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

SBC Teleholdings, Inc.,
Petitioner,
v MTT Docket No. 320440

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Patricia L. Halm

FINAL ORDER AND JUDGMENT

On August 18, 2009, Administrative Law Judge (ALJ) Thomas A. Halick issued a Proposed Order denying in part Petitioner's Motion for Summary Disposition, granting in part Petitioner's Motion for Relief, and granting in part Respondent's request for relief. At that time, ALJ Halick also issued an Order requiring the parties to stipulate to a refund amount. On October 22, 2009, the parties filed their stipulation as to that amount.

On November 10, 2009, ALJ Halick issued a Proposed Order granting relief to Petitioner pursuant to the August 18, 2009 Order. The Proposed Order provided, in pertinent part:

> The parties shall have 20 days from date of entry of this Proposed Opinion to notify the Tribunal in writing if they do not agree with the Proposed Opinion and why they do not agree (i.e., exceptions). After the expiration of the 20-day time period, the Tribunal will review the Proposed Opinion and consider the exceptions, if any, and:
>
> a. Adopt the Proposed Opinion as a Final Decision.
> b. Modify the Proposed Opinion and adopt it as a Final Decision.
> c. Order a rehearing or take such other action as is necessary and appropriate.

Neither party filed exceptions to the Proposed Opinion within the allotted time.

The Tribunal, haven given due consideration to the case file, adopts the November 10, 2009 Proposed Order as the Tribunal's Final Decision in this case pursuant to MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law in the Proposed Order in this Final Order and Judgment.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent shall remit to Petitioner a refund of Single Business Tax and interest paid pursuant to Assessment No. L743510 in the amount of $43,016, plus statutory interest, accruing 45 days from the date of Petitioner's claim for refund, which was filed November 7, 2005.

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

MICHIGAN TAX TRIBUNAL

Entered: March 17, 2010 By: Patricia L. Halm

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STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

SBC Teleholdings Inc., formerly known as
Ameritech Corporation,
Petitioner,

v

Department of Treasury,
State of Michigan
Respondent.

MICHIGAN TAX TRIBUNAL
MTT Docket No. 320440

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER GRANTING RELIEF TO PETITIONER PURSUANT TO AUGUST 13, 2009 ORDER GRANTING IN PART PETITIONER'S MOTION FOR SUMMARY DISPOSITION

On August 13, 2009, the Tribunal entered a "Proposed Order Denying in Part Petitioner's Motion for Summary Disposition and Granting in Part Petitioner's Motion for Relief" and "Proposed Order Granting in Part Respondent's Request for Judgment under MCR 2.11(I)(2)." In addition, the Order entered August 13, 2009, required *inter alia* that the parties stipulate to the refund amount that was due under the prior legal ruling.

On October 22, 2009, the parties filed a "Stipulation of Refund Amount" agreeing that pursuant to the Tribunal's Order entered August 13, 2009, that Petitioner is entitled to a refund of Single Business Tax and interest paid in the amount of $43,016, plus statutory interest accruing 45 days from the date of Petitioner's claim for refund, which was filed November 7, 2005. Therefore, there is no need for further proceedings in this case.

IT IS ORDERED that Respondent shall grant Petitioner a refund of Single Business Tax paid in the amount of $43,016, plus statutory interest accruing 45 days from the date of Petitioner's claim for refund, which was filed November 7, 2005.

IT IS FURTHER ORDERED that the Tribunal's Order entered August 13, 2009, which is incorporated herein by reference, disposes of the entire action and grants all relief demanded as provided by this Order. This Order together with the August 13, 2009 Order constitute a proposed decision under MCL 205.726, MCL 205.761, and MCL 24.281.

This Proposed Opinion and Judgment ("Proposed Opinion") was prepared by the State Office of Administrative Hearings and Rules. The parties have 20 days from date of entry of this Proposed Opinion to notify the Tribunal in writing if they do not agree with the Proposed Opinion and why they do not agree (i.e., exceptions). After the expiration of the 20-day time period, the Tribunal will review the Proposed Opinion and consider the exceptions, if any, and:

a. Adopt the Proposed Opinion as a Final Decision.
b. Modify the Proposed Opinion and adopt it as a Final Decision.
c. Order a rehearing or take such other action as is necessary and appropriate.

