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

Cardiac Leasing, LLC,
Petitioner,

v — MTT Docket No. 332301

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

ORDER GRANTING PETITIONER'S MOTION TO RECONSIDER

ORDER GRANTING SUMMARY DISPOSITION IN PETITIONER'S FAVOR

ORDER GRANTING JOINT MOTION FOR PROTECTIVE ORDER

FINAL OPINION AND JUDGMENT

I. INTRODUCTION

Petitioner, Cardiac Leasing, LLC, is appealing the Final Assessment of its Single Business Tax reflected on the Final Assessment number N803095 and the denial of the Single Business Tax Credit by Respondent, Michigan Department of Treasury, pursuant to MCL 208.36 for the 2004 tax year. On June 12, 2009, Petitioner filed a Motion for Summary Disposition under MCR 2.116(C)(10), which entitles the moving party to Summary Disposition when there is no genuine issue as to any material fact. On June 26, 2009, Respondent submitted its response in opposition to Petitioner's Motion for Summary Disposition and its Counter-Motion for Summary Disposition pursuant to MCR 2.116(I)(2).

On August 25, 2009, the Tribunal issued an Order denying Petitioner's Motion for Summary Disposition, and on September 9, 2009, Petitioner filed a Motion requesting that the Tribunal reconsider the Order Denying Petitioner's Motion for Summary Disposition. On September 22, 2009, Respondent filed a response to Petitioner's Motion for Reconsideration,

along with a Motion to Hold Case in Abeyance. On October 6, 2009, Petitioner filed a response in opposition to Respondent's Motion to Hold Case in Abeyance. On October 5, 2009, Petitioner and Respondent filed a Joint Motion for Entry of Protective Order. Judge Kimbal R. Smith requested that the parties submit a brief setting forth the legal basis for issuing a protective order with respect to each such document or applicable portion thereof.

On November 25, 2009, the Tribunal issued an Order Placing Petitioner's Motion for Reconsideration and Joint Motion for Protective Order in Abeyance, in addition to Granting Respondent's Motion to Hold Case in Abeyance. The Tribunal determined that the ultimate outcome of Petitioner's Motion for Reconsideration would be based upon the pending appellate review of *Alliance Obstetrics & Gynecology, PLC v Dep't of Treasury*, 285 Mich App 284; 776 NW2d 160 (2009) by the Michigan Supreme Court. The Tribunal further Ordered, on November 25, 2009, that the parties notify the Tribunal in writing within 21 days of the final resolution of *Alliance Obstetrics*. On December 30, 2009, the parties filed a Brief in support of their Joint Motion for Entry of Protective Order. On February 19, 2010, Petitioner filed a letter with the Tribunal, informing the Tribunal that on January 29, 2010, the Michigan Supreme Court denied the Department of Treasury's Application for Leave to Appeal in *Alliance Obstetrics & Gynecology*. Petitioner also requested the Tribunal to now consider Petitioner's Motion for Reconsideration.

II. PETITIONER'S CONTENTIONS

Petitioner presents two alternative arguments. Petitioner's Motion for Reconsideration reasserts the arguments in Petitioner's Motion for Summary Disposition that were previously denied. First, Petitioner states that there is no genuine issue of material fact as to whether Petitioner is entitled to the single business tax credit because Petitioner satisfies all the statutory

requirements under MCL 208.36(2). Second, Petitioner states that the payments received by Dr. Wunderly and Dr. Olivares were not "guaranteed payments," but even if they are considered "guaranteed payments," they are still not considered part of Dr. Wunderly's and Dr. Olivares' "distributive shares" for purposes of the limitation set forth in MCL 208.36(2)(a).

