Power Wellness Management LLC,
Petitioner,
and

Chelsea Health & Wellness Foundation, d/b/a
5 Healthy Towns Foundation,
Intervening Co-Petitioner

v

City of Dexter,
Respondent.

MICHIGAN TAX TRIBUNAL

MOAHR Docket No. 18-001383

Presiding Judge
Preeti P Gadola

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On September 30, 2019, Petitioner together with Intervening Petitioner, and Respondent filed cross motions requesting that the Tribunal enter summary judgment in their favor in the above-captioned case.

On October 18, 2019, Petitioner together with Intervening Petitioner, and Respondent, filed responses to the Motions.

The Tribunal has reviewed the Motions, responses and the evidence submitted and finds that granting Petitioner's[1] Motion for Summary Disposition is warranted at this

[1] In this Order and Final Opinion, Petitioner and Intervening Petitioner are referred to as "Petitioner," given a joint brief was submitted.

time. The Tribunal further finds that denying Respondent's Motion for Summary Disposition is warranted at this time.

THE PARTIES' CONTENTIONS

Petitioner's Motion for Summary Disposition

In support of its Motion, Petitioner contends that there is no issue of material fact that MCL 211.181(1) ("the lessee-user tax") is inapplicable to Power Wellness Management's (PWM) activities at the subject property. As such, PWM is not liable for the payment of tax in the same amount and to the same extent as though it was the owner of the real property.

Petitioner contends the subject property, Dexter Wellness Center (DWC), is owned by the nonprofit charitable institution, Chelsea Health and Wellness Foundation d/b/a 5 Healthy Towns Foundation (Foundation). The property of the Foundation was found to be exempt from ad valorem property taxation pursuant to MCL 211.7o, by the Michigan Court of Appeals (COA) in *Chelsea Health and Wellness Foundation v Scio Township, City of Dexter, Dexter Downtown Development Authority and Department of Treasury.*[2] However, Respondent contends that the property, though exempt from taxation, is subject to the lessee-user tax which states,

> Except as provided in this section, if real property exempt for any reason from ad valorem property taxation is leased, loaned, *or otherwise made available to and used by* a private individual, association, or corporation *in connection with a business conducted for profit*, the lessee or user of the real property is subject to taxation in the same amount and to the same extent as though the lessee or user owned the real property.[3]

[2] *Chelsea Health and Wellness Foundation v Scio Township, Respondent, City of Dexter, Dexter Downtown Development Authority and Department of Treasury, Intervening Respondents,* unpublished *per curiam* opinion of the Court of Appeals, issued October 12, 2017 (Docket No. 332483).
[3] See MCL 211.181(1).

Respondent contends that PWM, a for-profit management company hired by the Foundation to run DWC is liable for the tax as a user of the property in connection with a business conducted for profit.

Respondent contends that the plain language of MCL 211.181(1) permits it to assess lessee-user tax against Petitioner; however, Petitioner contends the claim defies legal precedent, statute, and State Tax Commission and Attorney General Opinions. Petitioner contends that Respondent's interpretation of the statute would "effectively prohibit all charitable entities from employing for-profit management companies to support their charitable operations without triggering a significant tax bill on the management companies. This is the very interpretation that the Court of Appeals warned against."[4]

Petitioner contends that the management agreement between it and the Foundation indicates that PWM is to "provide certain, specified management services to the Foundation and in exchange the Foundation reimburses PWM for its costs and pays PWM a flat, annual management fee. Any and all revenue generated by the DWC belongs to the Foundation."[5] Petitioner claims it has a contract with the Foundation to provide services, but it is not an arrangement where Petitioner uses the property to collect and retain 100% of the profits.

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[4] Petitioner is referring to *Northport Creek Golf Course LLC v Twp of Leelanau*, unpublished per curiam opinion of the Court of Appeals, issued May 30, 2019 (Docket number (337374) and *Northport Creek Golf Course LLC v Township of Leelanau*, unpublished per curiam opinion of the Court of Appeals, issued November 28, 2017 (Docket No. 337374). *Northport Creek, supra* 2017 was remanded by the Supreme Court to the COA to the Tribunal, to determine "whether the golf course is 'used by' petitioner in connection with a business conducted for profit and petitioner is the 'user of the real property.'" See *Northport Creek Golf Course LLC v Twp of Leelanau,* 503 Mich 881; 918 NW2d 809 (October 24, 2018).
[5] See Petitioner's (Pet's) Brief at 2.

Petitioner notes that the exemption of the subject property from ad valorem property taxation pursuant to MCL 211.7o, was determined by the COA in the initial litigation for the 2014 and 2015 tax years.[6] However, Respondent continued to assess ad valorem property taxes against the property for the 2016 and 2017 tax years. Further, Respondent filed three Petitions in 2016, 2017 and 2018, with the State Tax Commission (STC) pursuant to MCL 211.154 in order for it to retroactively assess PWM under the lessee-user statute for tax years 2014-2017. Those Petitions were denied by the STC because it found it did not have jurisdiction over the dispute.[7] However, the STC Staff Memorandums relative to the subject property and the lessee-user statute, suggest that Petitioner is not liable for tax pursuant to MCL 211,181.[8] Respondent also appealed the STC decisions to the Washtenaw County Circuit Court, where they were denied. Respondent has filed an application for leave to appeal the Washtenaw County Circuit Court decision to the COA, which application remains pending.[9]

As noted above, Petitioner contends "[t]he operation of the DWC and the relationship between the Foundation and PWM are governed by a written Management Agreement."[10] The agreement was originally executed on December 10, 2014, was slightly modified in January 2017 and January 2018, and extends through December 31, 2022.[11] Petitioner claims the Foundation can terminate the agreement at any time