The exceptions are limited to the evidence submitted prior to or at the hearing and any matter addressed in the Proposed Opinion. There is no fee for the filing of exceptions. A copy of a party's written exceptions must be sent to the opposing party.

MICHIGAN TAX TRIBUNAL

Date Signed: November 10, 2010 By: Thomas A. Halick

Date Entered by Tribunal: November 10, 2010

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

SBC Teleholdings Inc., formerly known as
Ameritech Corporation,
Petitioner,

v

Department of Treasury,
State of Michigan
Respondent.

MICHIGAN TAX TRIBUNAL
MTT Docket No. 320440

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER DENYING IN PART PETITIONER'S MOTION FOR SUMMARY DISPOSITION AND GRANTING IN PART PETITIONER'S MOTION FOR RELIEF

PROPOSED ORDER GRANTING IN PART RESPONDENT'S REQUEST FOR JUDGMENT UNDER MCR 2.116(I)(2)

ORDER TO STIPULATE TO REFUND AMOUNT

On March 20, 2009, Petitioner filed a Motion for Summary Disposition under MCR 2.116(C)(10) and a brief in support. On April 17, Petitioner filed a reply brief.

On April 10, 2009, Respondent filed an answer to Petitioner's motion and a brief in opposition, requesting that the Tribunal deny Petitioner's motion and enter judgment in its favor under MCR 2.116(I)(2).

On May 6, 2009, counsel for the parties appeared for oral argument.

Brief Statement of Judgment and Order for Further Proceedings

Upon review of Petitioner's Motion and brief in support, Respondent's Brief in Opposition, Petitioner's Reply Brief, and oral argument, it is concluded that Petitioner's motion shall be denied with regard to the relief requested in paragraphs (1) and (2) of its motion, relating to the claim that royalties and interest are not included in "sales" under MCL 208.7(1). However, Petitioner shall be granted relief as indicated herein because the amounts that are determined to be "sales" in this case are not included in the sales factor numerator under MCL 208.53.

Petitioner's request to cancel the assessment set forth in paragraph (3) of its motion is granted, subject to the conditions set forth in this Order.

The relief requested in paragraph (4) of Petitioner's motion is denied, subject to the conditions set forth in this Order.

The relief requested in paragraph (5) of Petitioner's motion is granted, subject to the conditions set forth in this Order.

The relief requested in paragraph (6) of Petitioner's motion, relating to dividends, is denied. It is further concluded that there exists no genuine issue of material fact, and that Respondent's motion for entry of judgment in its favor under MCR 2.116(I)(2) shall be granted in part on its claim that the royalties and interest at issue constitute "sales" as a matter of law under MCL 208.7(1). Respondent's motion is also granted with regard to the dividend issue.

Respondent has conceded that the royalty and interest amounts are included in the denominator (only) of the sales factor under MCL 208.53(b), which shall require recalculation or cancellation of the assessment L743510 and a determination on Petitioner's refund request. Accordingly, Respondent's request to affirm assessment L743510 and for dismissal of the Petition is denied.

An evidentiary hearing shall be required to determine the amount of a refund if the parties either 1) fail to stipulate to a sum certain or, 2) Respondent does not oppose entry of judgment for a refund as set forth in Petitioner's Motion for Summary Disposition, paragraph 5 ($44,786).

Standard of Review

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. The Tribunal must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists requiring trial. *Spiek v Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998). When determining whether there is a genuine issue of any material fact, the admissible evidence must be viewed in the light most favorable to the non-moving party. *Heckman v Detroit Chief of Police*, 267 Mich App 480; 705 NW2d 689 (2005). If the "affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." MCR 2.116(I)(1). "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2).

Procedural History and Summary of Undisputed Facts

The parties executed a joint "Stipulation of Facts and Admissibility of Documents" dated March 18, 2009, which is incorporated herein by reference.

The taxes in dispute are single business taxes for year 2000 only.

Petitioner, SBC Teleholdings, Inc. is a Delaware Corporation with its principal offices located in Texas. Petitioner acquired Ameritech Corporation in October 1999, at which time Petitioner maintained its headquarters in Chicago, Illinois. During 2000, Petitioner moved its headquarters to San Antonio, Texas.

