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LANSING

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November 10, 2020 MTT 2020-6

MTT CLOSED IN HONOR OF VETERANS DAY
PERSONNEL CHANGES
RECENT CASE LAW OF INTEREST

Welcome to this edition of the MTT Newsletter. Please note that the Michigan Tax Tribunal office will be closed in observance of Veterans Day, Wednesday, November 11, 2020.

This issue highlights some personnel changes at the Michigan Tax Tribunal and includes information on recent court developments.

As the COVID-19 pandemic continues, we continue to see changes in the Michigan Tax Tribunal. We recently added one new Tribunal member, congratulated an existing member on her reappointment, and bid a fond farewell to one of our long-serving Legal Secretaries.

We welcome Judge Patricia Halm to the Tribunal, who fills one of the two “At Large” positions. Judge Halm was appointed to fulfill a partial term which expires in June 2022. Judge Halm is a familiar face at the Tribunal. Judge Halm was originally appointed to the Tribunal in 2003 and in 2007 was elevated to Chair of the Tribunal, a role she held until 2011. She left the Tribunal in 2011 and was appointed to the Michigan Compensation Appellate Commission. Judge Halm is an attorney, a graduate of Thomas M. Cooley Law School and a member of the State Bar of Michigan.

We are also pleased to have Assessor member, Victoria Enyart, reappointed to the Tribunal. Judge Enyart has over 25 years of professional real and property assessment administration experience. Judge Enyart is a Certified General Appraiser in the State of Michigan and a Michigan Master Assessing Officer (MMAO IV). Judge Enyart is the longest serving member and holds the distinction of having been appointed by four different Governors.

Lastly, we bid a very fond farewell and warm wishes to Cheryl Barbour, one of the Tribunal’s Legal Secretaries who retired at the end of October 2020. Cheryl was hired by the Tribunal in 2011 and retired just short of her 10-year anniversary. Cheryl was a beloved member of our team, many of you have worked with her over the years, and we will all miss working with her. Please join us in wishing her the very best in her retirement.

Recent Case Law of Interest

Patru v City of Wayne, unpublished per curiam opinion of the Court of Appeals, issued February 18, 2020 (Docket No. 346894).

Petitioner appealed from the Tribunal's Final Opinion and Judgment on remand. Petitioner purchased the property in 2015 and performed various repairs. The Court had previously remanded the case for the Tribunal to determine whether repairs made to the subject property were "normal repairs" under MCL 211.27(2) such that the value of those repairs could not increase the true cash value of the property. The Court explained that because there was a transfer of ownership in 2015, the assessor could consider the impact of "normal repairs" on true cash value for 2016. Taxable value does not "cap" until the end of the calendar year following the transfer of ownership because true cash value is determined as of December 31 of the year in which the transfer occurs. Petitioner argued that the law-of-the-case doctrine prevented the Tribunal from considering the impact of any "normal repairs" when determining the 2016 true cash value. The Court explained that the prior case did not consider the effect of the transfer of ownership on the subject's true cash value and did not consider whether the repairs could be considered in determining the true cash value. Petitioner further argued that the Tribunal erred when it concluded that the repairs did not have any bearing on the subject's true cash value. The Court explained that the Tribunal did not conclude that the subject was in substandard condition prior to Petitioner purchasing it, and that it could infer that the increase in assessed value from 2015 to 2016 could have been attributable to inflation. Petitioner argued that the Tribunal was required to calculate the true cash value based on "before" and "after" appraisals. The Court explained that this was not required because the property's taxable value uncapped. Petitioner further argued that the Tribunal failed to arrive at an independent conclusion of value. The Court explained that the Tribunal evaluated the evidence set forth by the parties and performed an analysis that concluded that Respondent's sales comparison approach supported the assessment. Finally, Petitioner argued that the Tribunal erred when it rejected the 2015 purchase price of the property. The Court stated that the Tribunal considered the purchase price, but that the sale was by the United States Department of Housing and Urban Development, which may not have been a motivated seller.

McAdoo v City of Ludington, unpublished per curiam opinion of the Court of Appeals, issued February 27, 2020 (Docket No. 347392).

Petitioner appealed the Tribunal's Final Opinion and Judgment denying a Disabled Veteran's Exemption for the 2017 tax year. Petitioner was incarcerated beginning in 1995. While incarcerated, Petitioner married, and Petitioner's spouse made him a co-owner of a home in 2016. For the 2017 tax year, Petitioner applied for a Disabled Veteran's Exemption, and the Tribunal upheld the denial because Petitioner never occupied the home. Petitioner otherwise qualified for the exemption. Petitioner argued that he used the property as a homestead and thus was entitled to an exemption. The Court explained that, to use a property as a homestead in order to qualify for a Disabled Veteran's Exemption, the claimant must physically reside there and occupy the property

as his or her home during the tax year at issue. Because there is no dispute that Petitioner never physically occupied the subject property, the Tribunal did not err. Petitioner also argued that his spouse was a legal extension of himself. The Court explained that the statute was clear that the veteran is the object of the requirement of occupancy, not the veteran's spouse. The Court also explained that neither the Board of Review nor the Tribunal violated his constitutional rights because there was no evidence of racial discrimination, and the denial of the exemption did not impair Petitioner's ability to marry or preserve his family. Further, the denial did not deny Petitioner equal protection because incarcerated prisoners are not a suspect class, and there was no dissimilar treatment between Petitioner and a veteran that was disabled but did not occupy the property.

Vectren Infrastructure Servs Corp v Dep't of Treasury, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 345462).

