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

Comerica Incorporated,
Petitioner,

v MTT Docket No. 17-000150

Michigan Department of Treasury, Tribunal Judge Presiding
Respondent. David B. Marmon

ORDER PARTIALLY GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER PARTIALLY GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

This matter concerns tax liability for financial institutions under the now-repealed Michigan Business Tax Act. Specifically, at issue is the calculation of the tax base upon which the tax is applied for tax years 2008, 2009, and 2010. Also, at issue is whether or not certain tax credits under the old Single Business Tax Act and subsequently under the Michigan Business Tax Act carry over to a new entity. A third issue regarding the ordering of such credits has also been raised.

Pursuant to the Tribunal's Prehearing Order, the parties filed Joint Stipulation of Facts on March 12, 2018. Also pursuant to that order, the parties filed dispositive motions on April 11, 2018. Respondent filed its motion requesting that the Tribunal enter summary judgment, arguing that its assessments are correct. Petitioner filed its Motion, alleging that Respondent improperly calculated Petitioner's tax base by a peculiar method of averaging, turning a $5 billion tax base into an $8 billion tax base. Petitioner further contends Respondent wrongfully denied the carryover of certain tax credits by treating them as an illegal second assignment from Comerica-Michigan to Comerica- Texas, rather than a transfer according to law. On May 2, 2018, both parties filed response briefs to the other party's Motion. Finally, the Tribunal heard oral arguments from the parties on May 23, 2018.

The Tribunal has reviewed the Motions, Responses, the Joint Stipulation of Facts and the evidence submitted and finds that partially granting each party's Motion for Summary Disposition is warranted.

PETITIONER'S CONTENTIONS

Petitioner contends that it is entitled to a refund for each year based upon an adjusted tax base, and additional refunds/credits for disallowed credits. Its contentions regarding refunds for adjustment of tax base are as follows:

Year	**contended tax base**	**apportionment rate**	**tax rate**	**resulting tax**	**surcharge rate**	**resulting surcharge**	**assessed and collected tax**	**assessed & collected Surcharge**	**tax refund**	**surcharg refund**	**total refund**
2008	$5,219,724,306	0.280684	0.00235	$3,442,969	0.277	953,702	$5,499,715	$1,523,421	$2,056,746	$569,719	$2,626,465
2009	$4,927,489,469	0.384434	0.00235	$4,451,592	0.234	1,041,673	$6,161,396	$1,441,767	$1,709,804	$400,094	$2,109,898
2010	$4,941,253,701	0.319618	0.00235	$3,711,387	0.234	868,465	$4,444,157	$1,039,933	$732,770	$171,468	$904,238
totals				$11,605,948		2,863,839	$16,105,268	$4,005,121	$4,499,320	$1,141,282	$5,640,602

Additionally, Petitioner contends that it is entitled to certain credits as follows:

2008	Audit Determination	Petitioner's determination	difference
SBT Investment Tax Credit(Comerica Bank)	$738,954	$738,954	$0
SBT Investment Tax Credit (Comerica Inc)	0	$34,983	$34,983
SBT Historic Preservation Credit	0	$809,485	$809,485
SBT "New" Brownfield Credit	0	$1,589,303	$1,589,303
Compensation and Investment Tax Credit	$1,271,340	$1,271,340	$0
Historic Preservation Credit	$605,606	$0	($605,606)
Brownfield Redevelopment Credit	$856,352	$0	($856,352)
Total Credits	$3,472,252	$4,444,065	$971,813
2009	Audit Determination	Petitioner's determination	difference
SBT Investment Tax Credit(Comerica Bank)	0	0	0
SBT Investment Tax Credit (Comerica Inc)	0	0	0
SBT Historic Preservation Credit	0	0	0
SBT "New" Brownfield Credit	0	1,699,529	1,699,529
Compensation and Investment Tax Credit	1,886,047	1,886,047	0
Historic Preservation Credit Carryforward	0	605,606	605,606
Brownfield Redevelopment Credit	978,832	978,832	0
Brownfield Redevelopment Credit carryfwd	0	803,616	803,616
Total Credits	2,864,879	5,973,630	3,108,751
2010	Audit Determination	Petitioner's determination	difference
SBT Investment Tax Credit(Comerica Bank)	0	0	0
SBT Investment Tax Credit (Comerica Inc)	0	0	0
SBT Historic Preservation Credit	0	0	0
SBT "New" Brownfield Credit	0	0	0
Compensation and Investment Tax Credit	1,559,753	1,559,753	0
Historic Preservation Credit	0	0	0
Brownfield Redevelopment Credit	891,400	891,400	0
Brownfield Redevelopment Credit carryfwd	0	52,736	52,736
Total Credits	2,451,153	2,503,889	52,736
Total additional credit			$4,133,300

RESPONDENT'S CONTENTIONS

Respondent contends that its audit results for each year are correct and that no refund or additional credit is due.