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[6] See *Chelsea Health and Wellness Foundation, supra.*
[7] See *City of Dexter v Chelsea Health and Wellness Foundation and Power Wellness Management LLC,* unpublished *per curiam* opinion of the Court of Appeals, issued December 20, 2018 (Docket No. 342364), relative to the 2014-2016 tax years.
[8] See Pet's Brief, Appendix G.
[9] See Pet's Brief at 3-5.
[10] See Pet's Brief at 6.
[11] See Pet's Brief at 6, Appendix A and B, Stipulation (Stip) of Facts, paragraph (para) 10-11.

for any reason.[12] Petitioner contends that pursuant to the agreement, no part of DWC is loaned to Petitioner, the agreement is not a lease,[13] nor does it convey any ownership interest in, or exclusive possession and control over DWC to PWM.[14] Petitioner contends the agreement "does not provide for the payment of any rent, money, or other consideration by PWM to the Foundation."[15]

The Foundation is the owner of DWC and "engages PWM to manage, operate, and maintain it 'as the agent of and for the benefit of [the Foundation] in accordance with the Mission.'"[16] Petitioner contends the Foundation controls PWM's operating budget and working capital and reimburses PWM for costs incurred in operating DWC, including payroll and expenses. Petitioner claims the Foundation has access to all parts of DWC at any time of the day or night.[17]

Petitioner claims PWM is paid a flat management fee of $95,000 and that "[a]ll membership fees collected, as well as fees for program participation and ancillary services, like personal training or massages, at the DWC go directly into accounts owned solely by the Foundation."[18] Further, the Foundation "pays any applicable property taxes, and directly or indirectly pays all insurance premiums."[19] " The Foundation must indemnify PWM from any loss, damage, or expense incurred by PWM

[12] See Pet's Brief at 6-7, Stip of Facts, Appendix A at A2, section 1(a).
[13] See Pet's Brief at 7, Stip of Facts, para 12. Dexter's Answer and Affirmative Defenses sec 29, Appendix D 73:6-14, Appendix E 145:17-25, 148: 9-12.
[14] See Pet's Brief at 7, Stip of Facts, Appendix A at A3-A4, section 2.
[15] See Pet's Brief at 7, Stip of Facts, Appendix A at A5, section 3.
[16] See Pet's Brief at 7, Stip of Facts, Appendix A, Recitals at B; A2, Sec. 2.1(a); Appendix B at 62:8-12, 116:11-21, 126:15-18; Appendix C at 15:20-23, 25:5-9,35:20-24,40:7-41:3.
[17] See Pet's Brief at 8, Stip of Facts, Appendix A at A1, A2, section 5.2.
[18] See Pet's Brief at 8. Stip of Facts, Appendix A at A2, section 2.3; Appendix G at March 26, 2018, para 6, July 9, 2018 p.2, March 13, 2019 p.2: Appendix B at 78:4-12, 120:14-21; Appendix C at 17;12-22.
[19] See Pet's Brief at 8. Stip of Facts, Appendix A at A6, Sec. 5.3.

as the result of injury to persons or property in and about the DWC, and further obligates the Foundation to reimburse PWM for any expenses it incurs in defense of any proceedings against it."[20] Further, the relationship between PWM and the Foundation is not a joint venture and Petitioner does not own or lease any real or personal property at DWC.[21]

Petitioner contends the Foundation has the final say on DWC's programming, hours of operation and membership fees. Further, the Foundation has regular contact with PWM regarding the operation of DWC. The Foundation's CEO, Amy Heydlauff, conducts a monthly meeting, pursuant to the management agreement, with Angela Sargeant and Cindy Cope, Directors of DWC and Chelsea Wellness Center, "to discuss general and specific operations issues relating to all of the Foundation's wellness centers."[22] Petitioner contends Ms. Heydlauff has input on hiring decisions, purchase of equipment and the types of classes and activities that are offered at DWC to "ensure that such classes and activities are consistent with the Foundation's mission."[23] PWM also seeks Ms. Heydlauff's approval before allowing other groups to utilize DWC for their meetings or events.

Respondent's Motion for Summary Disposition

In support of its Motion, Respondent contends that PWM falls squarely within the language of MCL 211.181(1) and should be responsible for the payment of tax for the

[20] See Pet's Brief at 8, Stip of Facts, Appendix A at A2, section 7(a)(1); Appendix G at March 26, 2018, sec 9, Appendix B at 81:22-82:16.
[21] See Pet's Brief at 8. Petitioner may also earn an additional "at risk" fee which is contingent on increasing membership enrollment at DWC.
[22] See Pet's Brief at 9, Appendix C (deposition of Angela Sargeant) at 51:16-52:6.
[23] See Pet's Brief at 9, Appendix C at 57:16-58:7.

building "it uses for its for-profit physical fitness management business, as if PWM owned the building."[24] Respondent contends that PWM is in the business of operating physical fitness centers and in 2017 "was paid just shy of $1.4 million, and employed 94 individuals, to complete each and every task required to operate this large, full-service, physical fitness center, seven days a week."[25]

Respondent contends PWM is a for-profit entity and has a contract with the Foundation to operate DWC, but also "operates other fitness centers, mostly in the Midwest, operating approximately 28 other fitness centers in 2017."[26] Petitioner "manages several fitness centers in Washtenaw County, and it moves its employees from one fitness center to another in order to provide services at each individual fitness center."[27] PWM operates two large fitness centers, DWC and Chelsea Wellness Center, plus two smaller facilities in Stockbridge and Manchester. Respondent claims the Foundation has only four employees, "and so it contracts with PWM to operate these facilities pursuant to a Management Agreement."[28]

Respondent contends the four fitness centers are "made available to and used by PWM for its for-profit business."[29] Respondent contends, the management agreement states, in pertinent part,

> PWM is experienced in providing management, administrative, operating, maintenance, and professional services to fitness and wellness centers. (Recital B, page A-1)

[24] See Respondent's (Resp's) Brief at 1.
[25] Resp's Brief at 2.
[26] Resp's Brief at 5, Stip of Facts, para 8.
[27] Resp's Brief at 5, Stip of Facts, para 16.
[28] See Resp's Brief at 5, Stip of Facts, para 15.
[29] See Resp's Brief at 5.

