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

Detroit Pistons Basketball Company,
Petitioner,

MTT Docket No. 357601

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER PARTIALLY DENYING AND PARTIALLY GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Detroit Pistons Basketball Company, appeals the inclusion by Respondent of net broadcast revenues received by Petitioner from the National Basketball Association ("NBA") and from Fox Sports Detroit ("Fox") in the Single Business Tax base for the tax years ending June 30, 2002 through June 30, 2004. The parties disagree regarding whether (1) Petitioner can exclude broadcast revenue received from the NBA as income attributable to another entity pursuant to MCL 208.9(9), and/or (2) royalty income received from the NBA and from Fox is a royalty "paid by television broadcasters for program matter." The Tribunal disagrees with Respondent that revenues derived from national broadcast rights can be included in the SBT tax base, but agrees with Respondent that revenues derived from local broadcast rights should be included in the SBT tax base pursuant to MCL 208.9, and, therefore, the assessment issued by Respondent against Petitioner should be cancelled in part and affirmed in part, as reflected in the conclusion below.

BACKGROUND

Petitioner is a professional basketball team that entered into a Joint Venture with 28 other professional basketball teams in 1989 (the NBA). Pursuant to the Joint Venture Agreement, each participant in the joint venture received an equal 1/29th share of joint venture income related to national broadcast revenue. Petitioner also entered into a broadcast agreement with Fox to locally broadcast basketball games not subject to the national broadcast agreement. Petitioner subtracted from its SBT tax base broadcast royalties received from the NBA and from Fox as royalties not containing "program matter" pursuant to MCL 208.9(7). Upon audit, Respondent adjusted Petitioner's SBT tax base for these royalty payments, determining that the royalties contained "program matter." Respondent issued its Final Bill for Taxes Due, Assessment number N950905, to Petitioner on April 25, 2006 in the amount of $1,207,204 plus interest.

Petitioner filed this appeal with the Tribunal on August 29, 2008. An amended petition was filed by Petitioner on August 24, 2010 and was accepted by the Tribunal in its Order dated October 24, 2010. On October 28, 2011, both Petitioner and Respondent filed Motions for Summary Disposition under MCR 2.116(C)(10). Oral argument on the parties' respective motions was held on November 4, 2011. Finally, by Order of the Tribunal dated November 9, 2011, the parties were required to file an Amended Stipulation of Facts to include information distinguishing national royal income from local royalty income with the Tribunal by December 12, 2011. The Tribunal's Order of November 9, 2011 also requested the parties to file briefs on the issue of apportionment raised by Petitioner in its brief and in oral argument. The parties filed the requested supplemental joint stipulation of facts and briefs on December 12, 2011.

STIPULATION OF FACTS

The parties have filed a Joint Stipulation of Facts and a Supplemental Joint Stipulation of Facts, and the Tribunal accepts as true the following:

1. "The issue in this matter is the Michigan Single Business Tax ('SBT') of Petitioner for the tax years ended June 30, 2002 through 2004, and its treatment of certain payments from the National Basketball Association ('NBA') to Petitioner."

2. "Also at issue in this matter is the SBT treatment of payments received by Petitioner from local broadcasters such as Fox Sports Detroit LLC ('Fox Detroit')."

3. "Petitioner is a professional basketball team that has an SBT filing obligation for the years at issue."

4. "The NBA is a joint venture entity which was jointly owned by Petitioner and 28 other professional basketball teams during the years at issue."

5. "The NBA traces its roots to the Basketball Association of America, which was founded in 1946, and was later merged with the National Basketball Association League in 1949 creating the National Basketball Association."

6. "The joint venturer teams entered into the 'Amended and Restated Joint Venture Agreement', dated January 1, 1989, whereby they restated their joint venture interests in the NBA."

7. "The Joint Venture Agreement, dated January, 1989, not only lists the joint venturer teams but also states that New York will be the principal location where the NBA will conduct business."