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[1] In this case, both parties moved for summary disposition under MCL 2.116(C)(10).

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 "when

[1] See TTR 215.

the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law."[2]

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.[3] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[4] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[5] Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving 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.[6] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[7]

CONCLUSIONS OF LAW

The Tribunal has carefully considered each parties' Motion under MCR 2.116 (C)(10) and finds that partially granting the Motions are warranted. Two broad maxims both apply to the facts of this case. Tax exactions, property or excise, must rest upon legislative enactment, and collecting officers can only act within express authority conferred by law:

> Tax collectors must be able to point to such express authority so that it may be read when it is questioned in court. The scope of tax laws may not be extended by

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2 *Lowrey v LMPS & LMPJ, Inc,* 500 Mich. 1, 5; 890 NW2d 344 (2016) (citation omitted).
[3] See *Quinto v Cross and Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[4] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[5] *Id.*
[6] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[7] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

> implication or forced construction. Such laws may be made plain, and the language thereof, if doubious,[sic] is not resolved against the taxpayer.[8]

This principle was more recently restated by the Supreme Court: “the authority to impose a tax must be expressly authorized by law; it will not be inferred. Moreover, ambiguities in the language of a tax statute are to be resolved in favor of the taxpayer.”[9]

The other maxim concerns exceptions to the tax, such as deductions, exemptions and credits. The Court of Appeals more recently summed up the law in this regard, as follows:

> Taxation is the rule, and exemptions are the exception. *Ladies Literary Club v. City of Grand Rapids,* 409 Mich. 748, 754, 298 N.W.2d 422 (1980). Consequently, statutory exemptions are strictly construed against the taxpayer. *ANR Pipeline Co. v. Dep't of Treasury*, 266 Mich.App. 190, 201, 699 N.W.2d 707 (2005). Similarly, a deduction presents a matter of legislative grace, and a clear provision must be identified to allow for a particular deduction. *Id.* A deduction must be clearly expressed because the “propriety of a deduction does not turn upon general equitable considerations, such as a demonstration of effective economic and practical equivalence.” *Perry Drug Stores, Inc. v. Dep't of Treasury*, 229 Mich.App. 453, 461, 582 N.W.2d 533 (1998) (citation and quotation marks omitted). The burden of proving a deduction is on the party seeking the deduction. See *Southfield Western, Inc. v. City of Southfield,* 146 Mich.App. 585, 590, 382 N.W.2d 187 (1985).[10]

Applying these two maxims to the motions, the Tribunal is in agreement with Petitioner that its tax base was improperly calculated by including capital from a defunct entity and double-counting assets. Further, the Tribunal is in agreement with Respondent that Petitioner has failed to carry its burden to show that the disallowed tax credits were available to it as a matter of law.

The parties stipulated to the following facts which the Tribunal finds relevant:

> 3. Until October 31, 2007, a Comerica subsidiary, Comerica Bank, was a Michigan Banking Corporation organized as a state-chartered bank regulated by the State of Michigan (“Comerica-Michigan”).

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[8] *In Re Dodge Brothers*, 241 Mich 665,669; 217 NW 777 (1928).
[9] *Mich Bell Tel Co . Dep't of Treasury*, 445 Mich 470, 477 (1994).
[10] *Menard Inc v Dep’t of Treasury*, 302 Mich App 467, 473; 838 NW2d 736 (2013).

4. As of October 31, 2007, Comerica-Michigan was capitalized with 5,852,732 shares of common stock and 350,000 shares of preferred stock.

5. For strategic business purposes, on October 8, 2007, Comerica created Comerica Bank, a Texas Banking Association, under the laws of the State of Texas, with authority to issue 500 shares of common stock ("Comerica-Texas").

