

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

Staffplus Michigan, Inc.,
Petitioner,

MTT Docket No. 357602

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Staffplus Michigan, Inc., appeals the denial by Respondent, Michigan Department of Treasury, of Petitioner's small business credit claimed on its 2004 Single Business Tax Return. The parties dispute whether the relevant facts in this matter meet the requirements of MCL 208.36(2)(b)(i), which provides that an entity is disqualified from claiming the small business credit if it provides compensation to one of its officers or shareholders in an amount greater than \$115,000. The Tribunal disagrees with Petitioner and determines that Assessment Number P102721 is proper and shall be affirmed.

BACKGROUND

Staffplus Michigan, Inc. ("Petitioner"), a C Corporation, was owned 100% by Philip Schreiber during the tax period at issue. During the same period, Mr. Schreiber also owned 100% of the stock of S&C Corporation, Inc. ("S&C"). Petitioner and S&C were members of a controlled group. Thus, Petitioner filed an SBT return for the tax period ending on June 30, 2005 claiming a small business credit of \$23,088, which eliminated its tax liability.

Respondent denied the small business tax credit claimed by Petitioner because Petitioner and S&C were part of a controlled group of corporations and Philip Schreiber received compensation from S&C in excess of the \$115,000 statutory limitation. Respondent issued an Intent to Assess P102721 on July 3, 2007. Petitioner requested an informal conference with

Respondent's Hearings Division, which was held on January 29, 2008. The hearing officer recommended, and Respondent accepted, that the assessment be assessed as originally determined. Respondent issued its Final Bill for Taxes Due, Assessment number P102721, to Petitioner on July 16, 2008 in the amount of \$23,088 plus interest.

Petitioner filed this appeal with the Tribunal on August 19, 2008. On September 7, 2011, the parties filed cross Motions for Summary Disposition. On September 28, 2011, Respondent filed a Response to Petitioner's Motion for Summary Disposition. On October 3, 2011, Petitioner filed a Response to Respondent's Motion for Summary Disposition.

PETITIONER'S CONTENTIONS

Petitioner requests that the Tribunal grant Summary Disposition in its favor pursuant to MCR 2.611(C)(10) on the basis that "there is no genuine issue as to any material fact, and the Petitioner is entitled to judgment as a matter of law." (Petitioner's Motion for Summary Disposition, page 1) Petitioner contends that Respondent erred by concluding that shareholder/officer compensation must be consolidated pursuant to MCL 208.37(7) for purposes of determining the disqualifying limitation set forth under MCL 208.36(2)(b). Specifically, Petitioner contends that the compensation paid by S&C, an entity under common control with Petitioner, to the common shareholder and officer, does not disqualify Petitioner from the small business credit. Specifically, Petitioner argues that "[t]he language of MCL 208.36(7), which lists an affiliated group, a controlled group of corporations, or an entity under common control ... shall not take the credit unless the business activities of the entities are consolidated, uses the plural in the first two, but the singular in the last." (Emphasis omitted) (*Id.* at 10) Thus, Petitioner argues that "... with respect to an entity under common control the test is applied on an entity by entity basis so that one entity may still qualify for the credit even though another entity under common control cannot." (*Id.*)

Petitioner argues that only business activities of the entities must be consolidated (See MCL 208.3) as compensation paid to an employee as a result of services rendered by an employee to his employer is not a business activity. Therefore, Petitioner contends that because S&C paid more than \$115,000 in compensation to Philip Schreiber, only S&C is disqualified from the small business credit.

Petitioner, in its response to Respondent's Motion, argues that "Respondent's disallowance of the credit, their cross entity disqualification, was not based on a clear reading of the law, but was based on the instructions to Single Business Tax Form C-8009, which do not have the force and effect of law." (Petitioner's response, p 3)

RESPONDENT'S CONTENTIONS

Respondent requests that the Tribunal grant summary disposition in its favor pursuant to MCR 2.116(C)(10). Respondent asserts that "...the disqualifier set forth in Section 36(2)(b)(i) disqualifies all entities in a controlled group if one [entity] pays its officer or shareholder more than \$115,000." Respondent's Brief in Support; page 7. Respondent cites RAB 1989-49 "... to explain the consolidated or combined filing provisions of the SBTA." (Respondent's Brief in Support of its Motion, p 5) The RAB "... specifically addresses the small business credit set forth in MCL 208.36 that is at issue in this case and provides [that] '[t]he small business credit is determined as though the member corporations were filing as one corporation. **Exception:** The shareholder and officer disqualifiers are computed on a separate return basis.'" Emphasis in original. *Id.* Respondent states that:

In other words, an officer or shareholder who is compensated by more than one entity under common control, but earns less than the disqualifying amount from each entity would not cause the credit to be disqualified. . . . But, a shareholder or officer who receives more than the disqualifying amount from one entity would disqualify all entities in the controlled group.

Id. at 6. Thus, Respondent contends that because S&C paid Philip Schreiber more than \$115,000, the entire controlled group is disqualified from claiming the small business credit.

