a licensed person.*
>
> *(ii) The performance of a service by a third party for the benefit of the principal that the taxpayer has not undertaken a contractual duty to perform.*
>
> *(iii) Principal and interest under a mortgage loan or land contract, lease or rental payments, or taxes, utilities, or insurance premiums relating to real or personal property owned or leased by the principal.*
>
> (iv) A capital asset of a type that is, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated cost recovery by the principal for federal income tax purposes, or for real property owned or leased by the principal.

> (v) Property not described under subparagraph (iv) that is purchased by the taxpayer on behalf of the principal and that the taxpayer does not take title to or use in the course of performing its contractual business activities.
>
> (vi) Fees, taxes, assessments, levies, fines, penalties, or other payments established by law that are paid to a governmental entity and that are the legal obligation of the principal. [Emphasis added].

Petitioner relies upon the definition found in Black's Law Dictionary, (no edition cited), that "Principal" and "Agent" are defined as "The employer or constitutor of an agent; the person who gives authority to an agent or attorney to do some act for him."[15] Respondent contends that as a matter of law, Petitioner cannot qualify as an agent, as it was not controlled by independent contractors, for whom which it had written agreements.

Petitioner contends that by being a collector of funds from General Motors, which it pays over to independent truckers, it qualifies as an agent, and these funds are therefore exempt. However, the Tribunal agrees with Respondent that this is in fact a question of law and not fact, and that the terms, *principal* and *agent* have specific meaning under common law in Michigan.[16] Respondent cites several cases in support of its position that without control by the principal, there is no agency, and thus Petitioner cannot be an agent. In *Briggs Tax Service v DPS* [17] the Michigan Supreme Court stated, "[f]undamental to the existence of an agency relationship is the right of the principal to control the conduct of the agent. (FN 32)." Footnote 32 of *Briggs* cites *St. Clair Intermediate School Dis. v IEA/MEA.*[18] This decision states in relevant part:

> Under the common law of agency, in determining "[w]hether an agency has been created," we consider "the relations of the parties as they in fact exist under their agreements or acts" and note that in its broadest sense agency "includes every relation in which one person acts for or represents another by his authority." *Saums*

[15] Petitioner's Brief is Support of Petitioner's Response in Opposition at 11.
[16] A similar issue came before the Court of Claims in *Andrie Inc v Dep't of Treasury* CC case No. 15-000153-MT, (issued Jan 24, 2017). In *Andrie*, because the claim involved ships on water, the Court of Claims applied federal law, under Admiralty, rather than state law to determine whether or not the taxpayer was acting as an agent.
[17] *Briggs Tax Service v DPS*, 485 Mich 69, 80; 780 NW2d 753 (2010).
[18] *St Clair Intermediate School Dis. v IEA/MEA* 458 Mich 540, 557–558; 581 NW2d 707 (1998).

> *v. Parfet*, 270 Mich. 165, 170–171, 258 N.W. 235 (1935). We further recognized in *Saums* that "[t]he characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons." *Id.* at 172, 258 N.W. 235. Also fundamental to the existence of an agency relationship is the right to control the conduct of the agent, *Capitol City Lodge No. 141, FOP v. Meridian Twp.*, 90 Mich.App. 533, 541, 282 N.W.2d 383 (1979), with respect to the matters entrusted to him. See *Int'l Longshoremen's Ass'n, AFL–CIO v. NLRB*, 312 U.S. App DC 241, 249, 56 F.3d 205 (1995), citing 1 Restatement, Second, Agency, § 14, p. 60, and cases applying this principle. [footnotes omitted].[19]

Respondent also cites *Logan v Manpower of Lansing*,[20] which contains the following quotation:

> An agency is defined as " 'a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.' " *Breighner v. Mich. High Sch. Athletic Ass'n*, 255 Mich.App. 567, 582–583, 662 N.W.2d 413 (2003), quoting *Black's Law Dictionary* (7th ed.).