> CWF [Foundation] desires to engage PWM "… as an independent contractor to manage, operate and maintain the Centers as the agent of and for the benefit of Owner…" (Recital C, page A-1)
>
> Pursuant to the Agreement, PWM provides a set of management services to CWF to operate the Fitness Center, which services are outlined in Exhibit A of the Agreement.[30]
>
> PWM "… Shall **use** the Facilities solely for the operation of a health and wellness facility and for other activities which are customary and usual in connection with operation of such facilities…" (emphasis added) (Section 2.1(a), at page A-2, 3).
>
> PWM shall engage all personnel as they may be reasonably necessary for the timely and efficient provision of the management services; all employees of the facilities will be PWM employees; and PWM, as independent contractor, retains all rights to act as employer of PWM's employees, including all rights to hire, fire, and discipline its employees. (Section 2.1(d), page A-3; section 9, page A-9)
>
> The Management Services provided by PWM to CWF at the Fitness Center are described in Exhibit A of the Agreement, and include the broad categories of "Financial," Programming," "Equipment Procurement and Preventative Maintenance," "Sales, Marketing and Customer Service," "Environmental Services," "Human Resources, Education and Training," "Communications and Best Practices," "Information Services," and "Marketing." (Exhibit A, pages A-1 through A-6)[31]

Respondent contends the agreement also states how PWM is paid for its services. It contends there are two components. "First, CWF reimburses any and all costs that PWM incurs in operating the Fitness Center, including all salaries of PWM employees plus any other costs PWM incurs in operating the Fitness Center."[32] The second component is PWM's management fee. For DWC, PWM was paid a management fee of $95,000 annually. Mr. Brian Hummert, PWM's President and Chief Operating Officer

[30] Stip of Facts, para 14.
[31] See Resp's Brief at 5-6.
[32] See Resp's Brief at 7.

testified, the "(p)urpose of management fee is for our expertise in managing or providing these services."[33]

Respondent contends that PWM provides services to DWC including childcare for members, instructors to lead fitness classes, personal trainers, and massage therapists. PWM employees also provide marketing and customer service and fitness floor monitoring, among other services.[34] Respondent contends, Mr. Hummert testified that the Foundation reimburses PWM all direct and indirect costs incurred at PWM's home office. . . .[35] Respondent further contends that Mr. Hummert and Ms. Sargeant admitted, without the fitness center building, PWM could not provide the management services to the Foundation and DWC had to be, "otherwise made available" to PWM for it to deliver its management services.[36] In sum, Respondent contends DWC was exempt from ad valorem property taxation in 2018, but it "was made available to and used by PWM, a private for-profit entity, in connection with a business conducted for profit, which business is PWM's fitness center management business. Therefore, PWM is responsible for the property taxes for the 2018 tax year for the Fitness Center."[37]

Respondent further contends that the language of MCL 211.181(1) refers to "a" business conducted for profit. "That means that if a property is used by private business conducting ANY business activity, pursued for profit, at an otherwise tax exempt

[33] See Resp's Brief at 8, referencing Hummert deposition, Exhibit C, at 113.
[34]See Resp's Brief at 9-10, 13.
[35]See Resp's Brief at 7, referencing Hummert deposition, Exhibit C at 87-89.
[36] See Resp's Brief at 11-12.
[37] See Resp's Brief at 11. The Tribunal opines that Respondent intended to contend, that PWM would not be responsible for "the property taxes for the 2018 tax year for the Fitness Center," but liable for lessee-user tax.

property, the business operator is responsible for the property taxes as if it were the owner."[38] Respondent contends Petitioner made $95,000 in profit by running DWC.[39]

Respondent contends Petitioner may argue that the Foundation is in control of PWM, while "seeking to avoid liability as an employer by claiming to the rest of the world that PWM is in control of its employees."[40] However, the Foundation has chosen to "arrange their relationship with PWM as an independent contractor, a term used repeatedly in the Management Agreement."[41] Respondent contends that Petitioner seeks "to have it both ways by claiming before this Tribunal that [the Foundation] **is in control** of PWM (in contradiction to the documents), while seeking to avoid liability as an employer by claiming to the rest of the world that **PWM is in control** of its employees."[42]

Petitioner's Reply Brief

In its reply brief, Petitioner again contends that the COA has already found the Foundation's property exempt from ad valorem property taxation pursuant to MCL 211.7o. As such, its real property must "be owned and occupied by [that] nonprofit charitable institution *while occupied by that nonprofit charitable institution* ***solely*** *for the purposes for which it was incorporated*. . .."[43] Petitioner contends to qualify for exemption, "DWC is required to be devoted *solely* to the charitable purpose *for which*

[38] See Rep's Brief at 12.
[39] *Id.*
[40] See Resp's Brief at 17.
[41] *Id.*
[42] *Id.*
[43] See Pet's Reply Brief at 2, quoting *Wexford Medical Group v City of Cadillac*, 474 Mich 192, 206-207; 713 NW2d 734 (2006). MCL 211.7o(1) states, "[r]eal or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act."

the Foundation was organized."[44] As such, it is not possible for DWC to be devoted to a for-profit business purpose, as alleged by Respondent. It cannot be devoted solely for a charitable purpose and also be "made available" for, for-profit business purposes.