Plaintiff appealed from an order of the Court of Claims granting summary disposition in favor of Defendant. Plaintiff was the successor-in-interest to Minnesota Limited, Inc (MLI), which provided services related to oil and gas pipelines. The siblings that co-owned MLI began looking to sell it in 2010. At that time, MLI was contracted to perform work in Michigan. During the time this project was ongoing, on March 31, 2011, MLI sold all its assets to Plaintiff for $80,000,000. MLI filed a Michigan Business Tax (MBT) return for 2010 and for that portion of 2011 before it sold its assets. MLI included the sale of its assets in its tax base as well as in the denominator of the sales factor formula as "sales everywhere." This resulted in an approximate sales factor of 15%. Defendant initiated an audit of the portion of 2011 prior to the sale of its assets. Defendant concluded that the sale of assets was improperly included in the denominator of the sales factor. It included the sale in the tax base but excluded it from "sales everywhere," resulting in a lower denominator, and a sales factor of approximately 70%. This increased Plaintiff's tax liability. The Court of Claims granted summary disposition in Defendant's favor, stating, in part, that MLI's argument that the sale should not have been included in its tax base did not concern the constitutionality of the apportionment formula. The Court of Appeals concluded that Plaintiff had provided clear and cogent evidence that applying the statutory formula attributed business activity to Michigan out of all proportion to the business activity in the state. During the portion of 2011 prior to the sale, a large portion of the business activity occurred in Michigan, but the assets sold had been built up over a long period from business activity outside Michigan. The Court further explained that looking only to the portion of 2011 prior to the sale did not reflect how income from the sale was generated. The Court also addressed the argument that Plaintiff failed to follow the MBT's procedural requirements by petitioning for alternative apportionment prior to filing its return. The Court explained that Defendant heard Plaintiff's request at the informal level, did not make this argument before the Court of Claims, and did not ask the Court of Appeals for relief. As such, the argument was considered waived. The Court also explained that the statute required that the parties settle the issue of what method of apportionment should be used, and thus remanded to the parties to make this determination.

Trugreen Ltd Partnership v Dep't of Treasury, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 344142).

Plaintiff appealed from an order of the Court of Claims granting summary disposition in the defendant's favor. Plaintiff provided its customers with services to care for lawns and ornamental plants. It sought a refund of use tax for items such as fertilizer and grass seed. It argued that it qualified for the exemption from use tax set forth in MCL 205.94(1)(f) because it was engaged in the business of "tilling, planting, caring for, or harvesting of the things of the soil." The Court explained that, in isolation, the language of the statute supported the plaintiff's argument. However, it also relied on statutory interpretation principles that require looking at the statute as a whole, and stated that the context of the statute indicated that it applied to businesses associated with agriculture. In addition, previous caselaw referred to this exemption as the "agricultural-production exemption." The Court affirmed the judgment of the Court of Claims.

Comerica, Inc v Dep't of Treasury, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 344754).

The parties cross-appealed from an order partially granting summary disposition in favor of Petitioner and partially in favor of Respondent. Petitioner, a bank holding corporation, decided to convert its Michigan subsidiary into a Texas banking corporation. To do this, it created a Texas banking association and merged the Michigan subsidiary into it in 2007. For the 2008 tax year, Petitioner reported the Michigan subsidiary's net capital, the tax base for the franchise tax, as the Texas subsidiary's, and did not include the Michigan subsidiary in its unitary business group (UBG). Petitioner also claimed certain Single Business Tax credits earned by the Michigan subsidiary as being carried over. Respondent audited the returns and adjusted the net capital by averaging the Michigan and Texas subsidiaries' net capital, and disallowed the credits because they could only be assigned once. The Tribunal concluded that Respondent improperly calculated Petitioner's net capital, ordering Respondent to recalculate, averaging the Texas subsidiary's net capital for the years in was in existence. It also affirmed the disallowance of the tax credits, concluding that the merger was not unintentional or involuntary, and thus it was not clear that a transfer by operation of law had occurred. The credits could only be assigned once, and because this had already occurred, they were extinguished when the merger occurred. The Court explained that the Tribunal's order directing Respondent to recalculate Petitioner's net capital did not comport with *TCF Nat'l Bank v Dep't of Treasury*, ___ Mich App ___; ___ NW2d (2019) (Docket Nos. 344892 & 344906), which required an averaging formula to be applied to the UBG rather than at the member level. It vacated this portion of the Tribunal's order and remanded to the Tribunal for the entry of an order consistent with the opinion. The Court rejected Respondent's argument that *TCF Nat'l Bank* did not apply because that case involved the calculation of UBG's generally. Respondent also argued that the holding in *TCF Nat'l Bank* did not allow the negation of billions of dollars in net capital. The Court explained that an unfavorable outcome was not a persuasive reason to ignore binding precedent. Respondent lastly argued that applying *TCF Nat'l Bank* would render part of the statute surplusage. The combination

of non-UBG financial institutions, stated the Court, would implicate the section cited by Respondent, but *TCF Nat'l Bank* does not apply to non-UBG institutions. Petitioner argued that the disallowance of the tax credits should be reversed. The Court agreed, explaining that, although the tax credits had already been transferred once, in the case at hand they transferred by operation of law. An assignment of the credits had already been made, which precluded a second assignment. The statute was silent on whether a transfer by operation of law was precluded, however. The tax credits were not acquired by the Texas subsidiary, but were acquired by operation of law as a result of the merger. The Court further disagreed with the Tribunal's conclusion that the tax credits were privileges, not property interests, because they were certified tax credits rather than a mere expectation that the credits could be obtainable in the future. *Jehovah Shalom Church of God v City of Detroit*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2020 (Docket No. 348320).