Petitioner has not submitted any case law regarding this issue. Instead, it relies upon an unidentified edition of Black's Law Dictionary. Both parties submitted contracts between Petitioner and independent truckers.[21] As argued in Respondent's brief, Petitioner controls the conduct of the independent subcontractors, rather than the other way around. Illustrative is the sample agreement provided by Petitioner.[22] The agreement itself characterizes the relationship as one of carrier and independent contractor.[23] Per this agreement, Petitioner assigns the contractor specific equipment to haul loads determined by Petitioner exclusively for Petitioner.[24] The contractor also agrees to "promptly file with [Petitioner] all log sheets, physical examination

[19] *Id. at* 557-558.
[20] *Logan v Manpower of Lansing*, 304 Mich App 550,559; 847 NW2d 679 (2014).
[21] Exhibits P-15, P-16, P-17 and P-18. Respondent's Exhibit J.
[22] Exhibit P-14.
[23] *Id.*, ¶22.
[24] *Id.*, ¶1.

certificates, accident reports and other reports, documents and data required by law or by [Petitioner]…."[25] The contractor, rather than the taxpayer is responsible for risk of loss of the cargo, and must carry insurance which is specified in the contract.[26] The contractor is also responsible for reporting to Petitioner the progress of its deliveries, at intervals reasonably requested by Petitioner.[27] The provisions of Paragraph 15 of the sample agreement are also telling as to who controls whom:

> If, in the opinion of [PETITIONER], CONTRACTOR has breached this Agreement in such a manner as to subject [PETITIONER] to liability to any shipper, consignee or a governmental authority, the [PETITIONER] may take possession of the commodities being hauled by CONTRACTOR and complete the shipment. CONTRACTOR shall reimburse [PETITIONER] for any costs, expenses or damages incurred by the [PETITIONER] as a result of [PETITIONER'S] taking possession of the commodities, and completing the shipment, including, but not limited to, costs of rehandling and transferring the commodities, hauling expenses and damages paid to the shipper or consignee.[28]

Per paragraph 16, Contractor must provide an escrow to Petitioner, who is authorized to make all proper deductions from the escrow.

In an actual contract entered into between Petitioner and Vildan Grabic, contractor, the contractor agrees not to solicit any of taxpayer's customers.[29] Also attached to this agreement is a list of deductions from compensation:

> CONTRACTOR authorizes the Company to deduct from his compensation the following:
> 1. FAILURE TO CALL· LATE PICKUP OR DELIVERY
> A. 15 minutes late 20.00
> B. 30 minutes late 40.00
> C. 45 minutes late 60.00
> 2. FAILURE TO CALL DISPATCH WHEN LOADED, WITH LOAD INFO. 25.00.

[25] *Id.*, ¶2.
[26] *Id*., ¶11.
[27] *Id*., ¶13.
[28] *Id*., ¶15
[29] Exhibit P-15, p. 15.11-15.12.

> 3. FAILURE TO CONTACT DISPATCH WHEN EMPTY. 25.00.
> 4. FAILURE TO CONTACT DISPATCH WHEN CLEARING CUSTOMS. 25.00.
> 5. EACH FAILURETO MAKE THREE HOUR CHECK CALL 15.00
> 6. ON INTERSTATE SHIPMENTS, IF A SHIPMENT DELIVERS FOUR OR MORE HOURS LATE, THE CONTRACTOR WILL ONLY BE PAID HIS PERCENT OF THE 50% REDUCTION OF RATE THAT IS GIVEN TO THE CUSTOMER.
> 7. LEASES TERMINATED WITHIN 120 DAYS OF INCEPTION WILL BE CHARGED A $250.00 ADMINISTRATION FEE PLUS A $250.00 QUALCOM REMOVAL FEE.
> 3. FLEET DRIVERS THAT ARE PRESENTED FOR HIRE BUT ARE NOT QUALIFIED WILL BE CHARGED A $150.00 ADMINISTRATIVE FEE.[30]