In 2000, Petitioner was a holding company whose subsidiaries provided various telecommunications services to customers. Petitioner entered licensing agreements with its subsidiaries granting them the right to use the "Ameritech" trade name and trade marks. Petitioner received royalties and interest from its subsidiaries pursuant to the licensing agreements. The royalty income is primarily at issue in this appeal. Petitioner also received dividends from its subsidiaries.

Petitioner filed a timely 2000 Single Business Tax return and excluded royalty income, interest income, and dividend income from the sales factor.

Respondent audited Petitioner for years 2000 through 2002 and determined that Petitioner should have included royalty income and interest income in the sales factor for 2000 (but not dividend income). On October 3, 2005, Respondent issued to Petitioner a final assessment L743510, alleging SBT in the amount of $383,411, plus interest in the amount of $106,765.34. The assessment was based on the premise that the royalty and interest amounts are included in the numerator of the sales factor. Petitioner accepted all the audit adjustments except for the

inclusion of royalty and interest income in the sales factor. Petitioner paid $5,699.37 in uncontested additional taxes on Sept 21, 2005.

The Tribunal's Order entered August 29, 2008, ruled that ". . . there is currently no disputed fact that the department held a position from 1992 until it changed that position for the 2000 tax year." Respondent formerly interpreted section 7(1) to exclude royalty income from the sales factor, but changed that interpretation, effective for the 2000 calendar year. Respondent acknowledges that it reviewed and reconsidered the treatment of royalty income for sales and gross receipts purposes following the 1997 decision in *Little Caesar Enterprises, Inc v Department of Treasury*, 226 Mich App 624; 575 NW2d 562 (1997), lv den 459 Mich 1000; 595 NW2d 854 (1999). Respondent contends that royalty payments from business activities constitute "sales" under MCL 208.7(1), citing *Prulease v Dep't of Treasury*, 8 MTTR 94 (1992), and *USX Corporation v Department of Treasury*, 187 Mich App 256; 466 NW2d 294 (1991).

Law and Analysis

The main issue is whether "sales" as defined by MCL 208.7(1) includes royalty income. As in effect for the 2000 tax year, the SBTA, MCL 208.7(1), provided:

> "Sale" or "sales" means the gross receipts arising from a transaction or transactions in which gross receipts constitute consideration: (a) for the transfer of title to, or possession of, property that is stock in trade or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business, or (b) for the performance of services, which constitute business activities other than those included in (a), or from any combination of (a) or (b).

The Tribunal must determine whether there are disputed facts regarding 1) the identification of the property at issue, 2) whether Petitioner transferred "possession" of the property, 3) whether the property was held for "sale to customers," and, 4) whether the transactions were in the "ordinary course of it trade or business."

The property is described by Petitioner as trademarks and trade names. "Petitioner received royalties for the use of the 'Ameritech' trade name." Petitioner's Brief in Support, page 2. There is nothing in the statutory language to support a conclusion that the term "property" in sec. 7(1) is limited to tangible personal property. In the absence of any express limitation, "property" includes both tangible and intangible property, which includes a trade name and a trademark. This is supported by MCL 208.53, which provides for the "sourcing" of "sales other than sales of tangible personal property."

The definition of "sales" includes amounts received as consideration from a transaction where possession of property is transferred, which includes rental of property or another type of transaction where possession of property is transferred. Therefore, a "sale" may include a transaction where intangible property is licensed for use by another, where the licensor retains title to the property, but "possession" of the intangible is transferred to the licensee. In our current case, the transactions do not involve a "transfer of title" to property.

It is not disputed that the trade names and marks are licensed to Petitioner's subsidiaries. The subsidiaries have the right to use the name and marks in their business activity. It is concluded that acquisition and use of the name and marks constitutes "possession" of the intangibles, as that term is used in the context of MCL 208.7(1).