Petitioner appealed from a Tribunal order dismissing the case for lack of jurisdiction. Petitioner filed a petition with the Tribunal on February 6, 2019. It contended that it had been exempt from property taxes in 2014 and 2015, but that Respondent had placed the property on the tax roll in 2016. Petitioner also contended that it did not learn about the exemption being removed until "late 2018," when it received notice that the property was going to be forfeited for failing to pay property taxes. Petitioner argued that, although the petition was not filed timely, it should be considered because Respondent denied Petitioner due process by failing to notify it that the tax exemption had been removed for 2016 and 2017. The Court explained that Petitioner failed to protest the assessments before the Board of Review and thereafter file a petition with the Tribunal before May 31 of the tax years involved. Petitioner also failed to timely file a petition because, even assuming it received notice on December 31, 2018, it did not file a petition within 35 days of that date. Petitioner also failed to invoke the Tribunal's jurisdiction under MCL 211.53a because it failed to pay the property taxes, and failed to invoke the Tribunal's jurisdiction under MCL 211.53b because it did not protest to either the July or December Board of Review prior to filing a petition. Petitioner also argued that its due process rights were violated because the Tribunal failed to exercise its subject matter jurisdiction. The Court explained that the time requirements for filing an appeal are jurisdictional requirements, and that the Tribunal correctly determined that it lacked jurisdiction because the appeal was filed untimely. It further explained that Petitioner's due process rights were not violated because it had notice and an opportunity to be heard but failed to act.

Foster v Van Buren Co, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 349001).

Petitioner appealed the Tribunal's denial of a Principal Residence Exemption (PRE). Petitioner owned a Michigan home, and co-owned an Illinois home with her spouse. Petitioner stated that she spent most of her time in 2016 and 2017 at the Michigan home and filing Michigan taxes in those years as a resident. For both tax years, Petitioner and her spouse filed separate state tax returns and joint federal tax returns. Petitioner's spouse claimed a property tax exemption for the Illinois home. The Tribunal upheld Respondent's denial of a PRE for the 2016 and 2017 tax years because the

couple filed a joint federal tax return and upheld that assessment of a $500 penalty for claiming an exemption in both states. The Court agreed that Petitioner was disqualified from claiming a PRE, but disagreed with the Tribunal's reasoning. It explained that the first sentence of MCL 211.7cc(3) applies to married couples, but that MCL 211.7cc(3)(b) applies to "a person." Thus, whether Petitioner and her spouse were required to file a joint return was irrelevant. Nonetheless, Petitioner was disqualified because her spouse owned property in Illinois, claimed an exemption on that property, and the couple did not file separate tax returns. The Court concluded that Petitioner and her spouse did not file separate tax returns because the plain meaning of "separate tax returns" is not limited to state tax returns. Thus, because Petitioner and her spouse did not file both separate state and federal tax returns, she was disqualified from claiming a PRE. The Court vacated the assessment of the $500 penalty because the assessment provision refers to "a person" claiming an exemption. A "person" in the PRE statute is an individual, and Petitioner did not claim an exemption on the Illinois property. The Court affirmed the denial of the PRE but vacated the assessment of the penalty.

Honigman Miller Schwartz & Cohn LLP v City of Detroit, ___ Mich ___; ___ NW2d ___ (2020) (Docket No. 157522).

Respondent appealed from the Court of Appeals decision reversing the determination of the Tribunal that, for purposes of the Uniform City Income Tax Ordinance (UCITO), "services rendered in the city" included legal services performed in the city but delivered to clients outside the city. Petitioner was required to apportion its net profit for city income tax purposes using a three-factor formula. This formula uses a "property factor," a "payroll factor," which accounts for compensation to employees for "services performed within the city," and a "revenue factor," which accounts for revenue derived from "services rendered in the city." The Court of Appeals concluded that, because the Legislature used "services performed" in one section and "services rendered" in another, the terms must be given different meanings and thus, because one section refers to services performed within the city, the other section must have a different meaning. The Court of Appeals also accepted Petitioner's definition of "render" as to "deliver." Accordingly, the Court of Appeals concluded that where services are "rendered" is the location where the service is delivered to the client. The Supreme Court concluded that "rendered" meant "to do (a service) for another." In reaching this conclusion, the Supreme Court analyzed the context of the statute, noting that specific guidance was provided to determine whether a sale was "made in the city," but not for "services rendered within the city." The Legislature thus differentiated between sales of goods and sales of services. "Services rendered within the city" refers to where the services were done or carried out, not where they were delivered. The Supreme Court also analyzed the statute and concluded that it taxed profits based on the location of the profit-earning activity, and similarly concluded that calculation of the revenue factor should be determined on the basis of the location of the activity. Although a reasonable interpretation is that "performed" and "rendered" have different meanings, the rule that different phrases must have distinctive meanings is a general rule that does apply in every situation. The Supreme Court concluded that the terms have similar meanings. The overall statute consistently uses "performed" in relation to employees in relation to

compensation, and “rendered” in relation to services performed for another. This explains the distinction between the two terms, and both apply to where the work was carried out. Accordingly, “services rendered in the city” applies to services performed in the city for clients outside the city.
Upper Peninsula Land Conservancy v Michigamme Twp, unpublished per curiam opinion of the Court of Appeals, issued June 11, 2020 (Docket No. 349492).