8. "The following articles of the Joint Venture Agreement restate how the NBA conducts business and how it will govern its relationship with its joint venture owners:

    II. Purpose of Venture
    III. Capital Contributions, Accounts and Withdrawals
    IV. Net Income and Losses
    V. Term of Agreement
    VI. Constitution of By-Laws"

9. "Pursuant to Article 4.2 of the Joint Venture Agreement, the net income of the joint venture (NBA) is credited equally to the income of each joint venture team."

10. "The joint venturer teams of the NBA held a special meeting at St. Regis Hotel, New

York, New York on April 27 and April 28, 1993 to address the issue of division of national broadcast revenue."

11. "The joint venturer teams entered into a resolution ('the Resolution') dated April 27-28, 1993, which states the teams' agreement on the national broadcast revenue issue."

12. "The NBA entered into contracts with national broadcasters, e.g., ABC, ESPN, Turner Network Television and AOL Time Warner, for licensing the right to record and broadcast live games on a national basis."

13. "Pursuant to the contracts with national broadcasters, the NBA received royalties from the national broadcasters for licensing the right to tape and broadcast the recording of its live games on a national basis."

14. "During the years at issue, there were 29 joint venturer teams with ownership in the NBA and each team received 1/29th of the joint venture income related to national broadcast revenue from the NBA, pursuant to Article 4.2 of the Joint Venture Agreement."

15. "Payments of income related to national broadcast revenue from the NBA to the individual teams were accompanied by a memo from the NBA indicating the tax treatment member teams should accord the transactions by the NBA."

16. "Should the Tribunal find that the payments received from the NBA are not partnership distributions, the parties stipulate that the payments are considered royalties for SBT purposes."

17. "As a joint venture, the NBA is considered a person pursuant to §208.6(1) and is subject to SBT if is has nexus with Michigan."

18. "Not all professional basketball games during the year are selected by the national networks and broadcasted on a national basis."

19. "For those games that are not broadcast nationally, the teams are permitted to negotiate separately with local broadcasters for the broadcast to local audiences."

20. "During the years at issue, Petitioner entered into agreement with Fox Sports Detroit to broadcast locally those games which were not broadcast by the national network."

21. "The agreement granted Fox Sports Detroit the sole and exclusive rights to produce and broadcast Petitioner's games in the local metro Detroit market that were not being broadcast nationally."

22. "Petitioner contracted directly with Fox Sports Detroit, and only received royalties for games that were broadcasted locally by Fox Detroit."

23. "Petitioner does not produce any broadcasts of the games it plays, nor does it make an audio or visual record of any portion of the games that could be broadcast. Any such recordings are made by Fox Sports Detroit or the national networks that have entered into contracts with the NBA."

24. "On its originally filed SBT returns, Petitioner treated the revenue received from the NBA and from Fox Detroit as royalties not containing 'program matter' and subtracted these amounts from its SBT tax base pursuant to MCL §208.9(7)."

25. "Upon audit, Respondent adjusted Petitioner's SBT tax base under the theory that both the revenue from the NBA and the revenue from Fox Detroit were royalties containing 'program matter', and therefore did not qualify for the tax base subtraction pursuant to MCL §208.9(7)(c)(v)."

26. "The term 'program matter' is not defined in 1975 PA 228 (the SBT Act), 1941 PA 122 (the Revenue Act), or in the Internal Revenue Code."

27. "Respondent's audit of Petitioner's SBT returns for the tax years ended 6/30/2002-6/30/2004 gave rise to the following assessment:

Tax Year Ended	SBT	Interest	Penalty	Total
6/30/2002	$337,992.00	Statutory	$ -	$337,992.00
6/30/2003	$301,681.00	Statutory	$ -	$301,681.00
6/30/2004	$567,531.00	Statutory	$ -	$567,531.00

28. "Depending on the treatment of payments from the NBA and local broadcasters for SBT purposes, consideration may be necessary on whether inclusion within the Petitioner's sales factor is appropriate."