Similar terms to the standard agreement, and to the terms in the Vildan Grabic contract were in place in the other two agreements provided by Petitioner.[31]

As the above terms clearly show, Petitioner is not controlled by the independent truckers. Accordingly, it cannot be its agent. As stated above, under MCR 2.116(C)(10), if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[32] Here, the documentary evidence presented by Petitioner does not present a dispute of material fact on the issue of whether or not Petitioner is an agent of contractors. The Tribunal holds that per the evidence provided, Petitioner is not an agent under Michigan law for the subcontractors its uses to help it comply with its contract with General Motors. As Petitioner is not an agent, the amounts collected and paid to the subcontractors cannot be properly excluded from gross receipts under MCL 1111(1).

III. Compensation Credit

The third issue raised in this appeal and summary disposition motion is a dispute as to how the compensation credit is calculated. This calculation is a question of law, rather than fact,

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[30] *Id*., 15.14.
[31] See Exhibits P-16 and P-17.
[32] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

and summary disposition is appropriate on this issue. MCL 208.1403(2) is the relevant provision, which states:

> (2) Subject to the limitation in subsection (1), for the 2008 tax year a taxpayer may claim a credit against the tax imposed by this act equal to 0.296% of the *taxpayer's compensation in this state*. For the 2009 tax year and each tax year after 2009, subject to the limitation in subsection (1), a taxpayer may claim a credit against the tax imposed by this act equal to 0.370% of the taxpayer's compensation in this state. For purposes of this subsection, a taxpayer includes a person subject to the tax imposed under chapter 2A and a person subject to the tax imposed under chapter 2B. A professional employer organization shall not include payments by the professional employer organization to the officers and employees of a client of the professional employer organization whose employment operations are managed by the professional employer organization. A client may include payments by the professional employer organization to the officers and employees of the client whose employment operations are managed by the professional employer organization. [Emphasis added].

Respondent's position is that compensation in this state refers to compensation paid for work performed in this state. Under authority derived from MCL 205.3(f), Respondent promulgated MBT FAQ C57 which states:

> For purposes of the compensation credit, "compensation in this state" means, actual compensation for that portion of the services that each of the taxpayer's employees provided at one or more locations in Michigan during the applicable tax year. Compensation for any services provided by an employee at a non-Michigan location may not be used to calculate the credit.

Neither party has cited any precedent discussing this provision. Respondent however, relies upon *In Re Complaint of Rovas*[33] for the proposition that its interpretation is entitled to "respectful consideration," and "should not be overruled without cogent reasons." Respondent contends that there is no cogent reason to adopt Petitioner's interpretation.

[33] *In Re Complaint of Rovas*, 482 Mich 90, 108; 754 NW2d 259 (2008).

Petitioner argues that the phrase means compensation paid to Michigan residents. In support, Petitioner submitted the Senate Fiscal Agency's Bill Analysis.[34] Said analysis states:

> New Tax Credits. This bill would provide for a number of tax credits that qualifying taxpayers could claim to reduce their combined tax liability under the income and net worth taxes. Some of these credits are new and some are currently available under the single business tax. The new tax credits proposed in this bill are summarized below.
>
> • Compensation Credit and Investment Credit – The Michigan Business Tax Act would create a compensation credit and change the investment tax credit. The compensation credit would equal 0.37% of compensation paid in Michigan and the investment tax credit would equal 2.9% of the cost of net new capital assets located in Michigan. Capital investments that would qualify for this credit are the same as under the current single business tax investment credit. These two credits would have to be claimed before any other credits and the combined amount that a taxpayer could claim under these two credits could not exceed 65.0% of the taxpayer's tax liability before these credits.