Petitioner appealed the Tribunal’s order granting Respondent’s motion for summary disposition. Petitioner acquired the property from Mark Murphy in 2014. The property was remote, and the public could access it by walking. However, if someone wished to drive onto the property, they would need to contact Petitioner to open the gates. The Tribunal granted Respondent summary disposition and denied Petitioner’s motion. The Tribunal denied Petitioner’s motion for reconsideration and stated that Petitioner’s argument that its activities as a whole should be considered had not been presented in the earlier pleadings. Petitioner argued that the Tribunal should have considered its activities as a whole. The Court explained that a “vast majority” of the documentary evidence related to the subject property, not Petitioner’s actions as a whole. Petitioner failed to highlight evidence of the activities of the organization as a whole to make this argument. It would be difficult for the Tribunal to search the entire record for evidence unassisted by counsel. Petitioner also argued that the Tribunal should have viewed the restrictions to the public’s access as a result of the property’s remoteness and Petitioner’s conservation efforts. The Court stated that the Tribunal properly concluded that Petitioner was not a charitable institution because the property did not benefit the general public. Petitioner did not offer activities to the general public and the public’s access was restricted. Visiting the property without prior authorization was difficult and the only way to visit without authorization was to walk. Although some restrictions were because of the remoteness of the property, Petitioner failed to remedy this by hosting educational programs and interacting with local organizations. The cases cited by Petitioner to support the argument that, because its primary purpose was conservation, its primary purpose was charitable, were distinguishable. Petitioner did not meet the threshold of being a charitable institution, unlike the petitioner *in Kalamazoo Nature Ctr v Cooper Twp*, 104 Mich App 657; 305 NW2d 283 (1981). Unlike the property at issue in *Moorland Twp v Ravenna Conservation Club, Inc*, 183 Mich App 451; 455 NW2d 331 (1990), there was no indication that general public benefitted from the subject property. The Court affirmed the Tribunal’s decision.

Tomra of North America, Inc v Dep’t of Treasury, ___ Mich ___; ___ NW2d ___ (2020) (Docket Nos. 158333 and 158335).

Defendant appealed the decision of the Court of Appeals reversing the Court of Claims. Plaintiff sells and leases machines that accept bottles and cans with a deposit. Plaintiff’s machines sort the bottles and cans, and then the bottles and cans are placed in bins and taken to manufacturers who use them to make other products. Plaintiff claimed that the machines were exempt from the General Sales Tax Act and the Use Tax Act under the exemptions for industrial processing. The Court of Claims granted summary disposition to defendant, and the Court of Appeals reversed, holding that

industrial processing may occur "without the initial step of moving raw materials from storage." The Court first clarified the canon of construction that tax exemption statutes are construed in favor of the government. This canon is a canon of last resort, to be employed when a statute is ambiguous. In this case, the Court stated, this canon is inapplicable because the statutes are unambiguous. The language of the exemption in both statutes is identical, and provide a general definition of industrial processing, as well as list of activities that constitute industrial processing. The second sentence of the general definition provides a time period when industrial processing must occur. The Court agreed that the machines perform activities prior to the time period in which industrial processing begins. However, holding that the temporal limitation applies to the specific activities would create a conflict between the two provisions because some of the specific activities fall outside the temporal period. Interpreting the list of activities as the more specific statute resolves the conflict, rendering the temporal limitation inapplicable to the specific activities listed. The Court affirmed the Court of Appeals and remanded to the Court of Claims.

Scott Lake Golf & Practice Ctr v Plainfield Twp, unpublished per curiam opinion of the Court of Appeals, issued July 23, 2020 (Docket No 348058).

Respondent appealed the Tribunal's Final Opinion and Judgment regarding the subject property's true cash value. The subject property was a 27-hole golf course. Respondent assessed the property, concluding that its highest and best use was as vacant land available for residential development. Petitioner contended that the subject's highest and best use was continued operation as a public golf course. The Tribunal gave little weight to either party's sales comparison approach and largely adopted Petitioner's income approach. Respondent argued that the Tribunal erred when it concluded that Respondent's valuation disclosure had less weight than an appraisal report. The Court explained that the Tribunal did not determine that a valuation disclosure has less weight than an appraisal report as a matter of law. Rather, the Tribunal admitted the valuation disclosure and determined that it lacked weight and credibility, and the Court will not interfere with the Tribunal's determinations of weight. The Tribunal explained several deficiencies with the report's substance, not its form. Respondent also argued that the Tribunal's finding that the subject's highest and best use was as a golf course was not supported. The Court explained that the evidence in the record did support the Tribunal's determination. Petitioner's appraiser opined that the property was so large that there was an insufficient demand to convert it to residential development. The property would be large enough to support 673 residential units, but only 100 building permits were issued by Respondent each year. It was unreasonable to assume that Petitioner would capture the entire market for development. Further, Petitioner's appraiser opined that it would not be financially feasible because it would take years to absorb and would not be closed out in a reasonable time. Respondent's assessor offered no evidence to support the feasibility of developing the property into residences. The Court rejected Respondent's argument that the Tribunal's true cash value determination was not supported. As the Court had already explained, it would not interfere with the Tribunal's credibility determinations concerning the evidence. Petitioner presented a developed income approach, and the

Tribunal rejected some of Petitioner's adjustments. The Tribunal thoroughly explained its reasoning and its determination fell within the range of evidence advanced by the parties. Finally, Respondent argued that the Tribunal judge was biased, evidenced by the judge rejecting Respondent's valuation disclosure. The rejection, stated the Court, was based on weight. The ruling did not display deep-seated favoritism and Respondent failed to demonstrate any error, much less the plain error required because the issue was not preserved. The Court of Appeals affirmed the Tribunal's determination.