29. "The chart below reflects the total number of Petitioner's basketball games broadcast by Fox Sports Detroit for the years at issue:

Tax Year Ended	Michigan Games	Non-Michigan Games	Total
6/30/2002	24	17	41
6/30/2003	25	16	41
6/30/2004	21	15	36

30. "If the Tribunal finds that neither the national broadcast revenue, nor the local broadcast revenue received from Fox Sports Detroit should be included in Petitioner's tax base for the years at issue, there would be no apportionment issue, and this matter will be resolved by the cancellation of this assessment in its entirety."

31. "If the Tribunal finds that both the national broadcast revenue and the local broadcast revenue received from Fox Sports Detroit should be included in Petitioner's tax base for the years at issue, the parties agree that a) both the national and the local broadcast revenue streams would be included in the denominator of the apportionment sales factor, and b) the national broadcast revenue would be sourced to Michigan for apportionment purposes and would therefore be in the numerator of the apportionment sales factor. However, the parties differ as to the apportionment sourcing of the local broadcast revenue. Respondent contends that local broadcasting revenue would be sourced 100% to Michigan, which would result in the assessment being upheld in its entirety. Petitioner contends that local broadcast revenue would be sourced to Michigan only for those games played in Michigan, which would result in a reduced assessment as set forth below.

Tax Year Ended	SBT	Interest	Penalty	Total
6/30/2002	$328,823	Statutory	$ -	To Be Determined ("T.B.D.")
6/30/2003	$291,267	Statutory	$ -	("T.B.D.")
6/30/2004	$534,321	Statutory	$ -	("T.B.D.")

32. "If the Tribunal finds that the national broadcast revenue should be excluded from Petitioner's tax base as subtractable income from another entity, but the local broadcast revenue received from Fox Sports Detroit should be included in Petitioner's tax base for the years at issue, the parties agree that only the local broadcast revenue would be added to Petitioner's sales apportionment factor denominator. However, the parties differ as to the apportionment sourcing of the local broadcast revenue. Respondent contends that local broadcast revenue would be sourced 100% to Michigan, which would result in an assessment as set forth below:

Tax Year Ended	SBT	Interest	Penalty	Total
6/30/2002	$71,231	Statutory	$ -	("T.B.D.")
6/30/2003	$56,837	Statutory	$ -	("T.B.D.")
6/30/2004	$153,476	Statutory	$ -	("T.B.D.")

Petitioner contends that local broadcast revenue would be sourced to Michigan only for those games played in Michigan, which would result in the following assessment as set forth below.

Tax Year Ended	SBT	Interest	Penalty	Total
6/30/2002	$70,314	Statutory	$ -	("T.B.D.")
6/30/2003	$49,495	Statutory	$ -	("T.B.D.")
6/30/2004	$129,434	Statutory	$ -	("T.B.D.")

33. "A fourth scenario, in which the national broadcast revenue would be included in Petitioner's tax base (not income from another entity, but includable as program matter) while the local broadcast revenue would be excluded (non-program matter), appears to be [] very unlikely and has not been modeled."

PETITIONER'S CONTENTIONS

Petitioner requests that the Tribunal grant Summary Disposition in its favor pursuant to MCR 2.116(C)(10) on the basis that, given the parties' filing of a Joint Stipulation of Facts, "there are no material facts at issue, all have been stipulated by both parties." Contending that tax statutes are to be construed in favor of the taxpayer, Petitioner contends that (1) the NBA's payments to Petitioner constitute income attributable to another entity and should not be included in Petitioner's tax base, and (2) royalty payments received by Petitioner from Fox are not for "program matter" as that term is used in MCL 208.9(7)(c)(v).