As quoted earlier from the Supreme Court in *Pohutski*, courts in Michigan first look to the plain meaning of the statute. "We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous."[35] In MCL 208.1403(2), the phrase "*compensation in this state*" can mean either compensation paid to persons in this state, or compensation for work done in this state. Where there is an ambiguity, courts will defer to the interpretation by the agency charged with interpreting the provision. *Andersons Albion Ethanol v Dep't of Treasury*.[36] In reversing the Tribunal, the Michigan Court of Appeals deferred to the Department of Treasury in interpreting a renaissance zone credit, *even though its interpretation was different than its own prior, long-standing*

[34] Petitioner's Exhibit D, attached to its Response. Petitioner filed a 10 page Response with attachments A through F, as well as a 19 page Brief in Support of its Opposition, which has Exhibits P-1 through P-31.
[35] *Pohutski*, 465 Mich at 683.
[36] *Andersons Albion Ethanol v Dep't of Treasury*, 317 Mich App 208; 893 NW2d 642 (2016).

interpretation. The Court of Appeals held that was not a cogent reason to overrule the department's interpretation.

Reviewing the portion of legislative history provided by Petitioner, the Tribunal is unconvinced that it sheds any additional light on this provision, or that it supports Petitioner's interpretation over Respondent's. Rather, it uses the phrase "compensation paid in Michigan," which is synonymous with compensation in this state. It does not provide an answer as to whether the credit applies to compensation paid for work performed in Michigan, or for Michigan residents, regardless of where they perform the work. Therefore, the Tribunal agrees with Respondent that we have no cogent reason to overrule Respondent's interpretation of MCL 208.1403(2), and summary disposition on this issue in favor of Respondent is required.

IV. Unitary Filing under *LaBelle*

During the pendency of this matter, Respondent filed an Application for Leave to Appeal the Michigan Court of Appeal's published decision *in LaBelle Management Inc v Treasury*. The application was denied by the Supreme Court on January 24, 2017. In *LaBelle*, the Court of Appeals held that rules of attribution found in 26 USC §318 do not apply to MCL 208.1117(6), which requires consolidated Michigan Business Tax returns to be filed for a unitary business group.

Petitioner raised the issue at the Prehearing Conference as to whether it and seven other entities were an affiliated group of entities for purposes of the control test of a unitary business group.[37] This issue was not addressed by Respondent in its Motion for Summary Disposition, and accordingly, the Tribunal Ordered supplemental briefs be filed.[38] In the Tribunal's Order

[37] See ¶ IV A, Petitioner's Prehearing Statement filed April 10, 2017.
[38] Respondent did address the propriety of raising this issue in its Motion to Strike, dated May 12, 2017. In the Tribunal's Order Denying Respondent's Motion to Strike, dated May 16, 2017, the Tribunal held that it would rule

dated May 12, 2017, Petitioner was required to file a supplemental brief explaining its theory of, and the applicability and specific tax consequences to the assessments at issue in this case, concerning *LaBelle Management, Inc v Department of Treasury.*

Petitioner filed a short brief explaining *LaBelle*. Said brief also set forth the ownership structure of Petitioner and the other members of the unitary group. However, Petitioner failed to set forth specific tax consequences to the Petitioner. Rather, in the ten lines of its brief devoted to the tax consequences of the *LaBelle* decision to Petitioner, Petitioner shared some general musings concerning the consequences. Petitioner pointed out that the elimination of transactions between some of the entities would be lost, which might increase gross sales to some of the entities, and reduce it to others, while other entities might not have any filing requirement, and other another subset of entities might be entitled to a Small Business Alternative Tax Credit.[39] While Petitioner pointed out general consequences of filing a standalone return, the Tribunal finds that Petitioner failed to set forth specific tax consequences for itself or for the other entities combined in the return, as it was ordered to do. Petitioner has also failed to set forth *any* contention of taxes owed or refunds due under this theory. As the Michigan Supreme Court stated in an oft quoted case:

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.[40]

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on Respondent's third argument that Petitioner had not adequately supported its Petition after reviewing the supplemental briefs, also ordered on May 12, 2017.

[39] Petitioner's Supplemental Brief, filed June 1, 2017, at 11.

