The Hertz Corporation & Affiliates, Petitioner,	MICHIGAN TAX TRIBUNAL
v	MOAHR Docket No. 19-003485
Michigan Department of Treasury, Respondent.	Presiding Judge Patricia L. Halm

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING PETITIONER'S MOTION FOR LIMITED DISCOVERY

ORDER DENYING PETITIONER'S MOTION FOR COSTS

ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF RESPONDENT

FINAL OPINION AND JUDGMENT

INTRODUCTION

In this case, the Hertz Corporation & Affiliates (Petitioner) appeals a Corporate Income Tax (CIT) Assessment levied by the Michigan Department of Treasury (Respondent). In 2012, Petitioner filed a CIT Return in which it claimed a credit for a tax overpayment/credit carryforward from prior tax years. Respondent disallowed this credit and on June 6, 2019, issued Final Assessment No. VA2XD3S in which Petitioner was assessed tax, penalties, and interest. On August 2, 2019, Petitioner appealed this Assessment.

On November 23, 2020, Petitioner filed a motion requesting that the Tribunal enter summary disposition in its favor under MCR 2.116(C)(10). On December 14, 2020, Respondent filed a response to Petitioner's motion, arguing that the Tribunal

should grant judgment in its favor under MCR 2.116(I)(2). On February 16, 2021, Petitioner filed a reply to Respondent's response.[1]

On June 4, 2021, Petitioner filed a motion requesting limited discovery and an award of costs due to the filing that motion. On June 24, 2021, Respondent filed a response in opposition to Petitioner's motions.

The Tribunal has reviewed the motions, the responses, the reply, and the evidence submitted and finds that denying Petitioner's Motions for Summary Disposition, Limited Discovery, and Costs is warranted at this time. Further, granting summary disposition in favor of Respondent under MCR 2.116(I)(2) is warranted.

PETITIONER'S CONTENTIONS

In support of its Motion for Summary Disposition and in its reply brief, Petitioner explained that on November 19, 2012, DTG and Petitioner merged. As a result, "DTG's tax attributes flowed into Hertz's 2012 CIT[2] Return for year end December 31, 2012."[3] At issue in this case is a $549,750 ITC[4] that DTG carried forward from its 2009 Michigan Business Tax (MBT)[5] Return, to its 2010 MBT Return, then to its 2011 MBT Return, and finally to its 2012 CIT short-year Return.[6] Eventually, this credit carryforward was claimed by Petitioner on its 2012 CIT Return. As Petitioner describes it, it was a waterfall effect.

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[1] The Tribunal granted the parties' Stipulated Motion to allow Petitioner to file a reply brief on January 26, 2021.
[2] MCL 206.601 *et seq*.
[3] Petitioner's Motion at 2.
[4] See MCL 208.1403.
[5] MCL 208.1101 *et seq*. The MBT was eliminated for most businesses as of January 1, 2012. The MBT was replaced by the CIT, which became effective January 1, 2012.
[6] Petitioner's Motion at 4 and 7.

According to Petitioner, in 2012, Respondent informed DTG that it had not provided sufficient information as it relates to the ITC; specifically, costs were not broken down by entity. Respondent requested additional information, which DTG submitted to Respondent on three separate occasions. Ultimately, Respondent rejected the ITC carryforward and issued a final assessment to Petitioner on June 6, 2019, which Petitioner timely appealed.

Petitioner asserts that enough detail was provided to Respondent to support the claimed ITC. Moreover, Petitioner argues that Section 403(3) of the MBT[7] does not require that costs be reported separately for each entity within a unitary business group. Petitioner further argues that Respondent instructed MBT taxpayers to claim an ITC by filing Forms 4567, 4568, 4570, in addition to supplemental documentation, as needed. In this case, DTG filed the requisite forms and supplemental documentation.

In its Brief, Petitioner cites *International Business Machines Corp v Department of Treasury,*[8] wherein the Michigan Supreme Court allowed taxpayers to rely on supplemental documentation. Petitioner argues that if it is not allowed to submit supplemental documentation, its constitutional rights to equal protection and due process will be violated given that other taxpayers were allowed to submit supplemental documentation.