More specifically, Petitioner contends that there is no genuine issue of material fact as to whether Petitioner satisfies all the statutory requirements under MCL 208.36(2). In support of this contention, Petitioner states:

> Drs. Wunderly and Olivares each received in excess of $115,000 of compensation from Cardiac Leasing during 2004, all of which was in consideration for the professional medical services they provided as leased employees of ACH. All compensation payments by Cardiac Leasing to the seven physicians it leased to ACH were only for the professional medical services that these leased employees provided. Cardiac Leasing reported this compensation for professional medical services to each of its seven employees (including Drs. Wunderly and Olivares) to the IRS and to the State of Michigan as employee wages, issuing them Forms W-2 (the "W-2 Wages"). Cardiac Leasing also withheld and paid all employment taxes with respect to such W-2 Wages (i.e., withheld federal and state income tax, withheld employees' shares of FICA, paid employer's share of FICA taxes and Federal and State unemployment taxes (FUTA and MESA)).
>
> Cardiac Leasing did not report any guaranteed payments to partners ("guaranteed payments") of Cardiac Leasing on its IRS Form 1065 for 2004. Accordingly, no guaranteed payments were deducted by Cardiac Leasing in determining its ordinary business income, and no guaranteed payments were reported to either Dr. Wunderly or Dr. Olivares on their respective Schedule K-1 for 2004.
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> Cardiac Leasing satisfies all of the requirements for the [Single Business Tax] Credit….Cardiac Leasing's gross receipts were only $6,147,278, which is far below the $10,000,000 limitation and its adjusted business income for such year was only $12,525, which is significantly less than the $475,000 threshold. Moreover,…, Dr. Wunderly's and Dr. Olivares' (the two 50% "partners" of Cardiac Leasing) "distributive shares"… were only $6,263 and $6,262, respectively, which is substantially below the $115,000 limitation set forth in MCL 208.36(2)(a).[1]

[1] Petitioner's Brief in support of Motion for Summary Disposition, pages 3-4. [Hereinafter Petitioner]

Furthermore, Petitioner argues that even if the payments were characterized as guaranteed payments, Petitioner would still satisfy all of the statutory requirements under MCL 208.36(2) since guaranteed payments are not included in the adjusted income of the partnership for the purposes of calculating the single business tax credit. In support of that contention, Petitioner states:

> [W]hile guaranteed payments are considered gross income to partners, such amounts are not included in a partners "distributive share" of the partnership's income[,] and [a]ccordingly, guaranteed payments are deductible for purposes of determining the business income of a partnership and not includible for purposes of determining a partner's "distributive share" of a partnership's business income.[2]

To further support this argument, Petitioner states:

> According to Treasury Regulations Section 1.707-1(a), "distributive share" only includes items received by a partner in his "capacity as a partner;" a "distributive share" does not include items received by a partner in a capacity <u>other than</u> as a partner, (e.g. amounts received by a partner in the capacity as an employee, contractor or creditor of a partnership), because a partner is treated as an unrelated third-party with respect to such amounts. (*Emphasis in original*). The wages received by Drs. Wunderly and Olivares [from Cardiac Leasing were] in their capacities as employees of Cardiac Leasing and not as "partners."[3]

Petitioner's position is further supported by IRC § 707(a), which addresses payments made to partners, in a non-partner capacity.

> Historically, the courts have used two tests to determine whether payments made to partners are received by the partners, in their capacity as partners. Under the first test, courts have held that an amount does not constitute an IRC Section 707(a) non-partner capacity payment if the payment to the partner is in consideration for services rendered that are within the scope of the partnership's business activities (the "business relation test"). *Zahler v Commissioner*, 41 TCM 1074 (1981); *rev'd and remanded*, 684 F2d 356 (6th Cir. 1982) (guaranteed payment issue not discussed). In the alternative test, instead of focusing on whether the services provided by the partner were within the scope of the partnership's business, this test looks to the service provider's risk with respect to the amounts paid for the services. Under the risk of payments test, it is immaterial whether the services provided related to the business activities of the partnership.[4]

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[2] MCL 208.36(2)
[3] Petitioner *supra*, note 1 at 8.
[4] *Id*. at 12-13.