[40] *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

This is precisely the position Petitioner has placed the Tribunal in, by merely announcing its position, and leaving us to glean from the various returns filed, its contentions of the exact errors made by Respondent. Accordingly, Petitioner has failed to comply with the Tribunal's May 12, 2017 Order, and has not supported its contentions.

There are additional problems beyond failing to set forth its version of specific tax consequences, in allowing Petitioner to proceed on the unitary return theory. For instance, it is unclear whether only the named Petitioner, or the other entities on the unitary return would be parties in this litigation, and whether Petitioner's representative could speak for all, or for any of them. There is also a question as to whether the entity in the combined return upon which liability was assessed is a separate entity entirely from the named Petitioner, Total Armored Car. Clearly, if each entity were treated separately, there would be winners and losers among the group, and a likely conflict of interest in having a common representative in the same case would be problematic for Petitioner's representative as well as for the Tribunal.

Respondent also points out a myriad of problems in allowing this issue to be litigated. Among them, the problem of a hypothetical filing, which was not an issue in *LaBelle.* Unlike the present case, a standalone return was filed in *LaBelle,* and the Court had in front of it the taxpayer's actual contentions. Nor did the Court of Claims or the Court of Appeals in *LaBelle* have to discuss or decide the tax consequences of non-parties to the litigation. Respondent also has practical issues in such a situation, including the risk of violating MCL 205.28 and risking criminal sanctions by divulging any facts and information which extends beyond the named taxpayer. Further, the Tribunal would face the issue of whether to dismiss non-named parties to the unitary filing for failing to exhaust administrative remedies, or for failing to pay undisputed portions, as required by statute and case law. Because of these problems, the Tribunal's task is

not unlike unscrambling an omelet, parsing out the specific tax consequences to Petitioner, and the other entities included in its unitary return, should Petitioner be allowed to go forward.

As stated above in deciding a Motion for Summary Disposition under MCR 2.116(C)(10), where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving 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.[41] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[42] Here Petitioner as the non-moving party failed to set forth specific facts, as it was ordered to do, and further, failed to present documentary evidence supporting its position. Petitioner has also failed to amend its Petition, or to file an amended return. Without an amended return, Respondent's position regarding exhaustion of administrative remedies is well taken, as is the issue of which among the combined entities is properly before the Tribunal. Accordingly, Petitioner has failed to show that a genuine issue of material fact exists as to the unitary filing issue. Therefore, the Tribunal must dismiss Petitioner's unitary filing issue.

CONCLUSION

The Tribunal holds that the materials and supplies deduction from the MBT found in MCL 208.1113(6)(c) does not include leases and rental agreements, and Respondent properly disallowed this deduction. The Tribunal also holds that Petitioner is not an agent under Michigan law, and therefore cannot avail itself of the exclusion from gross receipts under MCL 208.1111(1)(b), and Respondent's inclusion of these funds as income is correct. The Tribunal

[41] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[42] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

further holds that Respondent's published interpretation of the compensation credit under MCL 208.1403(2) does not conflict with the statute and must therefore be followed, and accordingly, Respondent's calculation of this credit is correct. Finally, the Tribunal holds that Petitioner has neither adequately set forth its contentions regarding its unitary filing issue under *LaBelle*, nor support these contentions as required under MCR 2.116(C)(10), and summary disposition in favor of Respondent on this is issue is appropriate as well.

JUDGMENT

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

IT IS FURTHER ORDERED that Assessment Numbers UO33953 and UO33954 are AFFIRMED.

This Final Opinion and Judgment resolves the last pending claim and closes the 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.[43] 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.[44] 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.[45] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[46]

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

[43] See TTR 261 and 257.
[44] See TTR 217 and 267.
[45] See TTR 261 and 225.
[46] See TTR 261 and 257.

21 days after the entry of the final decision, it is an "appeal by leave."[47] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[48] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[49]

By David B. Marmon

Entered: July 13, 2017

[47] See MCL 205.753 and MCR 7.204.
[48] See TTR 213.
[49] See TTR 217 and 267.