As stated above, Petitioner transferred "possession" of the intangible property to its subsidiaries. Petitioner claims that, "Title and possession of the trade names and trademarks remained with SBC Teleholdings at all times," citing the Affidavit of Richard W. Hardy. Petitioner's Brief in Support, page 2. This mere assertion is not sufficient to create a genuine issue of material fact. The property at issue is intangible. The issue of what constitutes "possession" of intangible property in this context involves primarily an interpretation of the statutory meaning of the term "possession" rather than a factual inquiry. The Affidavit of Richard W. Hardy states in relevant part:

> 5. SBC Teleholdings managed assets used in the business operations of affiliated companies for the year in issue.
>
> 6. During the year at issue, SBC Teleholdings licensed the use of trade names and trademarks, including the Ameritech trade name, to its affiliates and subsidiaries.
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> ---
>
> 11. Title and possession of the trade names and trademarks remained with SBC Teleholdings at all times for the year in issue.
>
> 12. The trade names and trademarks were not reflected in the books and records of SBC Teleholdings as inventory or as other property primarily for sale to customers for the year at issue.
>
> 13. SBC Teleholdings' business did not involve the sale of its trade names and trademarks to unrelated third parties for the year in issue.

It is undisputed that Petitioner's affiliates and licensees "use the trade names and trademarks." Affidavit of Richard W. Hardy, paragraph 6. Petitioner cannot obtain a ruling in its favor on the meaning and application of the term "possession" as it appears in MCL 208.7(1) merely by declaring the matter to be established in its favor. It cannot be genuinely disputed that Petitioner's subsidiaries and affiliates publish, display and or otherwise use the trademarks and the trade name – and, therefore the subsidiaries possess the name and marks. Petitioner offers no legal authority to support the notion that a licensee does not "possess" intangible property that it has the right to use. The fact that the licensor retains title to property does not preclude it from transferring possession to another. The name "Ameritech" and the associated trademark, and the rights to use and exploit those intangibles, can be possessed. There is no reason conceptually or legally as to why Petitioner cannot retain title to and certain rights associated with this intellectual property, and at the same time, Petitioner's subsidiaries and affiliates possess rights associated with those marks, including the right to use those marks in their business activity, and thus acquire "possession" of the name and marks. Viewing the admissible evidence in the light most favorable to Petitioner, nothing in the Affidavit of Richard W. Hardy creates an issue of

fact to be tried. The transactions at issue involve the transfer of *possession* of intangible property within the meaning of MCL 208.7(1). To rule otherwise would allow the taxpayer to dictate the tax consequences of a transaction merely by proclaiming that possession of an intangible does not transfer.

The definition of "sale" states that the "property" must be: 1) stock in trade or other property that would be included in the inventory of the taxpayer, or, 2) "held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business." Contrary to Petitioner's argument at page 5 of its brief in support, it is not necessary to determine whether the property meets a technical definition of "stock in trade" or "inventory" as long as the taxpayer holds the property "primarily for sale to customers in the ordinary course of its trade or business." Petitioner is engaged in trade or business as a "holding company" that enters into contracts to license others (its subsidiaries) to use the trade name "Ameritech." Petitioner's brief in support admits that Petitioner's business activity relates to the "management, licensing or administration of the trade name . . . ." See Petitioner's Brief in Support, page 2. Petitioner owns and holds rights to the trade name and marks and has power to license others to use that property. Petitioner may have been engaged in other business activities, but this would not alter the fact that the licensing transactions were a significant part of its business activity. It is concluded that the trade marks and trade names were property that was held by the taxpayer in the ordinary course of trade or business.

It is irrelevant that the property was licensed to subsidiary corporations rather than "unrelated third parties." See page 5 of Petitioner's reply brief.

The property was held for the purpose of "sale" to customers. The "sale" was the transaction by which the property was licensed to Petitioner's subsidiaries. The term "sale" as used within section 7(1) is not limited to a transfer of title. Although this appears indisputable from the statutory language, it is necessary to discuss this issue due to the holding in *Detroit Lions, infra,* cited by Petitioner.

> "Sale" or "sales" means the gross receipts arising from a *transaction or transactions* in which gross receipts constitute *consideration:* (a) for the transfer of title to, *or possession of*, property that is stock in trade or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period *or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business,* or (b) for the *performance* of *services,* which constitute *business activities* other than those included in (a), or from any combination of (a) or (b). (Emphasis supplied.)