Petitioner contends that under either test, the W-2 Wages would be characterized as IRC § 707(a) non-partner capacity payments.

> Under the business relation test … the payments for the medical services provided by Drs. Wunderly and Olivares in consideration for such W-2 Wages were not within the scope of Cardiac Leasing's business activity (i.e. its employee leasing activities). During 2004, Cardiac Leasing's sole business consisted of leasing medical professionals to ACH; Cardiac Leasing itself did not provide any medical services directly to patients. In fact, because Cardiac Leasing was not a "professional" limited liability company, it could not, acting through its "member[s]," legally provide professional medical services directly to patients. MCL 450.4201. Because of this limitation, Drs. Wunderly and Olivares could not legally provide professional medical services in their capacities as "members/partners" of Cardiac Leasing, which is why they had to provide such services to ACH in their capacities as leased employees. As a result, the W-2 Wages received could not have been received in their "capacities as partners," but rather were received as employee wages.[5]
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> Under the risk of payment test, the W-2 Wages would also be characterized as IRC Section 707(a) non-partner capacity payments. If a payment is not subject to substantial risk as to amount, then it generally is treated as a 707(a) non-partner capacity payment. On the other hand, a 707(c) guaranteed payment is generally a payment that is determined without regard to the partnership's income, which is made by a partnership to a partner acting in his 'partner capacity' in exchange for services or capital, and thus, is usually [a] fixed amount. When Congress enacted IRC Section 707(a)(2)(A), IRC Section 707(c) was already in effect, and yet, Congress…stated that payments by a partnership to a partner should generally be regarded as IRC Section 707(a) non-partner capacity payments if there is no risk of loss with respect to such payments. [There was] no risk with respect to the amounts owed to them by Cardiac Leasing, as pursuant to the Employee Leasing Agreement and their employment arrangements with Cardiac Leasing…[c]onsequently, under the risk of payment test, the W-2 Wages would be treated as 707(a) non-partner capacity payments.[6]

After Petitioner filed its Motion for Summary Disposition, the Court of Appeals issued a published decision in *Alliance Obstetrics & Gynecology, PLC v Dep't of Treasury,* 285 Mich App 284; 776 NW2d 160 (2009). Petitioner contends that *Alliance Obstetrics* is directly on point to the facts in this matter. Specifically, the court in *Alliance Obstetrics* stated:

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[5] *Id.* at 13.
[6] *Id.* at 14.

> Business entities such as Alliance that are neither a corporation nor a partnership should not be required to elect a classification inconsistent with its organization under state law. Therefore, Plaintiff is not to be treated as a corporation for the purposes of calculating the small business tax credit and the income limitations under MCL 2-08.36(2) do not disqualify plaintiff from claiming the credit. Thus, Plaintiff is entitled to receive the credit.[7]

Petitioner argues that:

> under *Alliance Obstetrics,* LLC's are not subject to the income limitations set forth in MCL 208.36(2), because limited liability companies are not listed among the organizations subject to those limitations. The court held that, even though Alliance was treated as a corporation for federal tax purposes, Alliance was to be treated as an LLC for SBT purposes, and not as a corporation.[8]

Petitioner contends that the same reasoning should be applied to this case. Although Cardiac Leasing filed as a partnership for federal taxes purposes, Cardiac should be treated as an LLC for SBT purposes. Therefore, Petitioner argues, there is no issue of material fact in this case.

III. RESPONDENT'S CONTENTIONS

In its response to Petitioner's Motions, Respondent makes two contentions. First, Respondent states that because the payments made to Drs. Wunderly and Olivares were "guaranteed payments," they are regarded as "distributive shares" for the purpose of determining whether Petitioner qualifies for the small business tax credit under MCL 208.36(2). In support of this contention, Respondent states, "The payments that Drs. Wunderly and Olivares received have been determined 'without regard to the income of the partnership' which is required under IRC 707(c)."