Petitioner contends that it does not matter that "some of the $549,750 credit flows from earlier tax years for which the statute of limitations has closed."[9] This is because Petitioner is not appealing DTG's 2009, 2010, or 2011 MBT assessments.

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[7] MCL 208.1403(3).
[8] *International Business Machines Corp v Department of Treasury,* 496 Mich 642; 852 NW2d 865 (2014).
[9] Petitioner's Motion at 12.

Instead, Petitioner is appealing Final Assessment No. VA2XD3S, in which Treasury disallowed the $549,750 ITC carryforward to be claimed on its 2012 CIT Return.

Petitioner asserts that because the Tribunal's review is de novo, it has the authority to review an overpayment/credit carryforward from a prior tax year, even if the statute of limitations is closed for that tax year, as long as the overpayment is applied to a tax year that is still open. "In other words, the Tax Tribunal may review anew each line and calculation on [Petitioner's] 2012 CIT Return."[10] Petitioner cites the Tribunal's decision in *Phillips Stevens Building Co v Dep't of Treasury*[11] in support of this argument. Petitioner argues that this principle is consistent with Federal tax practice, and that the Income Tax Act relies on Federal income tax law, as does the Michigan Court of Appeals. Petitioner also cites Federal Tax Court cases and an Internal Revenue Service (IRS) letter ruling. Finally, Petitioner cites *McLane Company Inc v Department of Treasury,*[12] a case in which the Court of Claims recently allowed the adjustment of a credit carryforward from a closed tax year even though the credit had been reviewed by Respondent.

RESPONDENT'S CONTENTIONS

It is Respondent's position that "this case turns on two points: (1) whether Petitioner's continued challenge to Final Assessment No. VA2XD3S constitutes an impermissible collateral attack on prior unchallenged Treasury decisions; and (2) whether the investment tax credits claimed by Petitioner's unitary business group (UBG)

[10] Petitioner's Motion at 11.
[11] *Phillips Stevens Building Co v Dep't of Treasury*, (Docket No. 433192) issued June 27, 2012.
[12] *McLane Company Inc v Department of Treasury,* Court of Claims Case No 19-000056 (September 10, 2020).

member were property disallowed."[13] Respondent contends that if the answer to either of these questions is in the affirmative, it is entitled to judgment under MCR 2.116(I)(2). If not, an evidentiary hearing is required to determine the correct balance of Final Assessment No. VA2XD3S.

According to Respondent, Final Assessment No. VA2XD3S, which involves Petitioner's 2012 CIT, has been corrected twice during the course of this litigation to account for the outcomes of informal conference proceedings in docket no. 20180927, involving Petitioner's 2008 through 2010 tax years, and docket no. 20190737, involving Petitioner's 2011 MBT liability after resolution of the 2008 and 2009 tax years. Respondent explained that, during this litigation, the informal conference in docket no. 20180927 was resolved in Petitioner's favor, resulting in a partial reduction of the MBT imposed by the assessment at issue.

As it pertains to DTG, Respondent explained that for the tax period ending December 31, 2009, DTG's MBT overpayment of $287,224 was reduced to $0 because DTG did not provide the information necessary to prove that it was entitled to the ITC. On April 28, 2017, Respondent issued Final Assessment No. UU56223 for the 2009 tax year. The assessment was paid in full, and the ITC disallowance was not challenged.

Respondent also made several adjustments to the MBT Return DTG filed for the period ending December 31, 2010. As with the 2009 Return, Respondent disallowed DTG's ITC because DTG did not provide the information necessary to prove it was entitled to the credit. These adjustments, including the 2009 ITC disallowance, resulted in a reduction of the overpayment from $472,600 to $79,372. These adjustments were

[13] Respondent's Response at 2.

included in Respondent's MBT Annual Return Notice of Refund Adjustment dated October 28, 2014. This Refund Adjustment was not challenged.