The phrase "transfer of title to, or possession of," modifies "property that is stock in trade or other property…" and also modifies "or property held by the taxpayer primarily for sale. . . ." A transaction for the transfer of "possession" applies to "stock in trade or other property of a kind. . ." and also to "property held by the taxpayer primarily for sale to customers. . . ."

Section 7(1) as a whole indicates that a sale includes a transfer of possession of property. Even if the term "sale" as used in the phrase "for sale to customers" is viewed in isolation, a common dictionary definition indicates that a "sale" does not necessarily involve a transfer of title.

"Sale…1. The exchange of goods or services for an amount of money. . . ." *The American Heritage College Dictionary* (4th ed) p 1224. This definition requires only an "exchange" of goods, which does not require transfer of title. "Exchange" means, "To give in return for something received; trade." *The American Heritage College Dictionary* (4th ed) p 486. Transfer of title is not required for an exchange.

The portion of the definition of "sale" that precedes subparagraph (a), states that a "sale" means gross receipts arising from *a transaction*, with no specific type of transaction stated, which would include a transfer of title, or a transfer of possession, such as pursuant to a license, or a lease. The definition plainly specifies that "sale" includes a transfer of possession.

Interest

Petitioner received interest income from its subsidiaries. The original Petition alleged that, "During the year in issue, Petitioner regularly received interest income." Petition, paragraph 6. However, during oral argument, Petitioner's counsel stated that "The interest income is a very small amount that is related to the royalty income where a late payment came in and it is a small amount of interest. It's really a derivative of the royalty so it's really not a separate thing." T 32-33. Therefore, the determination of the "interest" issue shall follow the disposition of the royalty issue. *Prulease, Inc v Dep't of Treasury*, MTT Docket No. 91414 (1992).

Analysis of Case Law

In its Brief and in Oral Argument, Petitioner claimed that *Detroit Lions v Dep't of Treasury*, 157 Mich App 207; 403 NW2d 812 (1986) requires a ruling in its favor.

In *Detroit Lions*, certain payments from television networks to the Detroit Lions were held to be royalties, and therefore excluded from the tax base. The main issue involved the character of the revenues and their inclusion in the tax base. The case did not specifically rule on the inclusion of royalties in the sales factor. The court held that the amounts were royalties because the agreement between the National Football League and the television broadcasters "resembled a licensing transaction" in that "absolute ownership" of the subject matter was not transferred because the NFL retained numerous rights with respect to the game broadcasts.

In *Detroit Lions*, the taxpayer disputed the inclusion of "certain revenue in its tax base and the computation of the various [apportionment] factors…." *Id.* 209. However, the apportionment issues focused on the property factor and certain non-royalty amounts that were included in the sales factor. The court rendered no ruling on the inclusion of exclusion of royalties in the sales factor. This is not surprising, given the department's position at that time that royalties were not included in the sales factor. During the tax years at issue (1976 through 1982) and in 1986 when the court issued its decision, neither the department nor the taxpayer would have argued for inclusion of royalties in the sales factor.

At the trial court level, "…the primary issues concerned whether television and radio revenue was incorrectly included in calculating plaintiff's Michigan tax base." *Id.* p 211. It is important to distinguish the "tax base" issue from the apportionment issue because they are governed by

different statutory sections. The Court did not in not analyze the "sales" definition in MCL 208.7(1) as it applies to royalties.

The Court of Claims granted the plaintiff's motion for summary disposition, ruling that the amounts at issue for years after January 1, 1978 (the effective date of the Copy Right Act of 1976, 17 USC 101) were royalties that were excluded from the tax base.

On appeal, the disputed involved both the tax base issue and the "computation of the various factors, as determined by defendant," which included the sales factor. However, the sales factor issue did not involve the "television revenues" (royalties). The court restated the issues as follows: 1) "whether post-season revenue received by plaintiff from the NFL for activity occurring wholly outside the State of Michigan and without any participation on the part of plaintiff was properly attributable to Michigan for purposes of the sales factor calculation… and 2) how to interpret the NFL bylaws governing the division of game receipts between a visiting and a home team." *Id*. p 212. The first issue on appeal was stated more specifically as follows:

> The issue turns on whether the television revenues in question constitute "royalties" within the meaning of the SBTA, which is in turn significant for purposes of calculating the plaintiff's Michigan tax base. Pursuant to sec. 9 of the SBTA, a corporate taxpayer's initial base is determined by reference to its federal taxable income. Various items are then either added or subtracted to arrive at the Michigan tax base. Of relevance here is sec. 9(7)…." *Detroit Lions,* p 214.