6. On October 16, 2007, Comerica-Michigan and Comerica-Texas entered into an "Agreement and Plan of Merger," under which Comerica-Michigan would be merged into Comerica-Texas.
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8. Pursuant to the Agreement and Plan of Merger and the certification of the Texas authorities, Comerica-Michigan was merged into Comerica-Texas on October 31, 2007 at 11:59:59 PM.
***
10. Comerica-Texas was the only acquiring corporation in the merger. Comerica-Michigan was the only acquired corporation.

11. Immediately following the merger, on October 31, 2007 at 11:59:59 PM, Comerica-Michigan ceased to exist and was no longer a state chartered bank.

12. Comerica filed 2008, 2009, 2010, and 2011 Michigan Business Tax returns for its unitary business group. It included Comerica-Texas as a member of the unitary business group, but did not separately include Comerica-Michigan as a member of the unitary business group.

I. Net Capital Calculation

Comerica attached as an Exhibit 2, Respondent's First Audit Report, which showed its determination of Comerica Bank's Determined Net Capital for 2004-2011:

	Determined Net Capital	Member2-Comerica Bank
	2004	$5,261,816,056
	2005	$5,248,615,346
	2006	$5,194,400,994
	2007	$5,381,750,034
	2008	$5,012,039,101
	2009	$3,800,641,868
	2010	$5,317,436,509
	2011	$6,035,432,756

The five-year averages resulting from this determination, also found in Exhibit 2, are as follows:

5-Year Averages Tax Base Member 2 - Comerica Bank

2008 (2004-2008) $5,219,724,306
2009 (2005-2009) $4,927,489,469
2010 (2006-2010) $4,941,253,701
2011 (2007-2011) $5,109,460,054

Comerica is in agreement with this determination. What Comerica objects to and is the first basis for this appeal is the redetermination of its Net Capital in the second audit.

Net Capital	Comerica TX (member 2)	Comerica-MI (member 42)	Total
2004	0	$5,261,816,056	$5,261,816,056
2005	0	$5,248,615,346	$5,248,615,346
2006	0	$5,194,400,994	$5,194,400,994
2007	$5,381,750,034	0	$5,381,750,034
2008	$5,012,039,101	0	$5,012,039,101
2009	$3,800,641,868	0	$3,800,641,868
2010	$5,317,436,509	0	$5,317,436,509

For 2008, Respondent took a two-year average (2007-2008) for Comerica-TX of $5,196,894,568 and a five-year average for Comerica-MI (2004-2008) of $3,140,966,479 and adding them together determined the tax base for 2008 to be $8,337,861,047, rather than the original determination of $5,219,724,306; a difference in tax base of $3,118,136,741. Similarly, using a three-year average for Comerica-TX and adding the base on a 5-year average for Comerica-MI, Respondent determined a tax base for 2009 of $6,820,080,269 and, using a four-year average, $5,916,847,077 for 2010.

The specific provision used to determine the tax base at issue is MCL 208.1265, which states:

> (1) For a financial institution, tax base means the financial institution's net capital. Net capital means equity capital as computed in accordance with generally accepted accounting principles less goodwill and the average daily book value of United States obligations and Michigan obligations. If the financial institution does not maintain its books and records in accordance with generally accepted accounting principles, net capital shall be computed in accordance with the books

> and records used by the financial institution, so long as the method fairly reflects the financial institution's net capital for purposes of the tax levied by this chapter. Net capital does not include up to 125% of the minimum regulatory capitalization requirements of a person subject to the tax imposed under chapter 2A.
>
> **(2) Net capital shall be determined by adding the financial institution's net capital as of the close of the current tax year and preceding 4 tax years and dividing the resulting sum by 5. If a financial institution has not been in existence for a period of 5 tax years, net capital shall be determined by adding together the financial institution's net capital for the number of tax years the financial institution has been in existence and dividing the resulting sum by the number of years the financial institution has been in existence. For purposes of this section, a partial year shall be treated as a full year.**
>
> **(3)** For a unitary business group of financial institutions, net capital calculated under this section does not include the investment of 1 member of the unitary business group in another member of that unitary business group.
>
> **(4)** For purposes of this section, each of the following applies:
>
> **(a) A change in identity, form, or place of organization of 1 financial institution shall be treated as if a single financial institution had been in existence for the entire tax year in which the change occurred and each tax year after the change.**
>
> **(b)** The combination of 2 or more financial institutions into 1 shall be treated as if the constituent financial institutions had been a single financial institution in existence for the entire tax year in which the combination occurred and each tax year after the combination, and the book values and deductions for United States obligations and Michigan obligations of the constituent institutions shall be combined. A combination shall include any acquisition required to be accounted for by the surviving financial institution in accordance with generally accepted accounting principles or a statutory merger or consolidation. [Emphasis added]**.**