Further, Petitioner contends to qualify for exemption under MCL 211.7o, Petitioner must *occupy* the property solely for its charitable purposes. If DWC is "leased, loaned or otherwise made available" to PWM, it could not then be occupied solely for its charitable purpose, which the COA found it was. Again, Petitioner has no exclusive possession, ownership interests, or control over DWC.

Petitioner opposes Respondent's allegations that it was paid "just shy of $1.4 million . . . To complete each and every task required to operate this large, full-service, physical fitness center, seven days a week."[45] "First, PWM was paid an annual management fee of at most $95,000 for services at the DWC. PWM was *reimbursed* for the costs of providing services at the DWC, which for 2017, totaled approximately $1.2 million."[46]

Petitioner takes issue with Respondent's quote from its management agreement which states, "PWM '… Shall **use** the Facilities solely for the operation of a health and wellness facility and for other activities which are customary and usual in connection with operation of such facilities…'" Petitioner contends that Respondent omitted the remainder of the quoted sentence "which provides that the operation of the facilities 'are in accordance with the [Foundation's] mission.'"[47] Petitioner also takes issue with

[44]See Pet's Reply Brief at 2-3.
[45] See Pet's Reply Brief at 14, footnote 10, referencing Resp's Brief at 2.
[46] See Pet's Reply Brief at 14, footnote 10.
[47] See Pet's Reply Brief at 14, footnote 10, quoting Stip App. A at A2-A3, Sec 2.1(a).

Respondent's allegations that Brian Hummert and Angela Sargeant "testified that PWM 'uses' the DWC or needs to 'use' the DWC for PWM's business."[48] Petitioner claims those words were never spoken in either person's deposition testimony.[49]

Petitioner contends that Respondent's claim that any organization that provides for-profit services to an exempt property, it is liable for tax, makes little sense. For example, would a for-profit security or cleaning service that renders its services in a charitable organization's property, be liable for tax? Petitioner further contends that there is no requirement that a charitable organization be run poorly, and it contracted with PWM because of its "expertise in managing medically-integrated wellness centers."[50]

In response to Respondent's argument that PWM is an independent contractor and therefore not in the Foundation's control, Petitioner contends, "PWM's activities at the DWC are subject to the oversight, control and budget of the Foundation. The Foundation approves and funds the operating budget for the DWC, which includes the payroll costs – salary, healthcare - for PWM employees who are employed by PWM to effectuate PWM's contractual obligation to provide management services under the Management Agreement."[51] Further, Petitioner contends "there is no contradiction in the Foundation having control over PWM under the Management Agreement while PWM controls its employees to implement PWM's obligations under the Management

[48] See Pet's Reply Brief at 14, footnote 10.
[49] *Id.*
[50] Pet's Reply Brief at 17.
[51] See Pet's Reply Brief at 13, Stipulation of Facts, Appendix A at A2, sections 2.3,2.5,5.1; Pet's Motion Appendix B (Mr. Hummert's deposition) at 87:7-89:7.

Agreement – Dexter's claims regarding the independent contractor relationship between the Foundation and PWM are not only baseless, they are irrelevant."[52]

Respondent's Reply Brief

Respondent first contends that submitting a MCL 211.154 application to the STC, as well any litigation surrounding the lessee-user tax, reflect prior years and not the tax year at issue. Further, Respondent is only undertaking its obligation to enforce tax statutes in submitting the applications and engaging in litigation.

Respondent again focuses on the language in MCL 211.181(1), which states, property exempt from taxation, that is otherwise made available to and used by a private entity in connection with a business conducted for-profit, is subject to taxation. Respondent notes Petitioner's claims that DWC is not made available to PWM because the Foundation retains control, exclusive occupancy, and it is occupied solely for its purposes and not PWM's purposes. However, Respondent contends Petitioner does not "dispute that PWM delivers its 'management services' inside of the fitness center; that PWM has the ability to use the fitness center pursuant to the written Management Agreement; or that PWM's employees provide **every single service** delivered to the dues-paying members of the fitness center, all inside the fitness center."[53]

Respondent contends that MCL 211.181(1) contains no reference to who controls a property, or whether a user has exclusive occupancy, "it simply asks whether a property is 'otherwise made available' to a private entity."[54] Respondent further contends the Legislature's intention was "'to apply the tax to any business using the

[52] See Pet's Reply Brief at 13-14.
[53] Resp's Reply Brief at 5.
[54] Resp's Reply Brief at 5.

property exempt from property taxes, regardless of how the use arose'."[55] Also, a property can be occupied solely by the Foundation, but still made available to PWM for its for-profit business activities. In the statute, "there is no mention of whether or not the property is occupied by another entity, or even more than one entity. It simply refers to whether a tax-exempt property is 'otherwise made available' to a private entity."[56]

Respondent contends that the management agreement here does not discourage private management of publicly owned land, as the Court referenced in the *Northport* case. Here, the Foundation is a private organization, not publicly owned.[57]

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.[58] In this case, the parties' each move for summary disposition under MCL 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 "when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue

[55] See Resp's Reply Brief at 5, quoting *National Exposition Co v Detroit,* 169 Mich App 25, 425 NW2d 497 (1988).
[56] See Resp's Reply Brief at 6.
[57] See Rep's Reply Brief at 10.
[58] See TTR 215.

as to any material fact and the moving party is therefore entitled to judgment as a matter of law."[59]

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.[60] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[61] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[62] 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.[63] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[64]