Zimmer US Inc v Dep't of Treasury, unpublished per curiam opinion of the Court of Appeals, issued July 23, 2020 (Docket No. 349358).

Petitioner appealed the Tribunal's order granting summary disposition to Respondent. The Court affirmed. Petitioner, based in Indiana, manufactures orthopedic implants. It provides the instruments to its customers, usually at no extra cash charge, and usually on an indefinite basis. Petitioner retains ownership of the instruments and the customers must reimburse Petitioner for lost, damaged, or destroyed instruments. Petitioner requested a Use Tax refund, asserting that it did not use the instruments in Michigan. Petitioner argued that the Tribunal erred when it adopted a "nexus" test and that it did not "use" the instruments. The Court explained that the Tribunal incorrectly adopted a nexus test. Such a test applies only to sellers, and Petitioner provided the instruments at no extra cash charge. The Tribunal reached the right result for the wrong reason, however. Petitioner was not a mere distributor because it retained control over the instruments, evidenced by the requirement that its customers pay to replace lost or damaged instruments. Because it did not relinquish total control, Petitioner was subject to use tax.

Razeen, Inc v City of Warren, unpublished per curiam opinion of the Court of Appeals, issued July 23, 2020 (Docket No. 350310).

Petitioners appealed the Tribunal's Final Opinion and Judgment denying their request for an exemption under MCL 211.9*o* for the 2017 and 2018 tax years. The Court of Appeals affirmed. Petitioners owned property, on which was located a gas station and convenience store. Neither Petitioner owned any other real or personal property in the city of Warren. Sabor Ghazi owned one Petitioner, and he and his wife owned the other. Petitioners claimed that the true cash value of the industrial and commercial property was less than $80,000. Ghazi testified that he owned several rental units in the city of Warren, and that some had a stove, oven, and refrigerator. Ghazi also stated that there was some commercial property at the subject that he did not own. Respondent's assessor testified that Petitioners' appraisal was incomplete, in part because Petitioners had not included every item of personal property "owned by, leased to or in the possession of" Petitioners or a related entity. The Tribunal found this testimony credible, and concluded that Petitioners did not submit sufficient or reliable evidence establishing entitlement to the exemption. The Tribunal further concluded that Petitioners also failed to properly value the property at issue. The Court explained that sufficient evidence supporting the Tribunal's determination was present on the record

because Petitioners appraiser used a methodology "contrary to accepted appraisal practices." The appraiser's testimony also supported the finding that the appraiser failed to include all the property at the subject. He testified that he did not appraise the security camera or property provided by various vendors. The Court explained that property that must be included for purposes of the exemption includes property in the possession of the person claiming the exemption. And Ghazi's property must be included because he directly or indirectly controlled Petitioners. As such, the property in the rental units was required to be included. Petitioners also argued that once they submitted affidavits claiming the exemption, Respondent then bore the burden to prove that Petitioners were not entitled to the exemption. The Court explained that there was no authority for this position because statute clearly placed the burden of proof on Petitioners.

Maple Manor Rehab Ctr, LLC v Dep't of Treasury, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 349168).

Plaintiffs appealed the order of the Court of Claims granting summary disposition to defendant on the basis that defendant lacked the authority to consider plaintiffs' petition for a refund of the Medicaid Long-Term Care Quality Assurance Assessment tax (QAA). The Court of Appeals affirmed. The authority to implement and administer the QAA is vested in the DHHS, which it must do in accordance with federal laws and regulations. Plaintiffs submitted information that they had overpaid the assessment to DHHS outside the 10-day window to make corrections. The DHHS corrected the information going forward, but refused to issue a refund. Plaintiffs filed a refund request with Treasury, but it denied the request, stating that it did not have jurisdiction because the QAA was not administered under the Revenue Act. Plaintiffs argued that the QAA is subject to the credit and refund provision of the Revenue Act. The Court explained that Treasury did not issue a decision on plaintiffs' petition, DHHS issued two prior letters denying the refund. Treasury's letter stated that it lacked authority to consider it and that it referred the matter to DHHS. Because plaintiffs did not receive an adverse decision from Treasury, the Revenue Act did not confer subject matter jurisdiction on the Court of Claims. The Court further explained that the Revenue Act's refund provisions did not apply to the QAA. The statute vests DHHS with the authority to assess and collect the QAA, and the duty to comply with federal law. Applying the Revenue Act to the QAA would make administration of the QAA conflict with federal law. Further, the QAA is the more specific statute. Had the Legislature meant for the Revenue Act to apply to the QAA, it could have expressly said so. Contrary to plaintiffs' argument, the Court of Claims relied on the plain language of the statutes. The cases relied upon by the Court of Claims illustrated statutory schemes where the Legislature bestowed authority on Treasury to administer taxes outside the Revenue Act.

Hoffman v Highland Twp, unpublished per curiam opinion of the Court of Appeals, issued August 13, 2020 (Docket No. 348938).