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[7] Petitioner's Brief in Support of Motion for Reconsideration, page 6 [Hereinafter Petitioner II] (citing the court in *Allaince Obstetrics*).
[8] *Id.* at 7.

In addition, Respondent contends that the payments were made to the two doctors for services rendered in their capacity as partners of the partnership. Respondent states that "[t]he role or capacity that Drs. Wunderly and Olivares have in Cardiac is to make themselves available to lease to ACH, which is allowed to engage in the practice of medicine. Therefore[,] their 'capacity' as partners in Cardiac is to make themselves available for lease, and accordingly are paid for being available for lease." As a result, Respondent contends, the payments made to the two doctors were "guaranteed payments," and as such, they must be included in each partner's distributive shares resulting from the partnership. In support of this contention, Respondent states:

> Guaranteed payments under the SBT [Single Business Tax Act] must be added to ordinary income to determine the business income of the partnership and the distributive share of such business income allocated to each partner. As payment or item of income separately reported to Drs. Wunderly and Olivares[,] derived from business activity, the guaranteed payments constitute business income under the SBT. The ordinary business income of the partnership from Form 1065 is the starting point for calculating business income under the SBT. The guaranteed payments must be added to determine business income under MCL 208.3. Therefore[,] the W-2 guaranteed payments are added back to determine the business income for a partnership according to the SBT. This results in the distributive share of business income to both partners in excess of $115,000 thereby disqualifying Cardiac from the SBT small business credit.[9]

Respondent also contends that:

> [e]ven if the compensation payments to Drs. Wunderly and Olivares are not guaranteed payments[,] the payments must be added back into the business income of Cardiac and included in the distribution amounts to the partners. [T]hereby the amounts exceed the statutory threshold and disqualify Cardiac for the SBT small business credit.[10]

Finally, Respondent contends that since:

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[9] Respondent's Brief in Support of Motion Opposing Summary Disposition, page 8 [Hereinafter Respondent].

[10] *Id.* at 9.

> the wages of Drs. Wunderly and Olivares are guaranteed payments and must be included in the business income and distribution calculation and are 'reported separately' to the Doctors thereby exceeding the maximum allowed distributive share which can be paid to a partner while still maintaining eligibility for the SBT credit. [Therefore,] Treasury has shown in regard to its [M]otion for [S]ummary [D]isposition according to MCR 2.116(I)(2) there is no question of fact.[11]

On September 22, 2009, Respondent filed a Response to Petitioner's Motion for Reconsideration. In its response, Respondent stated:

> the cases relied upon by Petitioner which are *Alliance Obstetrics* and *Kmart* are subject to further appellant review. Treasury has filed a Motion for Reconsideration with the Michigan Court of Appeals in the *Alliance Obstetrics* case and the Plaintiff in that case has filed an Answer that supports the Court of Appeals narrowing its holding. Treasury has [also] filed an application for leave to appeal the *Kmart* case to the Michigan Supreme Court.[12]

IV. JOINT CONTENTIONS FOR PROTECTIVE ORDER

On December 30, 2009, the parties filed a Brief in support of their Joint Motion for Entry of Protective Order. In the Brief, the parties contend that:

> The Tax Tribunal has the authority to issue a protective order. *Herald Co v Tax Tribunal*, 258 Mich App 78; 669 NW2d 862 (2003). To issue a protective order, the Tax Tribunal must identify the confidential information, the basis for the requested protection, and determine whether or not the information should be protected by conducting an *in camera* review.[13]

The parties contend that information regarding employment status and benefits is personal confidential information that is exempt under MCL 15.243(1)(a), which provides an exemption from the freedom of information act (FIOA) for "information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an

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[11] *Id.* at 11-12.
[12] Respondent's Brief opposing Petitioner's Motion for Reconsideration, page 3 [Hereinafter Respondent II].
[13] Parties Joint Motion for Protective Order, page 5.