Petitioner first argues that Respondent's methodology of including Comerica-MI, which ceased to exist on October 31, 2007, and adding its capital together with Comerica-TX amounts to taxation in 2008, 2009 and 2010 of a financial institution that no longer existed. In support, Petitioner relies on MCL 208.261(f), which defines financial institution as:

> (f) "Financial institution" means any of the following:
> (i) A bank holding company, a national bank, a state chartered bank, an office of thrift supervision chartered bank or thrift institution, a savings and loan holding

> company other than a diversified savings and loan holding company as defined in 12 USC 1467a(a)(F), or a federally chartered farm credit system institution.
> (ii) Any person, other than a person subject to the tax imposed under chapter 2A, who is directly or indirectly owned by an entity described in subparagraph (i) and is a member of the unitary business group.
> (iii) A unitary business group of entities described in subparagraph (i) or (ii), or both.

Respondent counters that it is not taxing Comerica-MI; rather, it is taxing a unitary business group. Respondent's argument begs the question as to whether a disbanded bank should be part of a unitary business group. The Tribunal holds that a former financial institution is not a financial institution and therefore cannot be part of the unitary business group.

Respondent also argues that Comerica-MI's net capital for purposes of the averaging provision must be accounted for separately in the years prior to the combination with Comerica-TX, per Section 265(4)(b). The Tribunal disagrees and finds such reasoning to be circular, as 265(4)(b) only applies to financial institutions, which Comerica-MI is not as of October 31, 2007. The Tribunal fails to find support in the text of Section 265 for extending a tax to a former financial institution.

Respondent counters that its interpretation of an ambiguous statute should stand, except for compelling reasons.[11] Petitioner's rejoinder to this argument is because Respondent has itself abandoned this interpretation, it is unclear which position is entitled to deference. Respondent issued a Notice dated November 21, 2016,[12] which states:

> NOTICE TO TAXPAYERS REGARDING FIVE-YEAR AVERAGING CALCULATION OF NET EQUITY CAPITAL FOR FINANCIAL INSTITUTIONS COMBINING WITH OTHER FINANCIAL INSTITUTIONS (RESCIND MBT FAQ FS AND CIT INSURANCE COMPANIES/FINANCIAL INSTITUTIONS FAQ 6)

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[11] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008).
[12] Exhibit 12 to Petitioner's Brief

> Issued: November 21, 2016
>
> Financial institutions calculate their MBT and their CIT net capital tax base by averaging net capital over a five-year period (or the number of years in existence if fewer than five years).1 When two or more financial institutions combine into one, the law requires the combined institution to be treated as if it had been a single financial institution for the entire tax year in which the combination occurs and for each tax year after the combination.2 The treatment of entities in the years prior to the combination for purposes of calculating net capital during the five-year lookback period was previously interpreted to require that net capital for both the surviving and acquired entities for tax years prior to the year of combination should be included in the calculation of the tax base. This policy was reflected in MBT FAQ F5 and CIT Insurance Companies/Financial Institutions FAQ 6.
>
> Upon further review of this policy, the Department now rescinds MBT FAQ F5 and CIT Insurance Companies/Financial Institutions FAQ 6. *The Department will no longer calculate net capital for years prior to the combination year using both the surviving and acquired entities' net capital. When two or more financial institutions combine, only the surviving financial institution's net capital for the years prior to the combination is used to calculate the surviving entity's tax base. Thus, for the years prior to the combination, the surviving financial institution will use only its own books and records to compute the five-year look-back averaging calculation. In the year of the acquisition and for all years following the combination, the surviving financial institution will merge its books and records with those of the acquired financial institution and the combined books and records will be used to compute the net capital tax base.*
>
> *The Department will give this change in policy full retroactive effect*, and will apply it to all open tax years. Whether a period is open under the statute of limitations may depend on whether and when an audit of a taxpayer's books and records commenced.3 If a taxpayer previously filed a return under MBT FAQ F5 and the tax period remains open, the taxpayer may amend accordingly. [Emphasis added].
>
> 1 MCL 208.1265(2) and MCL 206.655(2).
> 2 MCL 208.1265(4)(b).
> 3 See MCL 205.27a(2) and (3) and LR 2015-2
> http://www.michigan.gov/documents/treasury/LR_2015-2_-_Administration_of_PA_3_491518_7.pdf