1. <u>The NBA's payments to Petitioner constitute income attributable to another entity.</u>

Petitioner contends that as a joint venture, with net broadcast revenues distributed equally to each of the 29 teams, the NBA is considered a person pursuant to MCL 208.6(1) and would be subject to the SBT for royalty payments made by national broadcasters to the NBA, depending upon a resolution of nexus issues. In support of its argument, Petitioner relies on MCL 208.9(9), which specifically excludes from the SBT tax base (to the extent included in federal taxable income) any gain or loss "attributable to another entity whose business activities are taxable under this act or would be taxable under this act if the business activities were in this state." Here, Petitioner contends that because the NBA owns the copyrights rights to the broadcasts, exclusively negotiates and controls all legal rights to national broadcast royalties, and receives and distributes broadcasting royalties, such amounts allocated and distributed equally to each of the members of the joint venture must represent income from another entity as

contemplated by the statute.

Petitioner further contends that Respondent's reliance on the NBA's characterization of its role in the negotiation and collection of royalties for national broadcast rights as that of "agent" for the various NBA teams is misplaced. Arguing substance over form, Petitioner distinguishes prior agency case law establishing an agency relationship (*PM One, Limited v Michigan Department of Treasury,* 240 Mich App 255, 611 NW2d 318 (2000) and *APCOA, Inc v Department of Treasury,* 212 Mich App 114, 536 NW2d 785 (1995)) because the NBA has the sole right to the broadcast revenue and, as such, cannot be held to be the agent for the teams comprising the joint venture.

2. Petitioner's receipt of local and national broadcast rights are not "program matter."

Petitioner acknowledges that Michigan statute (MCL 208.9(7)(c)(v) allows a taxpayer to deduct all royalties included in federal taxable income from its SBT tax base except for "royalties, fees, charges, or other payments or consideration paid or incurred by radio or television broadcasters for program matter or signals." In this regard, Petitioner contends that the royalties it receives for broadcast rights are not for "program matter." Petitioner contends that because both parties have stipulated that no definition for "program matter" is provided in the SBT Act, the Revenue Act or the Internal Revenue Code, other resources must be considered in attempting to define the term "program matter" as included in the statute. Petitioner further contends that Respondent's reliance on dictionary definitions is misplaced as Respondent attempts to rely on separate definitions for "program" and "matter", recognizing that no specific definition can be found in the dictionary for the term "program matter." Therefore, Petitioner contends that the Tribunal should look to Federal Communications Commission statues as the most appropriate explanation of what is contemplated by the term "program matter." Relying on

47 USC Sec. 508, which discusses "program matter" in terms of finished product produced or prepared by broadcasting, Petitioner distinguishes the subject facts, contending that "these games are not being 'prepared or produced' by Petitioner, nor do they take place for the purpose of broadcasting." Petitioner contends that the royalties generated by granting broadcast rights do not relate to a finished, produced program that is broadcast ready, and therefore are not "program matter."

In further support of this contention, Petitioner relies on legislative analysis of House Bill 4857, which amended MCL 208.9 to include the "program matter" provision when determining how royalty payments should be treated by both payer and payee for single business tax purposes. Specifically, the statute was amended as a direct reaction to a Michigan Court of Appeals decision (*Field Enterprises v Department of Treasury*, 184 Mich App 151; 457 NW2d 113 (1990)), which held that payments made for licensing the right to use M*A*S*H* episodes were royalties and not rent for purposes of the single business tax. Petitioner contends that in the *Field* case, "the broadcaster paid to use an already created and produced television program" which constituted program matter, as the episodes were scripted, taped, edited, existing programs. Petitioner distinguishes Detroit Pistons broadcasts which are not scripted and are simply live sporting events for which royalties are paid by Fox, for example, for the right to broadcast said live events. Fox then uses the live sporting event and "adds other elements to create a television program, including commentary, analysis and interviews," which it then can license to others in exchange for royalty payments, which finished product would then constitute "program matter."

3. <u>If the national or local revenue is denied subtraction from the SBT tax base, then such revenue should be included in the sales factor.</u>

Petitioner contends that if the Tribunal denies Petitioner's claim that royalty payments should not be included in its SBT tax base, then such revenues should be included in its sales factor. Relying on MCL 208.53(a)-(b), Petitioner contends that it "is appropriate to source income related to intangible property to the jurisdiction where the greatest costs associated with this revenue stream were incurred." Therefore, Petitioner further contends that "it is proper to include not only its costs associated with this revenue stream, but also the costs incurred by all member teams associated with this revenue stream."