CONCLUSIONS OF LAW

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

The subject property consists of the Dexter Wellness Center, a 46,000 square foot, two-story building owned by the Foundation.[65] The property was found to be

[59] *Lowrey v LMPS & LMPJ, Inc,* 500 Mich. 1, 5; 890 NW2d 344 (2016) (citation omitted).
[60] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[61] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[62] *Id.*
[63] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[64] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[65] See Stip of Facts, para 1,2.

exempt from the payment of ad valorem property taxation by the Michigan Court of Appeals pursuant to MCL 211.7o for the 2014-2015 tax years.[66] The City of Dexter determined the DWC was exempt from ad valorem property taxation for the 2018 tax year, the tax year under contention in this matter.[67] For the 2018 tax year, however, the City of Dexter assessed tax against Petitioner, Power Wellness Management under MCL 211.181(1), a specific tax, not an ad valorem tax, in the same amount, and to the same extent, as if it owned the real property.

In 2017, PWM, a for-profit entity, provided management services for its hospital-based and other health and wellness center clients in approximately 28 locations, of which 90-95% are nonprofit owned.[68] PWM had a contract with the Foundation to manage DWC,[69] but no part of DWC was loaned to PWM, nor does PWM own any real or personal property at DWC.[70] PWM moves its employees between several health and wellness center locations in Washtenaw County, including the health and fitness center at Washtenaw Community College.[71] The Foundation has four employees and its CEO in 2017, and presently, is Amy Heydlauff.[72]

Petitioner contends that it is not liable for any tax because it is not an owner, lessee or user of the property, pursuant to statute. Respondent contends Petitioner is liable for tax, to the same extent and in the same amount as though it owned the

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[66] See *Chelsea Health and Wellness, supra.*
[67] See Stip of Facts, para 3. MCL 211.2(2) states: "The taxable status of persons and real and personal property for a tax year shall be determined as of each December 31 of the immediately preceding year, which is considered the tax day, any provisions in the charter of any city or village to the contrary notwithstanding."
[68] See Stip of Facts para 8,9.
[69] See Management Agreement, Stip of Fact, Appendix A.
[70] See Stip of Facts, para 12,13.
[71] See Stip of Facts para 16.
[72] See Stip of Facts para 15.

property, because DWC was otherwise made available to, and used by PWM, in connection with its business conducted for profit, managing fitness centers. The tax was imposed by Respondent pursuant to MCL 211.181(1) which again, states,

> Except as provided in this section, if real property exempt for any reason from ad valorem property taxation is leased, loaned, *or otherwise made available to and used by* a private individual, association, or corporation *in connection with a business conducted for profit,* the lessee or user of the real property *is subject to taxation in the same amount and to the same extent* as though the lessee or user owned the real property.[73]

First and foremost, the parties and the Tribunal agree that there was a management agreement between the Foundation and PWM. The management agreement did provide PWM with the authority to run DWC, including hiring and firing employees, teaching fitness classes, overseeing payroll, marketing the health and wellness center, and even recommending hours of operation and services to be provided by DWC, among other authorities. It was a full-service, twelve page, management agreement, between the Foundation and PWM, and PWM was chosen to run the health and wellness center because of its expertise in such management.[74] For its services, Petitioner was paid a flat fee of $95,000, as well as certain "at risk" additional compensation dependent on achievement of approved budgeted net operating income, positive member surveys, and mission related incentives.[75] Further, Petitioner was reimbursed by the Foundation for its expenses. The Tribunal finds there is no disagreement that Petitioner was in fact, managing the subject property; however,

[73] See MCL 211.181(1). (Emphasis added).
[74] The management agreement also had two exhibits, one six pages and the second consists of two pages.
[75] See Stip of Facts, Appendix A, Management Agreement, Exhibit B.

does this management somehow make Petitioner liable for tax, in the same amount and to the same extent as though it owned the property? The Tribunal finds that it does not.[76]

In *Northport Creek Golf Course LLC v Township of Leelanau*,[77] Petitioner was allegedly a management company running a golf course for a municipality on municipal land. It was in fact, using the property to run its golf course company, keeping 95% of the profits for itself and paying 5% back to the municipality in payment of the property tax it lost when the golf course became exempt from taxation.[78] The golf course was not profitable, but its losses were offset on the one Member, LLC's personal income tax return. Petitioner was not paid a set management fee, but retained all of the profits, as described above. The COA found that the "management company [was not] managing a golf course but using the Village's property to operate a golf course company."[79] As such, Petitioner was liable for the payment of tax pursuant to MCL 211.181(1) in the same amount and to the same extent as if it owned the real property.

Before considering additional facts collected at the hearing on remand in the *Northport* case, the Court reversed the Tribunal's opinion, relative to summary disposition motions, that Petitioner was liable for the lessee-user tax.[80] It found, "[i]n

[76] It is interesting to note, that Petitioner contends, pursuant to the management agreement, if Petitioner is found liable for tax pursuant to the lessee-user statute, it will be the Foundation, whose property (the subject property) is exempt, that will be liable for the tax. See Petitioner's Brief at footnote 2.
[77] *Northport Creek Golf Course LLC* issued May 30, 2019, *supra.*
[78] The golf course was previously owned by Northport Creek LLC, which is related to petitioner, and donated to the Township by Northport Creek LLC, which was not in a position to run it. As such, it contracted with petitioner to "manage" the property. See *Northport Creek Golf Course LLC v Township of Leelanau*, unpublished per curiam opinion of the Court of Appeals, issued November 28, 2017 (Docket No. 337374).