Petitioner appealed from the Tribunal's final opinion and judgment regarding the subject property's 2018 assessments. The property had an observation and wine tasting room,

and a farmhand's house. The Tribunal concluded that the observation and wine tasting room was not an agricultural building for property tax purposes. It also concluded that respondent's comparable sales were appropriate, and that Petitioner's unsigned appraisal was unpersuasive. Petitioner argued that the Tribunal erred when it valued the observation and wine tasting room as a commercial winery because Petitioner sold wine under a small winemaker's license and that valuing it as a commercial winery did not respect zoning ordinances. The Court explained that no authority cited by Petitioner supported the contention that the status as a small winemaker meant that the operations were not commercial in nature. Further, the Court stated that valuation determines occupancy only for purposes of property taxes, not for zoning purposes. Despite Petitioner's contention that certain statements made by respondent's agents were "admissions," respondent never adopted these statements, and valuation is determined by property tax laws, not statements of government employees. Although Petitioner argued that the Tribunal overlooked facts, the Court stated that its review of Tribunal decisions does not include consideration of allegedly ignored facts. Sufficient evidence supported the Tribunal's factual findings that the observation and wine tasting room was not used as an agricultural structure. More specifically, photographs showed tables, a bar, wine, and food. The Tribunal understood its duty to make an independent determination of value, and its determination was based on its "thorough and detailed findings." Petitioner argued that the Tribunal should have valued the observation and wine tasting room as a horse arena or stable. The Court stated that photographs showed that the observation and wine tasting room was walled off from the horse arena. With regard to the farmhand's house, Petitioner argued that it was unnecessary to sign the comparable sales analysis because the supporting data came from the Multiple Listing Service, and this information was available to both respondent and the Tribunal. The Court explained that Petitioner provided no legal authority for this proposition, and it was not the Tribunal's responsibility to verify petitioner's data. Petitioner lastly argued that respondent's comparable sales were flawed, but the Court noted that there was no evidence showing that petitioner's unsigned documentation was more reliable than respondent's valuation. The Court affirmed the final opinion and judgment.

Hoffman v Highland Twp, unpublished per curiam opinion of the Court of Appeals, issued August 13, 2020 (Docket No. 348939).

Petitioner appealed from the Tribunal's final opinion and judgment, which reduced the qualified agricultural exemption for the property for the 2018 tax year. In 2016, petitioner added a two-story addition to an existing horse area, which consisted of an observation and wine tasting room. Petitioner used the first floor of the addition as a place to observe horse training, and petitioner also sold their own brand of wine. Respondent sought to reduce the qualified agricultural exemption because the observation and wine tasting room was used for commercial purposes rather than agricultural purposes. The Tribunal's final opinion and judgment concluded that the use of the observation and wine tasting room was commercial for property tax purposes and set the exemption at 80%. Petitioner argued that the Tribunal erred when it found that the observation and wine tasting room was used for commercial purposes because there was no profit motive. The Court explained that the authority cited by Petitioner

involved the determination of whether activity was for profit within the meaning of the Internal Revenue Code. The federal authorities provided minimal instruction on the issue. The definition included in MCL 211.27a(11)(c) is directed at transfers of ownership, not eligibility for the qualified agricultural exemption. Further, petitioner conceded that the wine tasting was to increase the appeal of the equestrian business, a commercial use. Petitioner also argued that the Tribunal erred when it accepted Respondent's photographs without establishing the photographer, dates, occasions, and persons depicted. Petitioner did not raise this issue until reconsideration, which means that appellate objections were forfeited, and the evidence was submitted with sufficient time for petitioner to raise an objection at hearing. In addition, evidentiary standards are relaxed in administrative hearings. Petitioner also argued that the entire square footage of the observation and wine tasting room were not used for a commercial purpose, which resulted in the incorrect reduction of the exemption. The Court explained that the photographs of the observation room supported the Tribunal's conclusion because they showed both floors being used for a commercial purpose. Petitioner lastly argued that the 46 acre subject property should be valued as a part of the entire 299 acre farm, and thus the observation room should be calculated as a part of the entire farm. The Court rejected this argument, reasoning that no language in the statute provides that uses on a contiguous property should be taken into account. The Court affirmed the Tribunal's final opinion and judgment.

New Covert Generating Co, LLC v Covert Twp, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 348720 & 348721) (2020).

Respondents appealed the Tribunal's Final Opinion and Judgment setting the true cash value of Petitioner's personal property for the 2016 tax year and the Tribunal's order sanctioning Respondents for the filing of frivolous motions. Respondents also appealed orders sanctioning them for motions filed in the appeal concerning the 2012 through 2015 tax years. Petitioner cross-appealed from the Tribunal's Final Opinion and Judgment setting the true cash value of its personal property for the 2016 tax year.

Petitioner owned a power plant with combustion and steam turbines. It was not a utility, it sold its electricity on the open market as a merchant generator. In June 2016, Petitioner transitioned from selling in the Midcontinent Independent System Operator (MISO) market to the PJM Interconnection (PJM). In order to do so, Petitioner built a new switchyard, the Segreto switchyard. In December 2012, the State Tax Commission ordered Covert Township to create a personal property parcel for Petitioner's turbines and generators, and to classify that parcel as industrial personal property. The change entitled Petitioner to claim an exemption to personal property other than turbines. In a separate appeal to the Tribunal concerning the 2010 and 2011 assessments, Covert Township argued that the Tribunal lacked jurisdiction because Petitioner did not file statements of assessable property. That case was appealed to the Court of Appeals. In the prior Court of Appeals decision, the Court concluded that the filing of personal property statements was not necessary when, as petitioner had, a party appealed after first protesting to the Board of Review. In the instant case, Respondent moved for summary disposition, arguing that Petitioner had no standing. The Tribunal denied the