At oral argument, Petitioner reiterated its contention that an agency relationship did not exist between the NBA and Petitioner. Rather, the NBA owned the copyrights and received royalties from the broadcasters. Thus, Petitioner argues, the broadcast revenue is income of the joint venture and is not received in an agent capacity. Petitioner also argued that the term "program matter" is ambiguous and undefined. Petitioner looks to FCC 508B which indicates that program matter is something intended for broadcasting. Petitioner distinguishes "program matter" from live broadcasts. Because Petitioner's games are live broadcasts and not scripted, it is not a program. Rather, the program is produced by Fox Sports Detroit when commentary is added to the live game. Thus, Fox Sports Detroit is the producer of the program matter and not Petitioner. Finally, Petitioner argued that because it is paid separately for each game that is taped, the sales factor should be apportioned based on the games played in Michigan.

RESPONDENT'S CONTENTIONS

Respondent requests that the Tribunal grant Summary Disposition in its favor pursuant to MCR 2.116(C)(10) on the basis that, given the parties' filing of a Joint Stipulation of Facts, "there is no genuine issue as to any material fact and Treasury is entitled to judgment as a matter of law." In support of its motion, Respondent contends that the Michigan Court of Appeals in

Detroit Lions, Inc v Department of Treasury, 157 Mich App 207; 403 NW2d 812 (1986) conclusively supports Respondent's position that national broadcast revenues received by Petitioner are not excludable from its SBT base as income attributable to another entity under MCL 208.9. Respondent further contends that royalty income received by Petitioner from Fox was a result of Petitioner's licensing of "program matter" to Fox.

1. The Pistons national broadcast revenue cannot be excluded from its SBT base as income attributable to another entity where the NBA contracts with broadcasters as agent for its member teams.

Respondent relies on the Court of Appeals holding in *Detroit Lions, supra,* that "amounts received by the Lions from the NFL constituted royalties that could be excluded from the Lions SBT base." Under the facts in *Detroit Lions,* the NFL is deemed to be the owner of copyright on live telecasts, the NFL negotiates contracts for national broadcasting rights and each member of the NFL shares equally in the television revenues. Respondent contends that the subject facts are similar to the facts in the *Detroit Lions* case in that, contrary to the argument offered by Petitioner, the NBA entered into broadcast contracts as "agent for member teams (and not through the joint venture." Therefore, because Petitioner recognized that "the NBA contracts for the national broadcast rights as an agent for the team, it cannot claim that the payments it receives is income attributable to another entity."

2. The television broadcasters acquired "program matter" under the broadcasting agreements with the NBA and the Pistons and, therefore, the Pistons cannot exclude the broadcast revenues from its SBT base under MCL 208.9(7)(c)(v).

Respondent agrees with Petitioner that royalties paid by television broadcasters for "program matter" are included in the SBT tax base, and also agrees that the term "program

matter" is not defined anywhere in Michigan statute or case law. In this regard, Respondent disputes Petitioner's argument that where statutory ambiguity exists, the statute must be strictly construed in favor of the taxpayer, since here Michigan statute include the same language as an add back to the payer and a deduction to the payee (MCL 208.9(4)(g)(vi). Respondent contends that "where opposite provisions of the SBTA apply equally to differing taxpayers with opposite results, there is no presumption in favor of either taxpayer. Respondent further contends that where there is no presumption in favor of either taxpayer, "Treasury's interpretation is entitled to deference." (*In re Complaint of Rovas,* 482 Mich 90, 103; 754 NW2d 259 (2008)).

Respondent further contends that where legislative history is lacking regarding the meaning of "program matter," it is "appropriate to apply the common understanding of the words making up the term." In this regard, Respondent relies on the Oxford American College Dictionary to define "program" as "a presentation or item on radio or television," and on several dictionaries to define "matter" as a "subject under consideration." Respondent therefore concludes that "program matter" as used in the SBTA "is the subject, or an important element, of a 'program,'" stating that "the 'program matter' (i.e., the subject) licensed under contract was the basketball games played by two teams. The program, when ultimately broadcast either live or taped, locally or nationally, conveyed this 'program matter' to the viewing audience."