[79] See *Northport Creek* issued May 30, 2019, *supra* at 2.
[80] See *Northport Creek,* issued November 28, 2017.

sum, we conclude that a governmental entity may contract with a private, for-profit business to manage property owned by the governmental entity without the private business necessarily becoming a "user" under MCL 211.181."[81] The Court warned,

> The tax Tribunal endeavored to distinguish away *Richland Twp* by pointing out that the entity was established by the city to operate the golf course as a non-profit. But this ignores that it was not, in fact, a nonprofit organization, nor had any obligation to continue with such. (internal citations omitted). *Moreover, the logical extension of this argument is that a governmental entity could never privatize operations of a government owned facility with a for-profit management company without triggering the imposition of a significant tax bill upon the management company.*[82]

In its opinion after remand, the Court found,

> After reviewing the dictionary definitions of "use" and "user," the tax Tribunal concluded that petitioner falls within those definitions. We are concerned that the tax Tribunal may have taken a somewhat broad view of "use" of the property*. That view might, in other circumstances, ensnare property management companies in the manner that we warned against in our original opinion.* [83]

The Tribunal finds after considering the two COA opinions, a for-profit management company can be present on exempt property without becoming a user in connection with a business conducted for profit, and thus, liable for the lessee-user tax.

Respondent contends that PWM is in the business of operating physical fitness centers and it "was paid just shy of $1.4 million, and employed 94 individuals, to complete each and every task required to operate this large, full-service, physical fitness center, seven days a week."[84] As such, Respondent contends DWC "was made

[81] See *Northport Creek,* issued November 28, 2017, *supra* at 4.
[82] See *Northport Creek,* issued November 28, 2017, *supra* at 3. (emphasis added).

[83] See *Northport Creek*, issued May 30, 2019, supra at 2. (emphasis added).
[84] Resp's Brief at 2.

available to and used by PWM, a private for-profit entity, in connection with a business conducted for profit, *which business is PWM's fitness center management business.* Therefore, PWM is responsible for the property taxes for the 2018 tax year for the Fitness Center."[85] It appears that Respondent acquiesces, for the moment, that PWM was not leasing[86] the DWC, DWC was not loaned to PWM, but more simply and more broadly, was made available to PWM, in connection with its for-profit management business.

In *United States v City of Detroit*,[87] the legislative intent of enacting MCL 211.181 was recognized:

> [T]he legislative intent here was to put such *lessees* of private property *used* by them in business conducted for profit on an equal footing with users of tax-exempt government property used by them in business conducted for profit, thus avoiding discrimination against the former and eliminating an element of unfair competition between them by requiring an equal tax burden as to both.[88]

In *Detroit v Nat'l Exposition Co.* the Court put more simply, the "lessee-user tax is intended to ensure that lessees of tax-exempt property will not receive an unfair advantage over lessees of privately owned property."[89] In the context of a lease, the analysis is easy, if a lessee leases the real property of an exempt organization and uses it in connection with a business conducted for profit, does that exemption carry over to

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[85] See Resp's Brief at 11. (Emphasis added)
[86] Respondent's brief includes a footnote that states, "Dexter is not waiving is potential argument that the Management Agreement function as a "lease" for purposes of MCL 211.181(1). But this issue can be addressed more simply by recognizing that the Fitness Center is "made available" to PWM for its business purposes." The Tribunal is unsure in which situation Respondent plans on presenting this potential argument? Does Respondent anticipate a hearing in which it will suggest there was a "lease" between the parties?
[87] *United States v City of Detroit*, 345 Mich 601; 77 NW2d 79 (1956), aff'd 355 US 466 (1958). (Emphasis added).
[88] *Id.* at 610.
[89] *Detroit v Nat'l Exposition Co.,* 142 Mich App 539, 543; 370 NW2d 397 (1985).

the lessee? Pursuant to MCL 211.181(1), the answer is no, because it would be unfair for the lessee of an already-exempt property to pay no tax, when a lessee of a non-exempt property is required to pay tax. The Tribunal finds the legislature carried this analysis further in MCL 211.181(1) to put forth that real property *loaned and used* by a private entity in connection with a business conducted for profit, is taxable to user of the property that was loaned/used. The legislature carried the analysis yet further by writing "if real property exempt for any reason from ad valorem property taxation is . . . *otherwise made available and used* . . .in connection with a business conducted for profit, the …user of the real property is subject to taxation in the same amount and to the same extent as though the lessee or user owned the real property."[90] The last interpretation is what Respondent is arguing in this matter.

The Tribunal finds that if Petitioner was leasing DWC (or any portion thereof) in connection with its for-profit business of running approximately 28 health and wellness centers, it would be liable for tax.[91] If PWM was loaned the DWC in connection with its for-profit business of running approximately 28 health and wellness centers, it would be liable for tax. If DWC was made available to PWM in connection with its for-profit business of running approximately 28 health and wellness centers, it would be liable for tax. However, DWC is permitting PWM to be present on[92] its property to manage it, not operate its management company. Just as the COA found in *Northport,* when determining that lessee-user tax was payable by the petitioner management company,

[90] See MCL 211.181(1).
[91] If PWM was leasing a potion of DWC, it would pay tax on that portion, only.
[92] Respondent makes the argument that "PWM delivers its 'management services' **inside** of the fitness center. . .." See Respondent's Brief at 5.

because, the "management company [was not] managing a golf course but using the Village's property to operate a golf course company."[93]

As noted above, PWM had a contract with the Foundation to manage DWC,[94] but no part of DWC is loaned to PWM, nor does PWM own any real or personal property at DWC.[95] PWM moves its employees between several health and wellness center locations in Washtenaw County, including the health and fitness center at Washtenaw Community College.[96] PWM operates two large fitness centers, DWC and Chelsea Wellness Center, plus two smaller facilities in Stockbridge and Manchester, but these facilities are not run from DWC, and DWC is not PWM's business headquarters.[97] In fact, Respondent contends Mr. Hummert testified, the Foundation reimburses PWM all direct and indirect costs, some incurred *at PWM's home office*.[98] He testified, "[t]here are services that are performed on behalf of the foundation that occur at our home office in Lombard."[99] The Tribunal does not find that DWC was leased by PWM, loaned to PWM, or made available to PWM, and used in connection with a business conducted for profit, because, again, PWM was not operating a management company from DWC, it was managing DWC.