In its response to Petitioner's Motion for Summary Disposition, Respondent contends that "[c]ompensation paid to an officer or shareholder is not excluded by the definition of a business activity under the SBTA." (Respondent's response, p 4). Respondent states that

even if services rendered by an employee or corporate director are excluded from the definition of business activity, this would not preclude Treasury from considering compensation paid to an officer or shareholder as part of the business activities that should be consolidated in determining whether the officer or shareholder disqualifier is applicable. *Id.*

FINDINGS OF FACT

The Tribunal finds the following facts:

1. Petitioner was incorporated as a Michigan corporation on September 21, 2004, and dissolved on November 9, 2010.
2. Petitioner filed as a “C” Corporation for Federal income tax purposes for fiscal tax year ended 6/30/2005.
3. During the tax period at issue, Petitioner was owned 100% by Philip Schreiber.
4. Philip Schreiber was the resident agent and only officer of Petitioner.
5. During the tax period at issue, Philip Schreiber also owned 100% of the outstanding stock of S&C Corporation, Inc. (S&C).
6. Philip Schreiber was the resident agent and only officer of S&C.
7. S&C filed as a “C” Corporation for Federal income tax purposes for tax year ended 12/31/2005.
8. Petitioner and S&C were members of a controlled group of corporations as defined in Section 1563 of the Internal Revenue Code and referenced in Section 36, paragraph 7 [MCL 208.36(7)] of the Single Business Tax Act.
9. Petitioner filed a 2004 Michigan Single Business Tax Annual Return for the short fiscal period September 21, 2004 through June 30, 2005.
10. Petitioner claimed a small business credit on its 2004 Single Business Tax Annual Return in the amount of \$23,088, which eliminated the tax liability.
11. S&C filed a 2005 Michigan Single Business Tax Annual Return for the calendar year ending December 31, 2005.
12. Petitioner did not report payment of compensation to any officers or shareholders on its Federal income tax return or its Single Business Tax return for the period ended June 30, 2005.
13. During the tax period at issue, Philip Schreiber was compensated by S&C in an amount greater than \$115,000.
14. Respondent denied the small business credit claimed by Petitioner asserting that it was disqualified from claiming the credit pursuant to MCL 208.36(2)(b)(i), which provides that an entity is disqualified from claiming the small business credit if it provides compensation to one of its officers or shareholders in an amount greater than \$115,000.

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' Motions for Summary Disposition under the criteria for MCR 2.116(C)(10), and based on the pleadings, affidavits and other documentary evidence filed with the Tribunal, determines that denying Petitioner's Motion and granting Respondent's Motion is appropriate. The Tribunal concludes that the pleadings, affidavits 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. The parties agree that for the 2004 tax year, short period ending June 30, 2005, that Petitioner (owned by Philip Schreiber, an individual) claimed a small business credit on its Michigan SBT return.

The SBTA includes a small business credit that reduces the tax liability for qualifying small business. MCL 208.36. To qualify for this credit, an entity cannot be disqualified by any one of three statutory disqualifiers. MCL 208.36(2) states that:

The [small business credit] 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.

The parties agree that Petitioner did not exceed the gross receipts limitation or the adjusted business income limitation, as set forth above.

The issue in this appeal pertains to the third disqualifier. MCL 208.36(2)(b)(i) states that a C Corporation is disqualified if the compensation and director's fees of a shareholder or officer exceed \$115,000.00 for tax years commencing after December 31, 1997. There is no dispute that Petitioner did not pay any compensation to its only officer, Philip Schreiber, during the tax period at issue. However, Philip Schreiber was compensated by S&C in an amount greater than \$115,000.

The pivotal issue is whether the situation where a shareholder or officer receives more than the disqualifying amount from one entity would disqualify all entities in the controlled group. Petitioner's argument that ". . . with respect to an entity under common control the test is applied on an entity by entity basis so that one entity may still qualify for the credit even though

another entity under common control cannot,” is not persuasive. (Petitioner’s Motion for Summary Disposition, page 10). Respondent concedes, and cites RAB 1989-49, that the shareholder and officer disqualifiers are computed on a separate return basis. Thus, the compensation paid to an officer or shareholder by one entity is not added to the compensation paid to an officer or shareholder of all the entities in the controlled group to determine disqualification under MCL 208.36(2)(b)(i). The Tribunal finds Respondent’s argument persuasive in that although the shareholder and officer disqualifiers are computed on a separate return basis, if any of the commonly controlled entities’ officers or shareholders are compensated more than \$115,000.00, the entire commonly controlled entity is disqualified from the small business credit.

Petitioner argues that only business activities of the entities must be consolidated as compensation paid to an employee as a result of services rendered by an employee to his employer is not a business activity. See MCL 208.36(7) and MCL 208.3. However, Petitioner manipulates the language of MCL 208.36(7) to its advantage. MCL 208.36(7) states, in pertinent part, that “. . . an entity under common control as defined by the internal revenue code shall not take the credit allowed by this section unless the business activities of the entities are consolidated.” This section determines when a credit can be allowed, not whether the disqualifying compensation of one of the entities’ officers and shareholders disqualifies the entire commonly controlled entity.

Thus, the Tribunal determines that there are no genuine issues of material fact remaining and Respondent’s Motion, under MCR 2.116(C)(10), shall be granted. The Tribunal concludes that Philip Schreiber received compensation in excess of \$115,000 from S&C, one of the members of the controlled group; thus the controlled group is disqualified from claiming the small business credit and Respondent’s assessment is affirmed.

JUDGMENT

IT IS ORDERED that Respondent’s Motion for Summary Disposition is GRANTED.

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

IT IS FURTHER ORDERED that Respondent’s Final Assessment Q089120, issued December 26, 2008, is AFFIRMED.

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

MICHIGAN TAX TRIBUNAL

Entered: January 10, 2012

By: Cynthia J Knoll