Section 9(7)(c) pertains to the exclusion of royalties from the tax base. The court then discussed the law regarding what constitutes a royalty within the meaning of MCL 208.9(7)(c).

The court addressed the "computation of the property and sales factors" but it is clear that this did not involve the revenues that had been held to be royalties. The discussion pertaining to the sales factor begins at page 223. The issue is stated as follows:

> Plaintiff [taxpayer] contends that it is entitled to include its 40 percent share of "gross ticket receipts" from away games that the Detroit Lions team played in, rather than its net take-home share of the receipts, in computing the denominator of the sales factor.

The issue stated above does not implicate any "royalty receipts" but rather involved "gross sum which plaintiff derived from the sale, i.e., its take-home share of the ticket receipts." The court cited the "sales" definition found in MCL 208.7(1) in relation to the actual amounts received by the taxpayer from ticket sales only and made no such ruling for royalties.

The Court's Discussion of "Sale" and "Transfer of Title" in *Detroit Lions*

In *Detroit Lions*, the court noted that the difficulty in determining whether the television revenues at issue were "royalties" within the meaning of sec. 9(7)(c) arose from the unique nature of the arrangement, which "…could not easily be characterized as either a 'sale' or a

licensing transaction producing royalties because it contains characteristics of both." In the court's view, the resolution of this apparent contradiction turned upon whether the transaction was a "sale" producing ordinary income, or a licensing transaction involving royalties. The court held that "…the transactions at issue are more indicative of a licensing arrangement, and the resulting proceeds more typical of royalty payments, rather than a sale." This analysis applies only to the tax base issue under section 9(7). The court did not hold that the royalties were not included in the statutory definition of sale under MCL 208.7(1).

The court held that exclusive broadcasting rights had been granted, which meant that the transactions "resemble a sale." The court then held that "…in order to constitute a sale, absolute ownership over the subject of the transaction must be passed. *Central Discount Co v Dep't of Revenue*, 355 Mich 463, 467; 94 NW2d 805 (1959)." Petitioner cites this portion of *Detroit Lions* to support its argument that the licensing transactions in question cannot give rise to "sales" because title to the trade name and trademarks did not transfer to its subsidiaries. The court invoked the title transfer issue to distinguish a licensing transaction (involving royalties) from another type of transaction not involving royalties. However, *Detroit Lions* does not stand for the proposition that a "sale" under section 7(1) requires a transfer of title. As stated above, the court never reached the sales factor issue for royalties. An application of the language cited from *Detroit Lions* to this case as argued by Petitioner would contradict the plain language of MCL 208.7(1). The statute plainly states that a "sale" for sales factor purposes includes transactions in which "gross receipts constitute consideration: (a) for the transfer of title to, or possession of…" certain property. Also, "gross receipts" (which appears in the "sale" definition) specifically includes "rental or lease receipts." Most certainly, a lease of property does not transfer title, and yet rental income is included in the sales factor under a plain reading of section 7(1), both by inclusion of "gross receipts" and by the transfer of "possession" language.[1] The result is the same for royalty receipts. If only transactions involving a transfer of "absolute title" are included in the sales definition, then it must be concluded that the court in *Detroit Lions* discarded the words "or possession of" from the statute without citation to or analysis of section 7(1).