individual's privacy."[14] In addition, financial information regarding the income and deductions of Petitioner and its members, which contains personal information such as Petitioner's members' addresses, social security numbers and income is exempt from disclosure under MCL 15.243(1)(a). "The information concerning earnings, deductions and social security numbers, which is set forth on this tax return, clearly constitutes information of a personal nature that is exempt from disclosure."[15] The parties state:

> Accordingly, such confidentiality should be maintained by the Tax Tribunal with respect to such personal financial information and the Tax Tribunal should redact these figures so that they do not appear in the public record. In this regard, it should be noted that the exact amount of wages earned by Petitioner's members is not relevant in this case, as the only relevant consideration is whether each earned wages in excess of the $115,000 compensation limit, which is agreed upon by the parties.[16]

V. FINDINGS OF FACT

Petitioner, Cardiac Leasing, is a Michigan limited liability company. Petitioner is in the business of leasing human resources, specifically physicians and other medical staff, to companies that are licensed to provide medical services in Michigan. Respondent, Michigan Department of Treasury, under MCL 208.80, has the authority to determine whether a business entity qualifies for a Small Business Tax Credit.

Petitioner, Cardiac Leasing, according to its Operating Agreement, consists of two members, Drs. Wunderly and Olivares. They are each 50%-interest owners of Cardiac Leasing, and as such, they are entitled to allocations and distributions proportionate to their interest holdings as well as "guaranteed payments," if any, as determined on a case-by-case basis by the manager of the company. In addition to Petitioner, another relevant business entity to this case is

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[14] *Id*.
[15] *Id*. at 6.
[16] *Id.*

Advanced Cardiac Healthcare (ACH), PLLC. Both parties agree that ACH, unlike Petitioner, is entitled to provide medical services and engages in the practice of medicine under the Michigan Limited Liability Company Act. ACH is a company to which Petitioner leases its employees to provide medical services. During 2004, ACH had five members and a manager, two of which were Dr. Wunderly and Dr. Olivares.

During 2004, Petitioner leased Dr. Wunderly, Dr. Olivares, and a few other employees, to ACH in order to perform medical services for ACH. According to the Employee Leasing Agreement between Petitioner and ACH, both doctors were contracted to ACH for the purpose of performing medical services, yet they were to remain as employees of Petitioner (Cardiac). Specifically, Article II.A. of the Employee Leasing Agreement states:

> The Lessor [Petitioner] will bill ACH once each calendar month the full costs to the Lessor related to the Lessor's employment of the Covered Employees. Such actual costs related to the Covered Employees shall include: 1. Gross salary or wages paid to Covered Employees; 2. Employee benefits, including but not limited to health, life, disability insurance, retirement or pension plan contributions, and severance benefits; 3. Payments for workers compensation insurance or self-insurance; 4. The amount paid by the Lessor as the employer's portion of payroll taxes (FICA, FUTA, State Unemployment Taxes, etc.) with respect to the Covered Employees; 5. A human resource fee of one percent (1%) of the total payroll for the Covered Employees (the "HR Payroll Percentage'), to pay for the costs incurred by the Lessor to hire and supervise the Covered Employees and to prepare all reports and other documents required for the employment of the Covered Employees; and 6. Payroll check processing fee of 25¢ per check.[17]

On April 4, 2007, Respondent issued a Decision and Order of Determination, in which Respondent denied Petitioner's Small Business Tax Credit claim. Subsequent to this determination, on April 11, 2007, Respondent issued a Final Bill for Taxes Due in the amount of the credit, $52,358.00, plus interest in the amount of $6,895.31 for the 2004 tax year. In

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[17] Employee Leasing Agreement, found in Petitioner's Brief in Support of Motion for Summary Disposition, **Exhibit B**.

Respondent's Reasons and Authority for the Decision of the Department of Treasury accompanying the April 4, 2007 Decision and Order, Respondent stated:

> Petitioner's claim [of] a small business credit on its 2004 return…was denied by the Department of Treasury (Department) because Wunderly and Olivares received guaranteed payments that caused their distributive share of the business income to exceed $115,000.00…. The Department agrees that the payments made to the Petitioner's partners are guaranteed payments under IRC 707(c); 27 USC 707(c).[18]

In that regard, no W-2 documents are submitted to show the earnings reported by Drs. Wunderly and Olivares in 2004.