Respondent argues that this notice only applies to financial institutions that merge with outside institutions. When asked at oral argument why this Notice was issued to that group, Respondent answered to the effect that its prior regimen was unfair to those institutions. The Tribunal finds this rationale unconvincing. Clearly, its treatment of Petitioner in calculating its tax base amounts to double-counting assets and is no fairer to Petitioner than it would be to a bank with an outside acquisition. The Tribunal also agrees with Petitioner that § 265(4)(b) refers to both mergers and consolidation. Thus, the Tribunal fails to find any distinction with a difference between merger and acquisition, as both are combinations referred to in the statute. The interpretation set forth by Respondent in its 11/21/16 Notice avoids the pitfalls found in its previous interpretation, which taxes entities beyond the scope of this section – former financial institutions. It also avoids the accounting anomie of double counting assets, which doubtlessly does not comport with Generally Accepted Accounting Principles, referred to throughout §265.

In summary, as to the issue of determining the tax base, the long-held rule in this state is the scope of tax laws may not be extended by implication or forced construction. Such laws may be made plain, and the language thereof, if dubious, is not resolved against the taxpayer.[13] Double-counting assets and taxing entities that are no longer financial institutions is a forced and dubious construction. Respondent's expansion of Petitioner's tax base to include a legally defunct bank is an extension of a tax by implication, which is prohibited under Michigan law. Accordingly, as there is no factual dispute, only a dispute as to the law, summary disposition is appropriate. As Petitioner's argument prevails concerning the tax base, summary disposition in its favor is appropriate on this issue.

II. Tax Credits

The second issue before the Tribunal is whether Petitioner is entitled to tax credits assigned to Comerica-MI. Petitioner argues that under Texas corporation law, as well as IRC

[13] *In Re Dodge Brothers*, *supra* at 669.

368(a)(1)(F), and under Michigan banking law, those credits transfer by law, rather than by an assignment. Respondent counters that Texas corporate law and Michigan banking law are irrelevant as to tax credits. As to federal law, Respondent argues that Petitioner has failed to prove its merger qualified under IRC 368(a)(1)(F), and even if it did, that law is not determinative as to tax credits.

The tax credits at issue are MCL 208.38g and MCL 208.39c. Both credits contain severe restrictions on assignment of the credits. Section 38g states in relevant part:

> (18) Except as otherwise provided in this subsection, for projects for which a certificate of completion is issued before January 1, 2006, if a qualified taxpayer is a partnership, limited liability company, or subchapter S corporation, *the qualified taxpayer may assign all or a portion of a credit* allowed under subsection (2) or (3) *to its partners, members, or shareholders, based on their proportionate share of ownership of the partnership, limited liability company, or subchapter S corporation or based on an alternative method approved by the Michigan economic growth authority. A credit assignment under this subsection is irrevocable* and, except for a credit assignment based on a multiphase project, shall be made in the tax year in which a certificate of completion is issued. A qualified taxpayer may claim a portion of a credit and assign the remaining credit amount. If the qualified taxpayer both claims and assigns portions of the credit, the qualified taxpayer shall claim the portion it claims in the tax year in which a certificate of completion is issued. *A partner, member, or shareholder that is an assignee shall not subsequently assign a credit or any portion of a credit assigned under this subsection.* The credit assignment under this subsection shall be made on a form prescribed by the Michigan economic growth authority. The qualified taxpayer shall send a copy of the completed assignment form to the Michigan economic growth authority in the tax year in which the assignment is made. A partner, member, or shareholder who is an assignee shall attach a copy of the completed assignment form to its annual return required under this act, for the tax year in which the assignment is made and the assignee first claims a credit, which shall be the same tax year. [Emphasis added].