motion, stated that there was no dispute that Petitioner owned the property at issue, and was thus a party in interest under *Spartan Stores, Inc v Grand Rapids*, 307 Mich App 565; 861 NW2d 347 (2014). The Tribunal denied the motion for summary disposition and concluded that the motion was not grounded in law or fact because Respondent ignored the holding in *Spartan Stores* and improperly attempted to distinguish it. In June 2018, Respondents moved for summary disposition, arguing that the Tribunal lacked jurisdiction, arguing part that Petitioner did not file statements of assessable property. The Tribunal denied the motion, stating that the Court of Appeals had already considered the argument and rejected it, and stated that the timing and nature of the motion raised concerns that Respondent made it for an improper purpose. The Tribunal held a hearing to determine the true cash value of the parcels at issue, after which it issued a final opinion and judgment and entered an order awarding costs and attorney fees to petitioner regarding respondents' motion for summary disposition. The Tribunal explained that respondents filed six motions for summary disposition and a request for immediate consideration, and respondents' counsel argued in direct contravention of *Spartan Stores* despite being familiar with it. It also concluded that the June 2018 motion was frivolous because it was identical to previous motions, and the motion failed to acknowledge that the issue had been resolved by the Court of Appeals.

Respondent argued that the filing of a properly completed statement of assessable property is always a prerequisite to invoking the Tribunal's jurisdiction. The Court explained that the Tribunal did not err when it concluded that it had jurisdiction over the appeals. MCL 205.731 provides the Tribunal's subject-matter jurisdiction and it does not limit that jurisdiction based on prerequisites. It reviewed the caselaw concerning the Tribunal's jurisdiction and explained that there had been inconsistency with some decisions holding that the prerequisites implicated the Tribunal's subject-matter jurisdiction and some concluding that they were merely procedural. The Court stated held that these prerequisites were jurisdictional only in the "looser sense" and thus were merely procedural. The Court further stated that MCL 205.735a(4) was not a limit on the Tribunal's jurisdiction, and the requirement to file a statement of assessable property was only a requirement to invoke a direct appeal to the Tribunal. If a taxpayer protests before the Board of Review, it has satisfied the prerequisite to invoking the Tribunal's jurisdiction. With respect to whether Petitioner was a party in interest that could invoke the Tribunal's jurisdiction, the Court explained that it was undisputed the Petitioner was the actual owner of the property. The Court also rejected Respondents' argument that allowing a so-called "shell" corporation to invoke the Tribunal's jurisdiction would be absurd because petitioner had incentive to comply with the Tribunal's orders to avoid liens, foreclosure, or seizure, and respondents could file a circuit court case to have the separate entity disregarded. In addition, the Tribunal had the authority to penalize petitioner for failing to cause its related entities to provide relevant discovery, and respondents had not appealed any of the Tribunal's orders related to discovery.

The Court explained that the Tribunal properly looked to a dictionary definition to define the word "turbine." Qualifying language in the statute did not expand the ordinary meaning of the term "turbine," it limited the exemption to certain kinds of turbines. The

law does not prescribe how the property must be valued, only that turbines are excluded from the exemption. The true cash value of the turbines are the value of functioning turbines in a power plant, as the statute requires that they be "powered." Valuing the turbines as part of a functioning power plant did not result in non-uniform taxation because similarly situated taxpayers would be taxed based on the same thing, the value of the turbine as a component of a functioning power plant.

With respect to the valuation, the Court considered issues related to replacements cost for the switchyard, intangibles, working capital, cost to finance, plant efficiency and fuel costs, owner's profit, and the Segreto switchyard. Respondents argued that insufficient evidence supported a $41 million deduction for the switchyard. The Court stated that it was undisputed that the parcels did not include the PJM switchyard on the valuation date. One of petitioner's experts provided testimony concerning the $41 deduction, and the testimony and evidence was evidence that a reasonable mind could consider. The costs did not reflect the actual costs of the MISO switchyard, and thus that Petitioner did not provide how much it actually cost to build the switchyard was irrelevant. Respondents argued that there was no support for a 3% reduction for intangibles, and that there was a double-deduction. Testimony established that petitioner had contracts and that the contracts had value, and expenses for maintaining an intangible asset are distinct from the value of the asset itself. Testimony also established that 3% was a standard amount of deduction for intangibles. Respondents argued that a working capital deduction was an error because petitioner did not need working capital, as PJM's weekly or bimonthly payments covered petitioner's operating expenses. Although expert testimony suggested that petitioner might not need substantial working capital, these opinions were not related to all of petitioner's expenses. Petitioner's expert's testimony was also adequate to establish that the general estimate of working capital was accurate with respect to petitioner's actual working capital. With respect to cost to finance, the parties agreed that the cost should be adjusted for these costs. The Tribunal did not err when it rejected respondents' market rate, because such a rate would depend on the developer, and using this rate would violate the doctrine of uniformity in taxation. Respondents also argued that the Tribunal erred when it accepted petitioner's heat rate. The Court explained that the Tribunal accepted petitioner's use of the 2016 Annual Energy Outlook Report, as opposed to respondents' use of the 2013 report. Although the 2016 report was released after the relevant tax day, December 31, 2015, it more accurately reflected technology available at the time the plant was built. And the fact that it was released after tax day did not automatically render the report irrelevant.