Given the above, the underlying issues in the above-captioned case relate to whether payments made to Drs. Wunderly and Olivares were, first, properly characterized as "guaranteed payments" within the meaning of the Internal Revenue Code § 707(c); and whether the payments are otherwise "distributive shares" for the purpose of determining the small business tax credit eligibility of Petitioner under MCL 208.36(2). In addition, whether the income limitation applies to Cardiac Leasing with regard to the small business credit, based upon the recent decisions in the *Alliance* and *K-Mart* cases.

VI. APPLICABLE LAW

A. SINGLE BUSINESS TAX CREDIT FOR PARTNERSHIPS

As of 2004, under the Single Business Tax Act (SBTA), MCL 208.31 (2004), general business tax is levied on all taxable business activities. However, the SBTA also allows for some businesses to claim tax credits. Under MCL 208.36, some businesses are qualified to claim tax credits if they meet all of the statutory requirements. The requirements differ depending on the form of business entity.

For partnerships, MCL 208.36(2) states in pertinent part:

[18] Respondent, *supra*, note 9, at 11.

> The credit provided in this section…is available to any person whose gross receipts do not exceed…$10,000,000.00 for tax years commencing after 1991, and whose *adjusted business income* minus the loss adjustment does not exceed $475,000.00 for tax years commencing…after January 1, 1985, subject to the following: (a)…a partnership…is disqualified if…any 1 partner of the partnership…receives…more than $115,000.00 for tax years commencing after December 31, 1997 as a *distributive share* of the adjusted business income minus the loss adjustment of…the partnership.[19] (Emphasis added.)

Under this provision, in order for a partnership to claim the single business tax credit, its adjusted business income must not exceed $475,000 for the tax year involved, and the distributive share of any one of the member-partners must not exceed $115,000.[20]

The term "distributive share" is not defined in the SBT, and as per MCL 208.2(2), it has "the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes in effect for the tax year."[21] To that extent, the Internal Revenue Code (IRC) makes several references to "distributive shares" in the context of partnerships. In § 702 of the IRC, distributive shares in a partnership is described to include "taxable income or loss," and "deduction, or credit." In addition, § 704 state, "A partner's distributive share of income, gain, loss, deduction, or credit shall, except as otherwise provided in this chapter, be determined by the partnership agreement[,]"[22] and if the agreement does not provide for such share, a partner's distributive share "shall be determined in accordance with the partner's interest in the partnership."[23] As such, whether or not certain payments made to a partner by the partnership constitute "distributive shares" will depend on how the amount of payment was determined – whether it was determined by the partnership agreement or in accordance with the partner's

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[19] MCL 208.36(2).
[20] *Id*.
[21] MCL 208.2(2).
[22] I.R.C. § 704.
[23] *Id*.

interest in the partnership, or whether it was determined in accordance with some other separate agreement between the partner and the partnership.

"Distributive shares" may include "guaranteed payments" in certain situations. The term "guaranteed payments" is not defined in the SBT but appears in several provisions within the IRC. As used in the IRC, "guaranteed payments" refer to "payments made to a partner for services or capital without regard to partnership income."[24] In order for any payments made to members of a partnership to constitute "guaranteed payments," these payments must be fixed in amount and not contingent upon the income of the partnership.[25]

Once payments are determined as "guaranteed payments," they will be "considered as made to a person who is not a member of the partnership only for the purposes of section 61(a) (relating to gross income) and section 162(a) (relating to trade or business expenses)."[26] However, "[f]or the purposes of other provisions of the internal revenue laws, guaranteed payments are regarded as a partner's distributive share of ordinary income."[27] This means that "[t]he partnership treats the guaranteed payments as a deductible expense, and the partner treats the receipt of the payment as income."[28] As applied to the SBT, "guaranteed payments" are deducted as a "business expense" for the purpose of calculating the business tax base, and the partners receiving "guaranteed payments" must include the amount in their individual income tax computation. Yet for other purposes, "guaranteed payments" will be treated as a "distributive share."[29]