Similarly, MCL 208.39c provides as follows:

> (7) If a qualified taxpayer is a partnership, limited liability company, or subchapter S corporation, the qualified taxpayer *may assign all or any portion of a credit allowed under this section to its partners, members, or shareholders, based on the partner's, member's, or shareholder's proportionate share of ownership* or based on an alternative method approved by the department. *A credit assignment under this subsection is irrevocable* and shall be made in the

> tax year in which a certificate of completed rehabilitation is issued. A qualified taxpayer may claim a portion of a credit and assign the remaining credit amount. *A partner, member, or shareholder that is an assignee shall not subsequently assign a credit or any portion of a credit assigned to the partner, member, or shareholder under this subsection.* A credit amount assigned under this subsection may be claimed against the partner's, member's, or shareholder's tax liability under this act or under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.532. A credit assignment under this subsection shall be made on a form prescribed by the department. The qualified taxpayer and assignees shall send a copy of the completed assignment form to the department in the tax year in which the assignment is made and attach a copy of the completed assignment form to the annual return required to be filed under this act for that tax year.

Both parties acknowledge that the credit has already been assigned once from one of Comerica-MI's partners.[14] Respondent argues paradoxically that there can be no assignment because the procedure for assigning was not followed, and if there was an assignment, it would be void, as it violates the probation against a second assignment found in each credit.

Petitioner argues that Michigan recognizes a difference between transfers as a matter of law and of assignments. In *KIM v JP Morgan Chase Bank, NA*,[15] the Supreme Court differentiated between the transfer of a mortgage by operation of law and the subsequent transfer via assignment. The Court noted that in fact there were two transfers of a mortgage; the first from the former mortgage holder to the FDIC by 12 USC 1821(d)(2)(G)(i)(II), and a second transfer from the FDIC to the Defendant. As to what constitutes a *transfer by operation of law,* the Supreme Court stated:

> Similarly, this Court has long understood the expression to indicate "the manner in which a party acquires rights *without any act of his own.*" Accordingly, there is ample authority for the proposition that a transfer that takes place by operation of law occurs unintentionally, involuntarily, or through no affirmative act of the transferee.[16] [Emphasis supplied in original; footnote omitted].

[14] See Petitioner's Exhibit 13, at 000337-000340
[15] *KIM v JP Morgan Chase Bank, NA,* 493 Mich 98; 825 NW2d 329 (2012)
[16] *Id*., at 110.

The second case cited by Petitioner is *Angela Sinacola Living Trust v PNC Bank NA*.[17] In *Sinacola*, which also involved the validity of a mortgage foreclosure without an assignment, the Court of Appeals held that a transfer of a mortgage through a series of mergers is an acquisition by operation of law in accordance with the National Banking Act, 12 USC 1 *et seq*.

While there was a merger between Comerica-MI and Comerica TX, it is far from clear that the transfer of credits from one entity to another was unintentional or involuntary, as the entities were both formed by the Petitioner.

In the present case, Petitioner argues that Section 10.008 of the Texas Business Organizations Code also transfers the tax credits by virtue of the merger, and not by assignment. Section 10.008 states in relevant part as follows:

> (a) When a merger takes effect:
>
> (1) the separate existence of each domestic entity that is a party to the merger, other than a surviving or new domestic entity, ceases;
>
> *(2) all rights, title, and interests to all real estate and other property owned by each organization that is a party to the merger is allocated to and vested, subject to any existing liens or other encumbrances on the property*, in one or more of the surviving or new organizations as provided in the plan of merger without:
> (A) reversion or impairment;
> (B) any further act or deed; or
> (C) any transfer or assignment having occurred; [Emphasis added]

One issue raised by this statute is whether a tax credit is "other property." At oral argument, Petitioner contended that it must be property, since it can be assigned. The Tribunal, however, concludes that a non-revocable tax credit is more akin to a privilege than to property.

[17] *Angela Sinacola Living Trust v PNC Bank NA*, unpublished per curiam decision of the Michigan Court of Appeals decided November 13, 2014 (Docket No 317481).