Unlike the petitioner in *Northport*, PWM was paid a set management fee, did not retain any profits earned by the Foundation, or record any revenues or losses on its tax

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[93] *Northport Creek* 2019, supra at 2.
[94] See Management Agreement, Stip of Facts, Appendix A.
[95] See Stip of Facts, para 12,13.
[96] See Stip of Facts at 16.
[97] Petitioner's home office is located at 851 Oak Creek Dr., Lombard, IL 60148. See Resp's Brief, Exhibit D.
[98] See Resp's Brief at 7, summarizing Mr. Hummert's deposition, Exhibit C, at 87-89.
[99] See Mr. Hummert's deposition, Respondent's Brief, at 61.

returns in relation to DWC. These facts provide additional support to the finding that a management company was not operating at the property. It does appear that PWM managed almost every aspect of DWC, as was its expertise, but such is not a reason for liability for lessee-user tax.

Respondent argues that the Foundation contends that it is ultimately in control of DWC's operations to confirm the operations are consistent with its mission. However, as an "independent contractor" as noted in the management agreement, Respondent argues Petitioner is in control, is using the property in connection with its business conducted for profit, and is liable for lessee-user tax. Respondent subsequently contends that by, contradictorily, denying oversight, the Foundation desires to avoid liability as an employer. The Tribunal finds though Petitioner is ultimately responsible for its employees and running DWC, it still has to answer to the Foundation, which approves the budget, conclusively determines which offerings are consistent with the Foundation's mission and can terminate the agreement at any time.[100] In *Campbell v Kovich*, the Court found, "'[i]f the employer of a person or business *labeled* an **"independent contractor"** retains control over the method of work, there is in fact no contractee-contractor relationship, . . .'"[101] Ultimately, the Tribunal finds Respondent's argument perplexing as it is not inconsistent that Petitioner has control over the majority of operations at the fitness center because it is the manager, but the Foundation has control over it. Mr. Hummert testified, "[t]he Chelsea Foundation is operating the fitness

[100] See Pet's Reply Brief at 13, Stipulation of Facts, Appendix A at A2, sections 2.3,2.5,5.1; Pet's Motion Appendix B (Mr. Hummert's deposition) at 87:7-89:7; See Pet's Brief at 6-7, Stip of Facts, Appendix A at A2, section 1(a).
[101] *Campbell v Kovich*, 273 Mich App 227, 234; 731 NW2d 112 (2007), quoting *Candeleria v BC Gen Contractors, Inc*., 236 Mich App 67,73; 600 NW2d 348 (1999). (Emphasis added and supplied).

center. We're providing those services to support that operation."[102] Respondent further argues that Petitioner's activities may only coincidentally advance the goals of the owner,[103] again the Tribunal is puzzled by this argument.

It is also true that PWM made a profit from its management of DWC, but again, it is a for-profit business and its profit was made from services provided, not income afforded to the Foundation. Respondent argues that if nonprofit real property is made available to a for-profit entity and it conducts, as noted above, any for-profit business activity by "using," or locating its employees inside to teach classes or to provide other services, that entity is liable for lessee-user tax.[104] The Tribunal finds Petitioner's employees are located inside DWC in order to "use the Facilities *solely* for the operation of a health and wellness facility and for other activities which are customary and usual in connection with operation of such facilities *and which are in accordance with [the Foundation's charitable] Mission."*[105] The only allowable "use" of DWC is in furtherance of the Foundation's charitable mission, not Petitioner's for-profit business.[106]

In *Nomads, Inc v City of Romulus*, the Court noted that "[t]he meaning of the language 'business conducted for profit' within the context of this statute has not [yet] been interpreted by the courts and the term is not defined by statute."[107] In resolving the

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[102] See Resp's Brief, Exhibit C, Deposition of Brian Hummert, at 61.
[103] See Respondent's Motion at 12.
[104] See Respondent's Brief at 12-13. Respondent contends, "The parties have stipulated that PWM provides those management services. The undisputed facts demonstrate that they all occur inside the Fitness Center . . . ."
[105] Pet's Brief at 18, Stip of Facts, Appendix A and A2, section 2.1(a) (emphasis added).
[106] It is interesting to note that Respondent's assessor on 12/31/17, Mr. Renius, testified in his deposition that at first, until involvement in litigation, he maintained that lessee-user tax should not be imposed on PWM: He testified, "I didn't believe that – entirety of the management agreement fit what 181 encompassed." Petitioner's Brief, Appendix D at 139.
[107] *Nomads, Inc v City of Romulus*, 154 Mich App 46, 53; 397 NW2d 210 (1986)

question, the COA observed "[t]he scope of the tax laws may not be extended by implication of forced construction. Such laws may be made plain, and the language thereof, if dubious is not resolved against the taxpayer."[108]

Petitioner argues that the COA found the Foundation to be a nonprofit charitable institution pursuant to MCL 211.7o. Thus, in order for its property to be exempt from taxation, it must own and occupy the property solely for the purposes for which is was incorporated. Petitioner contends to qualify for exemption, "DWC is required to be devoted *solely* to the charitable purpose *for which the Foundation was organized*."[109] As such, it cannot be devoted solely for a charitable purpose and also be "made available" for, for-profit business purposes.[110] Further, Petitioner contends to qualify for exemption under MCL 211.7o, Petitioner must *occupy* the property solely for its charitable purposes. If DWC is "leased, loaned or otherwise made available" to PWM, it could not then be occupied solely for its charitable purpose, which the COA found it was.