B. SINGLE BUSINESS TAX CREDIT INCOME LIMITATIONS FOR LLC

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[24] 33 Am Jur 2d ¶ 2283. *See also* IRC 707(c); Treas. Reg. 1.707-1(c).
[25] *Id*.
[26] *Id*.
[27] Treas. Reg. 1.707-1(c).
[28] 33 Am Jur 2d ¶ 2283.
[29] *Id*.

MCL 208.36(2) provides for the Credit to be applied against single business tax liability, as long as the requirements, set forth above, are satisfied. LLCs are not subject to the income limitations set forth in MCL 208.36(2), because limited liability companies are not listed among the organizations subject to those income limitations.[30] Even if a business is treated as a corporation or partnership for federal tax purposes, it is still to be treated as a LLC for SBT purposes.[31] *Id*. at 285.

> Neither the SBTA nor the federal regulations require an entity to be consistent in its self classifications with respect to its state and federal tax filings for a given year and nothing in subsection [MCL 208.2(2)] indicates that entity classification elections in the federal tax code must be carried over to an entity's SBT filing.[32]

C. SUMMARY DISPOSITION PURSUANT TO MCR 2.116

Petitioner moves for summary disposition pursuant to MCR 2.116(C)(10). A motion for 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.[33] Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is not genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[34] However, in the event it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied.[35]

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

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[30] *Alliance Obstetrics & Gynecology, PLC v Dep't of Treasury*, 285 Mich App 284; 776 Nw2d 160 (2009).
[31] *Id*. at 285.
[32] *K-mart Michigan Property Service, LLC v Dep't of Treasury*, 283 Mich App 647, 655; 770 Nw2d 915, 919 (2009).
[33] *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (march 4, 2004).
[34] *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 Nw2d 28 (1999).
[35] *Arbelius v Poletti*, 188 Mich App 14; 469 Nw2d 436 (1991).

most favorable to the non-moving party.[36] The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider.[37] The burden then shifts to the opposing party to establish that a genuine issue of material fact exists.[38] Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.[39] If the opposing party fails to present documentary evidence establishing the existence of a material fact dispute, the motion is properly granted.[40]

Pursuant to MCR 2.116(I)(1), Respondent requests the Tribunal to enter judgment as a matter of law. "If the pleadings show to the court that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."[41] "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."[42] Therefore, the Tribunal "may enter a judgment in favor of the opposing party if it appears that the opposing party is entitled to judgment."[43]

VII. CONCLUSIONS OF LAW

The Tribunal has carefully given due consideration to Petitioner's Motion for Reconsideration of the Order Denying Petitioner's Motion for Summary Disposition and Respondent's answer thereto under the criteria of MCR 2.116(C)(10), and based on the pleadings

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[36] *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[37] *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[38] *Id*.
[39] *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[40] *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).
[41] MCR 2.116(I)(1).
[42] MCR 2.116(I)(2).
[43] *Walgreen Co v Macomb Twp,* 280 Mich App 58, 62; 760 NW2d 594 (2008). *See also* MCR 2.116(I)(1).

and other documentary evidence filed with the Tribunal, the Tribunal finds that granting Petitioner's Motion for Reconsideration is appropriate. Petitioner has demonstrated a palpable error by which the court and the parties have been misled and a different disposition must result. As such, the Tribunal finds that Petitioner is entitled to judgment as a matter of law, pursuant to MCR 2.116(C)(10).