Finally, Respondent contends that because the statute was changed in 1993 in response to the Court of Appeals decision in *Field Enterprises,* and as a result of lobbying by representatives of movie theater owners and broadcasters, one can assume that this amendment to MCL 208.9 benefitted broadcasters. Because broadcasters do not benefit from the amendment to MCL 208.9 under the analysis presented by Petitioner, Respondent concludes that the term "program matter" must be interpreted to preclude Petitioner's deduction of royalty payments received from Fox

from its SBT tax base.

At oral argument, Respondent reiterated its argument that *Detroit Lions, supra* supports its stance that the NBA acted as an agent on behalf of Petitioner. Respondent disagrees with Petitioner's stance that ". . . programming matter is something you have a hard copy of that you transmit." Transcript, p 43. Respondent reiterated its argument that the term "program matter" is ". . . broader than simply the hard copy that is created by the broadcaster and transmitted to somebody else." *Id.* Respondent contends you must look to the substance of the broadcast to determine whether something is program matter. Respondent again cites *Detroit Lions, supra* with regard to the sales factor apportionment. Specifically, Respondent argues that the *Detroit Lions* case indicates that ". . . you look at the business of the taxpayers and that is the basis for determining cost of performance." Transcript, p. 50. As such, Respondent contends that Petitioner's cost of performance was in Michigan and it should all be allocated to Michigan.

STANDARD OF REVIEW

Petitioner and Respondent both move 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).

CONCLUSIONS OF LAW

The Tribunal has carefully considered the parties' respective Motions for Summary Disposition under the criteria for MCR 2.116(C)(10), and based on the pleadings and other documentary evidence filed with the Tribunal, determines that granting Petitioner's Motion and denying Respondent's Motion is appropriate. The Tribunal concludes that the pleadings and documentary evidence prove there is no genuine issue with respect to any material fact.

The Michigan Single Business Tax was enacted into law in 1975 and was replaced by the

Michigan Business Tax, effective in 2008. The facts of this case are not in dispute. For the tax years at issue, the parties agree (Joint Stipulation of Facts filed by the parties on October 4, 2011) that (1) Petitioner received royalty payments for broadcast rights from the from Fox, (2) Petitioner received either partnership distributions or royalty payments from the NBA, (3) the NBA is a joint venture jointly owned by Petitioner and 28 other professional basketball teams, (3) the net income of the NBA is credited equally to each joint venture team, (4) MCL 208.9(7) excludes royalty income (other than royalty income from broadcasts containing "program matter") from the SBT tax base, and (5) the term "program matter" is not defined in the SBT Act.

The first issue to determine is whether the NBA's payments to Petitioner constitutes income attributable to another entity or is considered royalty payments for "program matter." As a Joint Venture, the NBA is a "person," under MCL 208.6(1), and was subject to the SBT as it is imposed on the adjusted tax base of every "person" with business activity in this state. MCL 208.31(1). During the tax periods at issue, the NBA received broadcasting revenue that would offset its operational expenses and then be distributed to the member teams. However, Petitioner contends that the broadcasting revenues would represent income from another entity and be excluded form Petitioner's SBT tax base under MCL 208.9(9).

Respondent argues that the national broadcast revenue cannot be excluded from Petitioner's SBT tax base as income attributable to another entity because the NBA contracted with broadcasters as an agent for Petitioner. Respondent cites *Detroit Lions, supra* in support of its position. At oral argument, Respondent's representative stated that:

> The Detroit Lions decision sets forth the language in the network agreement addressing copyrights. Which starts off with, 'League on behalf of member clubs is deemed owner of the copyright on live telecasts made under this agreement.

> NFL.' Here we have the NBA which claims to be the owner of the copyright. It says that it enters into these agreements as agents for its members.