The ruling in *Detroit Lions* relies upon an intangibles tax case, *Central Discount, supra*. In that case, the issue was whether the taxpayer's transaction was "…a sale of the intangibles…in such a fashion that it passed complete ownership to Securities so as not to be liable under the Michigan Intangibles Tax Act?" In *Central Discount*, the court looked to the former Michigan Uniform Sales Act, MCL 440.1 et seq, which then defined "A sale of goods" as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." For intangibles tax purposes, it was critical to determine whether the taxpayer transferred title to the intangibles to the Securities Investment Company of St. Louis, Missouri. The title holder was liable for the intangibles tax. It was held that the tax liability turned upon whether the seller had "parted with the complete ownership of the goods." In *Central Discount*, the court applied a generally applicable definition under commercial law, but at issue in our present case is a technical definition of the term "sale" found in the SBTA, which expressly includes transactions for the "transfer of title to, or possession of" property. The court concluded that the transactions at issue between Central and Securities were "in reality loans and not sales." The title passage

[1] See, *Home Properties LP, v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided June 16, 2009 (Docket No. 280939).

issue was critical in *Central Discount*, because if the taxpayer had transferred title to the intangible property, it would not have been liable for the intangibles tax. In this case, the issue of who holds legal title to the trademarks and trade names does not have the same significance to the sales factor issue. Therefore, *Central Discount* does not determine the outcome of this case.

The holding in *Detroit Lions*, at page 217, as cited in Petitioner's Brief in Support (at page 6), is authoritative law only on the issues actually litigated and decided in that case. The court did not reach the issue of whether royalty income is included in the definition of "sales" under MCL 208.7(1). The court held that the amounts at issue were "royalties" for the tax base calculation only under MCL 208.9(7). *Detroit Lions* is not controlling on the question of whether royalties are included in the sales factor.

Case Law Cite by Respondent

Respondent relies upon *USX Corporation v Dep't of Treasury*, 187 Mich App 256; 466 NW2d 294 (1991), where the issue focused squarely upon whether certain amounts were "sales" under MCL 208.7(1). In that case, the taxpayer argued that proceeds from the sale of securities and investment paper are included in the definition of "sales." "The securities were acquired from the issuers and then redeemed or resold to banks or investors." *Id*, 258. The issue was whether the transactions occurred "in the ordinary course of its trade or business" within the meaning of MCL 208.7(1) or whether the transactions were investment activity.

The court held that the taxpayer's transactions involving the transfer of securities were investment activity and not "business activity," and the CD's, commercial paper, stocks, and bonds were not held "primarily for sale to customers in the ordinary course of business." There was no evidence that the taxpayer was in the business of selling securities to customers, but rather, the taxpayer bought and sold securities on its own account, as an investment activity. The taxpayer's lines of business included manufacturing, chemicals, resource development, fabricating, engineering, domestic transportation, and utilities. Therefore, the court upheld the department's position that the receipts from the sales of securities were not the taxpayer's "business activity" and not included in the taxpayer's sales factor.

USX stands for the proposition that consideration from transactions involving intangible property (securities) are "sales" if the taxpayer holds the property "primarily for sale to customers in the ordinary course of its trade or business" under MCL 208.7(1).

The holding in *USX* supports a conclusion that Petitioner (SBC) held trademarks and trade names and licensed them to its subsidiaries in the *ordinary course of its trade or business*. In our present case, the licenses are part of SBC's business activity. As discussed above, SBC held, managed, and administered, the trademarks and trade names. (The fact that Petitioner licensed the intangibles to its own subsidiaries is irrelevant. There is no reason in this case to disregard the separate corporate identity of the subsidiaries).

Also relevant is the Tribunal's decision in *Prulease, Inc v Dep't of Treasury*, MTT Docket No. 91414 (1992), which held that amounts received by the taxpayer that were characterized as "interest" and not included in the tax base, were incidental to its primary business activity of leasing property, and were properly included in the sales factor. The interest was held to be

consideration received for the transfer of personal property pursuant to various leasing and sales transactions. In *Prulease*, the Tribunal found that *USX* and *Heinz, infra*, were distinguishable because the amounts at issue in *Prulease* were not earned from investment activities, but were related to the taxpayer's primary business activity.

In *Prulease,* the taxpayer was engaged in the business of leasing equipment. The Tribunal held that the transactions involved transfer of tangible personal property that was the taxpayer's stock in trade. Some of the transactions were structured as a "straight lease" and some were structured as a lease with a grant of a security interest, which the Tribunal held to be a "conditional sale" that generated interest income. A third type of transaction involved a loan by Prulease to its customer to finance the purchase of property, and which generated interest income. The Tribunal held that the interest from such transactions was not like the investment interest in *USX,* but was incidental to its primary business activity of selling and leasing property, and therefore the interest income was properly included in the sales factor.