With respect to Petitioner's Motion, Petitioner, as the moving party, bears the initial burden of supporting its position by presenting documentary evidence for the Tribunal to consider. The Tribunal finds that Petitioner has met its initial burden. Specifically, Petitioner contends that Cardiac Leasing meets all of the requirements to qualify for the SBT, as set forth in MCL 208.36(2). Further, Petitioner points to the recent decision of *Alliance Obstetrics*, which held that an LLC is not subject to the income restrictions placed on corporations and partnerships. In addition, Petitioner contends that simply because it files as a partnership for federal tax purposes, it should still be treated as an LLC for SBT purposes.

Under MCL 208.36(2), a Credit is to be applied against single business tax liability provided the taxpayer has met certain requirements.[44] The gross receipts for the tax year must not exceed $10,000,000, and the adjusted business income minus the loss adjustment must not exceed $475,000.[45] These two requirements have been met by Petitioner and are not in dispute. There is one additional requirement to be eligible for the Credit; however, such requirement only applies to *individuals, partnerships, and corporations.* (Emphasis added) Respondent contends that Cardiac (Petitioner) was ineligible for the Credit because it elected to be taxed as a partnership for federal income tax purposes and therefore was a partnership for SBT purposes. Respondent contends that as a partnership its "partners" distributive share of Cardiac's adjusted

[44] MCL 208.36(2).
[45] *Id*.

business income exceeded the $115,000 limitation set out in MCL 208.36(2)(a). However, a recent decision by the Michigan Court of Appeals has proven this contention to be incorrect.

Under *Alliance Obstetrics & Gynecology v Dep't of Treasury*, the court held that LLCs are not subject to the income limitations set forth in MCL 208.36(2), because limited liability companies are not listed among the organizations subject to those income limitations.[46] In *Kmart Michigan Property Services, LLC v Dep't of Treasury*, the court stated "[n]either the SBTA nor the federal regulations require an entity to be consistent in its self classifications with respect to its state and federal tax filings for a given year" and that "nothing in this subsection [MCL 208.2(2)] indicates that entity classification elections in the federal tax code must be carried over to an entity's SBT filing."[47]

Based on the Court of Appeals' decisions in *Alliance* and *Kmart*, Cardiac is entitled to the Credit. Like Alliance, Cardiac is organized as an LLC under state law, and not as a partnership or a corporation. Like Alliance, Cardiac's owners are members of an LLC for state law purposes and not shareholders of a corporation or partners of a partnership. Moreover, both Alliance (electing to be treated as a corporation) and Cardiac (electing to be treated as a partnership) made entity classification elections for federal income tax purposes. Because Cardiac is a state law LLC, it is not a partnership for purposes of the Credit set forth in MCL 208.36(2), and therefore the income limitations do not apply to Cardiac. As such, Cardiac's election to be treated as a partnership for federal income tax purposes has no effect on its entity classification for SBT purposes.

Given the above, the Tribunal finds that Cardiac has met all of the requirements of MCL 208.36(2) and in doing so qualifies for the SBTC. Thus, Petitioner (Cardiac) is entitled to

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[46] 285 Mich App 284; 776 NW2d 160 (2009).
[47] 283 Mich App 647, 655; 770 NW2d 915, 919 (2009).

judgment as a matter of law under MCR 2.116(C)(10), as there is no genuine issue of material fact with respect to whether Cardiac is entitled to the Credit under MCL 208.36(2).

In regards to the Joint Motion for Protective Order, the Tribunal finds, after reviewing each document request individually, that the parties have shown good cause and an adequate basis as to why these documents should remain sealed. In addition, the parties have sufficiently identified each document that they wish to keep confidential. As such, the parties Joint Motion for Entry of Protective Order should be granted.

VIII. JUDGMENT

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

IT IS FURTHER ORDERED that Summary Disposition is GRANTED in favor of Petitioner.

IT IS FURTHER ORDERED that the Joint Motion for Protective Order is GRANTED.

MICHIGAN TAX TRIBUNAL

Entered: April 13, 2010 By: Kimbal R. Smith III
NB