Transcript, p 36. Respondent relies on the Memo from Steve Richard to NBA Team Controllers that states the NBA enters into broadcast contracts as ". . . agent for the members teams' (and not through the joint venture," and also the Telecast Rights Agreement which states that the NBA entered into the broadcast contracts as agent for the NBA member clubs. Stipulated Exhibit 3 and Stipulated Exhibit 4. However, Respondent's representative, at oral argument, acknowledged that it is not part of joint venture law that the entity acts as agent for the participants. Further, there is no document admitted into evidence between the NBA and Petitioner that formally acknowledges this purported agency relationship. Rather, the Amended and Restated Joint Venture Agreement states that the purpose of the venture is to ". . . consist of professional basketball teams, each of which shall be operated by a Joint Venturer." Stipulated Exhibit 1. It also states that any ". . . net income . . . of the Joint Venture . . . shall be credited equally to the income account of each of the Joint Venturers." *Id.* Further, the Minutes of the Special Meeting of the Board of Governors of the National Basketball Association states that ". . . the Association owns and controls the copyright in the telecast of all NBA games by any means whatsoever. . . ." Stipulated Exhibit 2. The evidence supports the conclusion that the Joint Venture owns and controls Petitioner's telecast copyrights and controls the Joint Venture. Petitioner cites *Stratton-Cheeseman Management Company v Department of Treasury*, 159 Mich App 719; 407 NW2d 398 (1987) which held that the substance of the transaction determines how to characterize payments for tax purposes. Thus, the substance of the transaction supports Petitioner's stance that "[a]s the owner of the copyrights to the nationally televised games, [] the NBA is the only party with the right to the revenue. If the NBA owners can't be principals, then

it would be impossible for the NBA to be an agent." Petitioner's Brief in Support of its Motion for Summary Disposition. Thus, the NBA was not acting on behalf of Petitioner and Respondent's argument fails.

In sum, the Tribunal determines that the NBA's payments to Petitioner constitute income attributable to another entity and the national broadcast revenue shall be excluded form Petitioner's tax base as subtractable income from another entity.

The next issue to determine is whether royalties from Fox, attributable to Petitioner in this matter, constitute "program matter." Under MCL 208.9(7)(c)(v), taxpayers are allowed to exclude from their SBT base all royalties except for "[r]oyalties, fees, charges, or other payments or consideration paid or incurred by radio or television broadcasters for program matter or signals." Alternatively, MCL 208.9(4)(g)(vi) states that taxpayers must include royalties paid by television broadcasters for program matter.

The parties have stipulated that the payments from Fox at issue are royalties. Thus, the Tribunal must determine whether the royalties were paid by television broadcasters for "program matter." The term "program matter" is not defined by the Michigan Single Business Tax Act or the Internal Revenue Code. See MCL 208.2. Petitioner looks to the Federal Communications Commission ("FCC") statutes, specifically 47 USC §508, to define "program matter." Petitioner states that:

> In 47 USC Sec. 508, 'program matter' is discussed in relation to payments made to a radio station in exchange for broadcasting or discussing musical recordings on the air. In the context of this statute, someone is preparing or producing program matter and supplying it to the radio station for them to broadcast. In addition, the FCC limits program matter as something that is 'intended for broadcasting.'"

Petitioner's Brief in Support of its Motion for Summary Disposition. Respondent looks to the

Oxford American College Dictionary to define each word separately. Respondent contends that "program" is defined as "a presentation or item on radio or television." The Oxford American College Dictionary (2002), p 1085. The word "matter" is defined as "the substance or content . . . as distinct from its manner or form." *Id.* Respondent also quotes the definition of "matter" from Black's Law Dictionary, The American Heritage College Dictionary and merriam-webster.com. Ultimately, Respondent contends that the basketball games was the "program matter" that was conveyed to the viewing audience.