Based upon the foregoing, the Tribunal rules that Respondent properly included the royalties at issue in Petitioner's sales factor. The interest income involved in this case is included in "sales" as it was earned pursuant to the licensing agreements and should be treated consistently with the royalty income. *Prulease, supra*.

Dividends

Petitioner's original return did not include dividends in the sales factor and Respondent's audit did not change the taxpayer's treatment of the dividend income. The Tribunal rules that the dividends are not consideration for the transfer of title to or possession of property within the meaning of MCL 208.7(1) and are not included in the sales factor. Petitioner cites no authority for its alternative argument that dividends are "sales," but merely states that if royalties are included, then the dividends "are as much a part of its ordinary course of business as royalties…." It could be said that Petitioner, as a holding company, is engaged in business activity that includes stock ownership. Petitioner exists, in part, to hold stock in its subsidiaries. However, a payment of a dividend to a shareholder is qualitatively different than a payment of a royalty to a licensor. Finally, the Tribunal is not persuaded by Petitioner's argument that the statutory changes that took effect in 2001 shed any light on the interpretation of the statute in effect in 2000. Acquiring stock and receiving dividends as a return on that investment is not the type of transaction contemplated by MCL 208.7(1). *USX, supra.*

Sales "in this state" under MCL 208.53

Respondent concedes that if it prevails on its claim that royalties and interest are included in the sales factor, that the amounts are not "in this state" under MCL 208.53. Initially, Respondent took the position that "the auditors properly sourced those transactions to Michigan in calculating the sales factor under sec. 51." Respondent's Brief in Opposition to Petitioner's Motion for Summary Disposition. However, during oral argument, Respondent conceded that the greater proportion of the business activity related to the royalty transactions was performed outside this state. As such, MCL 208.53(b) dictates that the royalties and interest income at issue must be included in the denominator of the sales factor and not the numerator. Therefore, the apportionment percentage upon which assessment L743510 was based is incorrect, and

Respondent shall recalculate the deficiency or calculate a refund, as the case may be, consistent with this Proposed Order.

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

IT IS FURTHER ORDERED that Respondent's motion for judgment in its favor under MCR 2.116(I)(2) is granted in part, with regard to the inclusion of royalty and interest in the sales factor.

IT IS FURTHER ORDERED that the royalties and interest at issue shall be included in the denominator (only) of Petitioner's sales factor.

IT IS FURTHER ORDERED that assessment L743510 shall be recalculated or cancelled consistent with this Order.

IT IS FURTHER ORDERED that Petitioner is not entitled to relief requested under paragraphs (6) and (7) of its motion.

IT IS FURTHER ORDERED that within 30 days of the entry of this Order that the parties shall file a stipulation of fact regarding the amount of any refund that may be required consistent with this Order. If no such stipulation is received, Petitioner shall be entitled to a refund in the amount of $44,786 as stated in paragraph (5) of its Motion for Summary Disposition, unless Respondent files a motion within 30 days of entry of this order demonstrating that the amount claimed by Petitioner is incorrect. Upon expiration of the 30-day period, if the Tribunal determines that there remains a genuine issue of fact with regard to the refund issue, the Tribunal shall schedule an evidentiary hearing to resolve the refund issue only.

This Proposed Order does not "dispose of the entire action or grant all the relief demanded" within the meaning of MCR 2.116(J)(1). This Proposed Order is not a "proposed decision" under MCL 205.726, MCL 205.761, or MCL 24.281, and therefore, the right to file exceptions and written arguments under MCL 205.281 does not apply. After resolution of the refund issue by stipulation or by evidentiary hearing, the ALJ shall issue a proposed order (a "proposed decision") that specifies the relief to be granted in a sum certain or otherwise resolves the case, and which shall include a notice regarding the right to file written exceptions and legal argument, prior to entry of a Final Order by the Michigan Tax Tribunal.

Date Signed: August 18, 2009 By: Thomas A. Halick

Date Entered by Tribunal: August 18, 2009