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

Jeff Walby,
Petitioner,

v

MTT Docket No. 342615
Assessment Nos. O240591 and O251924

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

FINAL OPINION AND JUDGMENT

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

I. INTRODUCTION

Petitioner, Jeff Walby, is appealing Final Assessments O240591 and O251924, issued by Respondent, Michigan Department of Treasury. The Final Assessment, for assessment no. O240591, establishes single business tax liability for the 2002 and 2004 taxable periods. The amount of tax, penalty, and interest due is $657.96. The Final Assessment, for O251924, establishes single business tax liability for the 2005 taxable period. The amount of tax, penalties, and interest due is $276.76. On May 14, 2010, Petitioner filed a motion requesting the Tribunal grant summary disposition in his favor, pursuant to MCR 2.116(C)(10). On June 4, 2010, Respondent filed a response to Petitioner's Motion for Summary Disposition.

II. PETITIONER'S CONTENTIONS

On May 14, 2010, Petitioner filed a Motion requesting that the Tribunal render summary disposition in favor of Petitioner in the above-captioned case pursuant to MCR 2.116. In support of his Motion, Petitioner contends that " . . . for the tax years 2002, 2004 and 2005, Dr. Walby claimed a small business credit under MCL 208.36(2)." Petitioner further states that "Mr. Burke, of the State of Michigan, disallowed the credit." Petitioner opines that since it ". . . is an LLC, and is not classified as a corporation under Michigan Law for the purposes of calculating the single business tax credit and income limitations under MCL 208.36(2), therefore [it] is able to claim the credit." Further, Petitioner argues that "[t]he pertinent facts of the [*Alliance Obstetrics & Gynecology, PLC v Department of Treasury*, 285 Mich App 284; 776 NW2d 160 (2009), *lv den*, 777 NW2d 195 (2010)] case apply to the current proceedings and therefore the precedent should prevail."

III. RESPONDENT'S CONTENTIONS

On June 4, 2010, Respondent filed a response to the Motion. In the response, Respondent states that "[*Alliance*] does indeed hold that parties similarly situated to Petitioner are entitled to the small business credit, provided they meet the other criterion for eligibility established by statute

for receiving the credit, notably the requirement of MCL 208.36(2) that the business have annual gross receipts of $10,000,000 or less." Respondent further states that "[g]iven that Treasury is not in a position to dispute that Petitioner meets this criterion for eligibility as well, Treasury does not see any basis on which it can oppose the motion, provided that Petitioner is prepared to represent that this criterion is met."

IV. FINDINGS OF FACT

Respondent issued Intents to Assess for Assessment No. O240591 on August 2, 2006 and O251924 on August 9, 2006 both establishing single business tax assessments against Petitioner. The assessments are a result of Respondent's disallowance of the small business credit under the Single Business Tax, pursuant to MCL 208.36. Respondent disallowed the credit because Petitioner's compensation of officers appeared to be over the $115,000 disqualifier. See MCL 208.36 (2)(b)(i).

The relevant credit was enumerated in MCL 208.36 and states in relevant part:

> (2) The credit provided in this section shall be taken before any other credit under this act, and 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 on or after January 1, 1985, subject to the following:
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> * * *
>
> (b) A corporation other than a subchapter S corporation is disqualified if either of the following occur for the taxable year:
>
> (i) Compensation and director's fees of a shareholder or officer . . . exceed $115,000.00 for tax years commencing after December 31, 1997.

For tax year 2002, Petitioner's gross receipts were $360,590.56. Petitioner's adjusted business income minus any loss adjustments was $0.

For tax year 2004, Petitioner's gross receipts were $254,832.53. Petitioner's adjusted business income minus any loss adjustments was $1,100.08.

V. APPLICABLE LAW

Respondent moves for summary disposition pursuant to MCR 2.116(C)(10). In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004), the Tribunal stated "[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." Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the

moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

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. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. 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. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic* v *Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

VI. CONCLUSIONS OF LAW

The Tribunal has carefully considered Petitioner's motion under MCR 2.116(C)(10), and the Tribunal finds that granting Petitioner's motion is warranted, based on the pleadings and other documentary evidence filed with the Tribunal. Further, Petitioner has proven through affidavits, pleadings, and documentary evidence that there is no genuine issue with respect to any material fact. MCR 2.116(C)(10).

On June 8, 2010, the Tribunal participated in a conference call with Petitioner and Respondent's counsel, the purpose of which was to discuss the status of the case and the need to move forward with a hearing. Respondent stated that it concedes to Petitioner's contentions provided Petitioner meets the statutory limits for gross receipts and adjusted business income promulgated under MCL 208.36 for the tax years at issue. As such, the only issue remaining is whether Petitioner meets the statutory limits as set forth in MCL 208.36.

While this appeal has been pending, the Michigan Court of Appeals published *Alliance Obstetrics & Gynecology, PLC v Department of Treasury*, 285 Mich App 284; 776 NW2d 160 (2009), *lv den*, 777 NW2d 195 (2010). In this case, the petitioner, a limited liability company (LLC), elected to be treated as a corporation for federal income tax purposes because federal tax law does not allow for the classification as an LLC. The petitioner filed a single business tax return claiming the small business credit under MCL 208.36 and the Department of Treasury determined that since the petitioner elected treatment as a corporation for federal income tax purposes it would also be treated as a corporation for the calculation of the small business tax credit. Since the corporation's "officers" earned more than $115,000 during the taxable year, the Department found that Petitioner was not entitled to the tax credit. The Court of Claims reversed

this conclusion and determined that the petitioner was an LLC and should not be treated as a corporation for purposes of calculating the small business tax credit and income limitations under MCL 208.36(2). The Court of Appeals agreed with the lower court and affirmed its finding. As such, the petitioner was not disqualified from claiming the credit as MCL 208.36 specifically states that "*[a] corporation* other than a subchapter S corporation is disqualified if compensation and director's fees of a shareholder or officer . . . exceed $115,000.00 for tax years commencing after December 31, 1997." (emphasis added). Since the petitioner was not a corporation, it was not required to adhere to the criteria set forth in MCL 208.36(2)(b)(i).

Respondent has conceded that *Alliance* is applicable to this case and MCL 208.36(2)(b)(i) does not apply to these facts as Petitioner is a registered LLC and is not a corporation. The only issues that remain is whether Petitioner meets the statutory limits for gross receipts and adjusted business income promulgated under MCL 208.36.

Petitioner submitted its 2002, 2004, and 2005 U.S. Corporation Income Tax Returns. The Tribunal has analyzed the returns and the information within and determined that Petitioner's gross receipts during the tax periods at issue did not exceed $10,000,000, and Petitioner's adjusted business income minus the loss adjustment did not exceed $475,000. As such, the Tribunal finds that Petitioner meets the criteria as set forth in MCL 208.36 and is therefore entitled to the Single Business Tax Small Business Credit for the tax years at issue.

VII. JUDGMENT

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

IT IS FURTHER ORDERED that Assessment Nos. O240591 and O251924 are CANCELLED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the cancellation of taxes, interest, and penalties included in Assessments Nos. O240591 and O251924 within 20 days of the entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes, interest, and penalties shall issue a refund as required by this Order within 28 days of the entry of this Final Opinion and Judgment.

MICHIGAN TAX TRIBUNAL

Entered: July 15, 2010 By: Cynthia J Knoll
pmk/sms