The Tribunal is persuaded by the logic of *Chrysler Corp v CIR*, [18] where the Sixth Circuit Court of Appeals described the Foreign Tax Credit as "a privilege granted by the government, and hence the statute is to be strictly construed in favor of the government." While *Chrysler* is a federal case about a different tax and different credit, the Tribunal notes the Sixth Circuit's rationale for strict construction. Michigan has long articulated a strict construction standard for tax credits. The Supreme Court quoted Justice Cooley as follows:

> The rule is also well stated in 2 Cooley on Taxation (4th Ed.), p. 1403, § 672: 'An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a specific privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant.'[19]

As a privilege, rather than property, the Tribunal holds that the Texas merger statute is not determinative as to whether the privilege of a tax credit transfers from Comerica-MI to Comerica-TX. Rather, the Tribunal agrees with Respondent that such a determination must be determined through Michigan tax law, and specifically, the terms of the disputed credits.

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[18] *Chrysler Corp v CIR*, 436 F.3d 644,654 (6th Cir 2006).
[19] *City of Detroit v Detroit Commercial College*, 322 Mich 142,148-149; 33 NW2d 737 (1948). This case was also cited by *Ladies Literary Club v Grand Rapids*, 409 Mich 748,754; 298 NW2d 422 (2002), which is more recently cited in *Menard Inc*, 302 Mich App at 473.

The terms of the tax credits are very specific as to who may use them, how they may be used, and places a very specific limit on their assignment. The statutes spell out that they can only be assigned to certain related parties, and then, only assigned once. While these statutes are silent as to whether they can be transferred by operation of law, Petitioner cannot point to any provision that allows these privileges to be transferred to a second successor entity by other means. Based on strict construction, the Tribunal holds that these credits, being privileges, cannot be transferred to a successor entity, except as specifically stated, through one assignment. When Comerica-MI was extinguished,[20] so were the tax credits.

Petitioner next argues that Comerica-TX and Comerica-MI are merely a change in form of the same entity. In support, Petitioner contends that it qualifies for such treatment under IRC 368(a)(1)(F). Respondent contests that Petitioner qualifies under §368(a)(1)(F), arguing that Petitioner failed to submit any documentation that the IRS has made such a determination. Respondent further argues that, based on the merger plan, Petitioner fails to meet the 6-part test found under the IRS regulations. Alternatively, Respondent contends that it is irrelevant as to whether Petitioner qualifies for a tax-free reorganization under federal law. The Tribunal agrees and holds that it is irrelevant as to whether Petitioner so qualifies, as such questions under federal tax law do not necessarily translate into Michigan law, concerning tax credits and a business taxing regimen peculiar to Michigan. Accordingly, whether it qualifies under IRC §368(a)(1)(F) is irrelevant to a determination as to whether the tax credits transfer.

Respondent also contends that Petitioner's new FEIN for Comerica-TX number proves that it is a different entity than Comerica-MI. Petitioner counters that while federal FAQs do not

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[20] Petitioner's Exhibit 16, Letter from Deputy Commissioner of Office of Financial and Insurance Services dated December 18, 2007 confirming that Comerica-MI ceased its corporate existence.

require a new FEIN, there is nothing therein that disqualifies Petitioner from tax-free treatment by adopting a new number. Further, Petitioner filed a return using the new number but added that it was formerly known under the old number.

The Tribunal finds that, while emblematic, a new FEIN is not determinative of whether Comerica-TX is, for all intents and purposes, the same entity as Comerica-MI. Rather, the Tribunal accepts the parties' stipulation that Comerica-MI ceased to exist on October 31, 2007, and therefore, Petitioner's net capital should not contain the capital of this defunct entity in Petitioner's 2008 tax base. For the same reason, the Tribunal holds that Comerica-TX is not the same entity as Comerica-MI and does not inherit the privileges of the tax credits.

Accordingly, as there is no issue of fact, but only of law, and because Respondent's arguments prevail, summary disposition on the tax credit issue in Respondent's favor is appropriate.

III. Relief calculation

Respondent contends that Petitioner is not entitled to relief from the assessments as it failed to set forth specific relief in its Petition or Prehearing Statement. Respondent further argues that Petitioner's Amended Prehearing Statement also fails to set forth specific calculations of taxes. Petitioner counters that it has set forth the amounts for which it has been aggrieved using Respondent's numbers, and the Tribunal is capable of determining the proper relief from the information set forth in its Amended Prehearing Statement using simple math. The Tribunal agrees with Petitioner. Original assessments were cancelled by Respondent after the audits, and what remains is an appeal of the audits and a request for refunds or credits. Further, Petitioner has set forth, for each count and each year, a dollar amount.