Petitioner argued that the Tribunal erred when it included owner's profit and that there was no evidentiary support for the 5% value concluded by the Tribunal. The Court explained that inclusion of owner's profit is appropriate when the developer might build the property in order to sell it, but that there must be some evidence supporting the conclusion that the market would bear such an inclusion. Petitioner was a merchant generator, and a merchant generator may be developed to be sold for profit and there was evidence supporting the inference that New Covert Generating had been acquired and then transferred for profit. Although there was contrary evidence, respondents'

evidence was sufficient for a reasonable person to conclude that a reasonable investor would expect a return of approximately 5% in the project. Petitioner also argued that the Tribunal should have reduced the cost of the property by the amount needed to build the Segreto switchyard, and that a deduction of the full $58,915,530 was necessary because it was required to ensure the property would fit its highest and best use. The Court stated that testimony and evidence supported a finding that the costs associated with the Segreto switchyard had already been paid on the valuation date. Accordingly, a potential purchaser would value the property based on the completed switchyard.

With regard to sanctions, the Court explained that respondents argued in one of the motions for summary disposition that petitioner was not a party in interest, ignoring the holdings in *Spartan Stores* and respondent also did not explain how the owner of a property could not be a party in interest. It is also well settled that courts must respect the separate existence of an artificial entity. As such, that motion was not well grounded in law or fact. With regard to the June 2018 motion asserting that the Tribunal lacked jurisdiction, respondents' preferred construction was implausible, but not so implausible that they could not argue that position without violating MCR 1.109. Respondents' counsel could also advance inconsistent positions, and thus the Tribunal erred in awarding sanctions on this basis. However, considering the timing of the motions, the Tribunal could find that they were filed with the motives to poison the well at hearing, harass petitioner, and increase the costs of litigation. Therefore, the Tribunal could award sanctions because the motion was filed for an improper purpose. On finding that the motion had been filed for an improper purpose, the Tribunal was required to impose sanctions. The Court affirmed.

Pine Lake Country Club v West Bloomfield Twp, unpublished per curiam opinion of the Court of Appeals, issued October 22, 2020 (Docket No. 351979).

Petitioner appealed the Tribunal's order barring a valuation disclosure or other evidence. Following the filing of the petition, the Tribunal entered an order setting a date for the parties to file and exchange valuation disclosures. The order stated that valuation disclosures would not be admitted into evidence unless exchanged in accordance with the order, unless good cause was shown. Petitioner's counsel was hospitalized because of an unknown illness on June 11, 2018. The parties thereafter filed a motion to change the dates for the exchange of valuation disclosures, and the Tribunal moved the date to January 18, 2019, with the same warning language as in the previous order. Petitioner filed a prehearing statement, but not a valuation disclosure before January 18, 2019. Another of petitioner's attorneys informed respondent's counsel that it was not "in a position to furnish" a timely valuation disclosure. The Tribunal scheduled the prehearing conference for March 18, 2019, as a show cause hearing because petitioner had not timely filed its valuation disclosure. Petitioner submitted its valuation disclosure on March 11, 2019. The Tribunal concluded that petitioner had not shown good cause, and barred petitioner from offering its valuation disclosure. Petitioner filed a motion for reconsideration, arguing that its appraiser could not complete the valuation disclosure because of complications from cancer. The Tribunal denied the motion because the delay was not related to the medical conditions

of petitioner's attorney or appraiser. Petitioner argued that it showed good cause for its late filing, the lack of formal recording of the prehearing conference violated Michigan law and the Tribunal's rules, and that the order preventing it from filing a valuation disclosure was the equivalent of a dismissal. The Court stated that petitioner had not made these arguments until its motion for reconsideration, and thus the review was for plain error. The Tribunal did not abuse its discretion because the first deadline was pushed back based on the illness of petitioner's counsel and petitioner did not inform the Tribunal that it would miss the deadline, which it did by more than 50 days. Although petitioner submitted the valuation disclosure quickly after its appraiser submitted it, petitioner was still in violation of the Tribunal's order. Petitioner's counsel also returned to work in September 2018, well before the January 2019 deadline. In addition, the e-mail to respondent's counsel asked to move the date for the exchange of valuation disclosures back "a couple weeks," but petitioner did not file the valuation disclosure for more than seven weeks. Petitioner could have been more diligent in attempting to get the appraisal, and it was aware of the deadline, so could not assert that it was unaware of the expectations of the Tribunal. That petitioner's valuation disclosure was submitted after the release of another decision of the Court of Appeals, in which one of petitioner's co-counsels and the same appraiser were involved, was also circumstantial evidence that petitioner waited for that decision. The Court agreed that respondent was not prejudiced by petitioner's late valuation disclosure submission because respondent had adequate time before the hearing to review it, and could have also cross-examined petitioner's appraiser. The Tribunal would have also scrutinized the valuation disclosure, so the prejudice would have been minimal. With regard to whether there should have been a transcript of the prehearing conference, the Court stated that the applicable administrative codes provided the Tribunal discretion as to whether a prehearing conference would be transcribed. Further, a "prehearing conference" and a "hearing" are different, and as such the rule requiring hearings to be transcribed does not apply to prehearing conferences. Evidence is not presented at prehearing conference, so a statute requiring transcription of hearings where evidence is presented did not apply. With regard to whether the sanction was essentially a dismissal, the Court explained that the Tribunal did not dismiss the case, it conducted a default hearing and still had an independent duty to arrive at a true cash value. Petitioner still had the chance for its case to be analyzed by the Tribunal, where a dismissal removes this opportunity and means that respondent's valuation controls. The Court affirmed.

I trust that this newsletter was of interest to you. On a personal note, if you are a veteran, or have a family member that is a veteran, my sincerest thanks for your service to our country.

Sincerely,

Steven M. Bieda
Chairman, Michigan Tax Tribunal