Under *Krohn v Home-Owners Insurance Co***,** 490 Mich 145; __ NW2d __ (2011), "[t]o ascertain the meaning of a statutory term, a court *may* consult a dictionary." (Emphasis added) However, the Michigan Supreme Court in *Duffy v Department of Natural Resources*, 490 Mich 198; __ NW2d __ (2011), found that "[r]elying on an unrelated statute to construe another is to be avoided, *but can be appropriate when there is no alternative definition*." (Emphasis added) The Tribunal finds that Petitioner's reliance on other statutes is supported. Conversely, although a dictionary *may* be consulted to define a statutory term, Respondent's definition of "program matter" is overly broad. Because there is no dictionary definition of "program matter," Petitioner was forced to combine two separate definitions. Therefore, the use of the term "program matter," in other law is more compelling an interpretation than the dictionary definition.

Rather than rely on Petitioner's very narrow definition from 47 USC §508, the Tribunal has completed its own research and found a report and policy statement issued by the FCC. In In the Matter of Petition of Action for Children's Television, 31 Rad. Reg. 2d (P & F) 1228 (1974), the FCC instituted a wide-ranging inquiry into children's programming and advertising practices. The report distinguished "program matter" and "commercial matter" as broadcasters are required to maintain an adequate separation between the two in programs designed for children. Further,

47 CFR 73.670 defines "commercial matter" as ". . . air time sold for purposes of selling a product or service and promotions of television programs or video programming services other than children's or other age-appropriate programming appearing on the same channel or promotions for children's educational and informational programming on any channel." Thus, both "program matter" and "commercial matter" is airtime however, one is for commercial advertisement and the other is for programming. Thus, the Tribunal finds that "program matter" is that which is not "commercial matter." Petitioner's distinction between recorded broadcasts and live broadcasts is not compelling. The Tribunal cannot assume that Petitioner's live broadcasts are not "program matter" until there is commentary. Petitioner asserts that the ". . . broadcast itself is not the game. Not only the game. That's a piece of it, but it's not a program until somebody puts it together." Transcript, p 25. The Tribunal finds that because Petitioner's games are not commercial matter, they are program matter and are, thus, includable in Petitioner's SBT tax base under MCL 208.9(4)(g)(vi) and MCL 208.9(7)(c)(v).

The final issue for the Tribunal to determine is the sourcing of Petitioner's broadcast revenues for sales factor apportionment purposes. First, the Tribunal must look to the Telecast Rights Agreement ("Agreement") as it is the formal contract defining the scope of the sale between the parties. The Agreement states that ". . . the Network shall pay to the Team a per game rights fee . . . for each Covered Game other than a Post-Season Game . . . ." Stipulated Exhibit 4. The contract is not a single transaction involving a 40-game broadcast package, as asserted by Respondent. Although the Agreement does encompass all covered games, payment is made on a per game basis. Thus, the Tribunal shall look to the location of the games to determine the appropriate apportionment.

The parties have stipulated that, for tax year ending 6/30/2002, there were 24 Michigan

Games and 17 Non-Michigan Games, for tax year ended 6/30/2003, there were 25 Michigan Games and 16 Non-Michigan Games, and for tax year ended 6/30/2004, there were 21 Michigan Games and 15 Non-Michigan Games.

In conclusion, the Tribunal finds that national broadcast revenue shall not be included in Petitioner's tax base for the years at issue. However, the local broadcast revenue received from Fox should be included in Petitioner's tax base for the tax years at issue for the games played in Michigan only. The assessment shall be revised as follows, pursuant to the Parties' Supplemental Joint Stipulation of Uncontroverted Facts:

Assessment No.: N950905

Tax Year Ended	SBT	Interest	Penalty
6/30/2002	$70,314	Statutory	$0
6/30/2003	$49,495	Statutory	$0
6/30/2004	$129,434	Statutory	$0

JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is DENIED in part and GRANTED in part.

IT IS FURTHER ORDERED that Respondent's Final Assessment N950905 issued April 25, 2006, is REVISED to reflect the assessment values above.

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

MICHIGAN TAX TRIBUNAL

Entered: December 29, 2011 By: Steven H. Lasher