For 2008, prior to its second audit, Respondent had originally calculated the Average Net Capital at $5,219,724,306, which Petitioner contends is the correct tax base. While that base does not double-count the same assets which were in Comerica-TX and Comerica-MI, it does include in the base for 2008 assets of a bank that was not in existence in 2008. As the Tribunal has determined that §265 does not include the capital of a former financial institution, the appropriate method is to look only at the net capital of Comerica-TX for the current year, and previous years it was in existence (if less than 5 years), and average the net capital for those years. In 2008, Comerica-TX was in existence for 2 years.[21] Its net capital for each year is as follows:

2007	$5,381,750,034
2008	$5,012,039,101
2009	$3,800,641,868
2010	$5,317,436,509

For 2008, its average net capital equals ($5,381,750,034 + $5,012,039,101) ÷ 2 = $5,196,894,567. For tax year 2009, the average net capital equals ($5,381,750,034 + $5,012,039,101 + $3,800,641,868) ÷ 3 = $4,731,477,001. For tax year 2010, the average net capital equals ($5,381,750,034 + $5,012,039,101 + $3,800,641,868 + $5,317,436,509) ÷ 4 = $4,877,966,878. The average net capital for each year is the tax base. That base is subject to an apportionment factor for each year, to which the parties are in apparent agreement. The resulting product is then multiplied by the tax rate for each year of 0.235%.[22] Additionally, there is a surcharge levied on this tax.[23] After the proper tax and surcharge are determined, these figures

[21] Per §265(4)(b), Comerica-TX is treated as if in existence for all of 2007, even though it was formed in October of that year.
[22] MCL 208.1263.
[23] MCL 208.1281(b)(i) for 2008, and (b)(ii) for 2009 and 2010.

are subtracted from the audit results, and the amount due as a refund is calculated.

These calculations are as follows:

Year	**tax base**	**apportionment rate**	**tax rate**	**resulting tax**	**surcharge rate**	**resulting surcharge**	**assessed and collected tax**	**assessed & collected Surcharge**	**tax refund**	**surcharge refund**	**total refund**
2008	$5,196,894,567	0.280684	0.0023	$3,427,910	0.277	949,531	$5,499,715	$1,523,421	$2,071,805	$573,890	$2,645,695
2009	$4,731,477,001	0.384434	0.0023	$4,274,510	0.234	1,000,235	$6,161,396	$1,441,767	$1,886,886	$441,532	$2,328,417
2010	$4,877,966,878	0.319618	0.0023	$3,663,852	0.234	857,341	$4,444,157	$1,039,933	$780,30	$182,592	$962,896
totals				$11,366,273		2,807,108	$16,105,268	$4,005,121	$4,738,995	$1,198,013	$5,937,008

No additional adjustment concerning the disallowed tax credits is necessary, as Respondent prevails on this issue.

JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition is PARTIALLY GRANTED on the issue of tax base only.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is PARTIALLY GRANTED on the issue of tax credits only.

IT IS FURTHER ORDERED that for 2008, Petitioner is entitled to a refund of $2,071,805 for the excess tax calculated under §265, and a refund of $573,890 for excess surcharge under §281.

IT IS FURTHER ORDERED that for 2009, Petitioner is entitled to a refund of $1,887,997 for the excess tax calculated under §265, and a refund of $441,792 for excess surcharge under §281.

IT IS FURTHER ORDERED that for 2010, Petitioner is entitled to a refund of $780,305 for the excess tax calculated under §265, and a refund of $182,592 for excess surcharge under §281.

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

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Opinion within 28 days of entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves the last pending claim and closes the case.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[24] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[25] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[26] Responses to motions for

[24] See TTR 261 and 257.
[25] See TTR 217 and 267.
[26] See TTR 261 and 225.

reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[27]

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[28] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[29] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[30]

Entered: May 31, 2018 David B. Marmon

[27] See TTR 261 and 257.
[28] See MCL 205.753 and MCR 7.204.
[29] See TTR 213.
[30] See TTR 217 and 267.