The Tribunal comprehends Petitioner's argument relative to the "solely" and "occupancy" requirements related to exemption under MCL 211.7o, that the property must be occupied by the Foundation solely for its charitable purposes. However, the Tribunal opines that it could be, since the Foundation already meets the requirements for exemption pursuant to MCL 211.7o, that its property remains exempt to itself, even if it is "leased, loaned or otherwise made available" to, and used in connection with a business conducted for profit. The entire property, or in the alternative, at least the

[108] Id. at 54-55. See Pet's Reply Brief at 7.
[109] See Pet's Reply Brief at 2-3. See also Stip of Facts, Appendix A at A2, sec. 2.1(a).
[110] See Petitioner's Brief at Footnote 11.

portion of the property not leased, loaned or made available, remains exempt, but the lessee or user of the property is liable for the specific tax.[111] The Tribunal's potential solely/occupancy related exploration is moot, given the Tribunal finds the real property was not made available to Petitioner in connection with a business conducted for profit. Furthermore, Petitioner is correct, the COA in *Chelsea Health and Wellness* found that the Foundation occupied the property, not PWM, and the Foundation, not PWM, occupied the property because it had a regular physical presence thereupon.[112]

Petitioner contends that the STC staff completed memorandums supporting its contentions relative to the MCL 211.154 petitions.[113] While the Tribunal agrees that the memorandums support Petitioner's contentions and it affords them some consideration, they are nevertheless, simply explorations of the issues, not final opinions. In fact, the STC dismissed the petitions for lack of jurisdiction. Further, the Attorney General's Opinion (AG) concludes that the use of tax-exempt hospital property by physicians, physician groups, or physician professional corporations for emergency room, radiology, or anesthesiology purposes does not subject the users to taxation under MCL 211.181. The opinion provides that the physicians, physician groups and physician professional corporations do not have exclusive control or occupancy over those areas, and as such are not liable for tax, unlike circumstances where there is exclusive control over office space by the aforementioned for-profit entities, where tax would be due. Petitioner contends the AG Opinion supports its contentions and the Court in *Attorney General v*

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[111] See *Northport Creek* 2017, supra, at 3. The Court found with regard to the exemption statute MCL 211.7m, "even if 211.181 applies, the property remains exempt under MCL 211.7m, it is just that MCL 211.181 imposes a tax on the lessee or user."
[112] See *Chelsea Health and Wellness, supra* at 14, 16.
[113] See Petitioner's Brief at Appendix G.

PowerPick Club found that AG opinions can be persuasive authority but are not binding on the Court.[114] The Tribunal finds the opinion, though not *stare decisis* or binding on the court, supports its analysis relative to the requirement that the real property has to be leased, loaned or otherwise be made available to and used in connection with a business conducted for profit, for tax to be due. Here, Petitioner does not have exclusive control or occupancy over any portion of DWC in connection with its management business. Again, pursuant to its agreement with the Foundation, it is managing the DWC, not operating a management business from the real property.

Respondent contends that the management agreement here does not discourage private management of publicly owned land, as the Court referenced in the *Northport* cases. Here, the Foundation is a private organization, not publicly owned.[115] The Tribunal concedes that Respondent's observation is correct, but it is not illogical to extend this conclusion to a private, charitable organization as the lessee-user statute refers to property exempt for any reason: "Except as provided in this section, if real property exempt for any reason from ad valorem property taxation . . . ."[116]

The Tribunal finds in this matter, that there is no genuine issue as to any material fact and Petitioner met its burden of supporting its position by presenting documentary evidence for the court to consider.[117] As a result, Petitioner is entitled to judgment as a matter of law.

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[114] See Atty. Gen. Op #6408 (December 17, 1986), Petitioner's Brief at Attachment F; *Attorney Gen v PowerPick Club,* 287 Mich App 13, 34; 783 NW2d 515 (2010).
[115] See Rep's Reply Brief at 10.
[116] See MCL 211.181(1).
[117] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

JUDGMENT

IT IS ORDERED that PETITIONER'S Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that RESPONDENT'S Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally provided in this Final Opinion and Judgment within 20 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization.[118] To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, 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. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and

[118] See MCL 205.755.

Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, through June 30, 2012, at the rate of 1.09%, (iv) after June 30, 2012, through June 30, 2016, at the rate of 4.25%, (v) after June 30, 2016, through December 31, 2016, at the rate of 4.40%, (vi) after December 31, 2016, through June 30, 2017, at the rate of 4.50%, (vii) after June 30, 2017, through December 31, 2017, at the rate of 4.70%, (viii) after December 31, 2017, through June 30, 2018, at the rate of 5.15%, (ix) after June 30, 2018, through December 31, 2018, at the rate of 5.41%, (x) after December 31, 2018 through June 30, 2019, at the rate of 5.9%, and (xi) after June 30, 2019 through December 31, 2019, at the rate of 6.39%.

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.[119] 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

[119] See TTR 261 and 257.

$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.[120] 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.[121] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[122]

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 21 days after the entry of the final decision, it is an "appeal by leave."[123] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[124] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[125]

By Preeti Sadoke

Entered: December 23, 2019

[120] See TTR 217 and 267.
[121] See TTR 261 and 225.
[122] See TTR 261 and 257.
[123] See MCL 205.753 and MCR 7.204.
[124] See TTR 213.
[125] See TTR 217 and 267.