Respondent made similar adjustments to the MBT Return DTG filed for the tax period ending December 31, 2011. As in 2010, Respondent disallowed DTG's ITC because DTG did not provide the information necessary to prove it was entitled to the credit. These adjustments reduced DTG's overpayment from $556,113 to $82,607 and were included in Respondent's Refund Adjustment dated October 29, 2014. Again, this Refund adjustment was not challenged.

According to Respondent, the most recent corrected version of Final Assessment VA2XD3S, issued November 25, 2020, imposes $151,776.20 in tax due, but because of credited amounts, the remaining balance owed is $94,051.64.[14]

Respondent argues that "Petitioner now requests that this Tribunal allow it to revisit Treasury's prior unchallenged decisions related to the DTG adjustments in order to reduce its outstanding tax liability for the 2012 tax year."[15] While Petitioner asserts that the 2012 tax year is the only issue under appeal, Respondent argues "[t]hat this statement is disingenuous given that the only challenge Petitioner raises with respect to the 2012 tax year is the reduction of the claimed overpayment from prior tax periods."[16]

It is Respondent's position that the Revenue Act[17] prohibits the Tribunal from making a determination about the propriety of these unchallenged decisions. Respondent cites MCL 205.22(1), which permits a taxpayer "aggrieved by an assessment, decision, or order" issued by Respondent to either: (1) file an appeal with

[14] *Id*. at 6.
[15] *Id*.
[16] *Id*.
[17] See the Revenue Division of Department Treasury Act, MCL 205.1 *et seq*.

the Court of Claims within 90 days; or (2) file a petition with the Tribunal within 60 days. Under MCL 205.22(4), if an appeal is not filed as prescribed, the assessment, decision, or order "is final and not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack."

Respondent argues that Petitioner's reliance on *Phillips Stevens* is misplaced and that there is a critical distinction between this case and *Phillips Stevens*. Specifically, in *Phillips Stevens*, it appears that the taxpayer was given the benefit of the ITC for the 2005 tax year; however, the decision does not state whether Respondent reviewed the 2005 tax return. For the 2006 and 2007 tax years, the petitioner was disallowed from benefitting from the ITC. In this case, Respondent actually reviewed DTG's 2009, 2010, and 2011 tax returns and issued final assessments and refund adjustments, triggering the appeal requirements of MCL 205.22. Because the adjustments made by Respondent were not appealed by DTG, DTG's 2009, 2010, and 2011 assessments are final under MCL 205.22(4) and cannot be collaterally attacked.

Respondent argues that Petitioner's citation to federal authority is unavailing because federal cases are not binding caselaw in Michigan courts.[18] The cases cited by Petitioner are also distinguishable because they did not involve re-examination of a disallowed claim. "Instead the taxpayers in those matters claimed the benefit of a credit that the taxing authority did not dispute they would have been entitled to in a closed tax period to reduce their liability in open periods."[19]

[18] *See Allen v Bloomfield Hills School District*, 281 Mich App 49, 59; 760 NW2d 811 (2008)
[19] Respondent's Response at 8.

Respondent argues that even if the Tribunal could revisit the unchallenged adjustments, Petitioner's own exhibits show that the adjustment was correct. To qualify for the ITC, Petitioner must have purchased eligible property within a certain time period and the property must have been located within a certain area. Respondent explained that Part 2 of Form 4570 requires a taxpayer seeking to claim an ITC to provide a description of the property purchased, the location, the date acquired, and the property's cost. Because DTG did not provide this information, the credits were disallowed. Respondent argues that Petitioner's own exhibits prove that each Form 4570 submitted lacked the necessary information. Citing *Menard Inc v Dep't of Treasury*[20], Respondent argues that a party claiming a tax credit has burden of proof in establishing that it is entitled to the credit.

Respondent does not disagree with Petitioner's claim that it must be allowed to provide supplemental documentation with its tax returns. Instead, in response to Petitioner's argument, Respondent asserts that it did not preclude Petitioner from filing supplemental documentation. Moreover, Respondent contends that it did not disallow the ITC because of the form of Petitioner's information. Instead, Respondent rejected the credit because Petitioner failed to provide complete information. For this reason, Petitioner's equal protection and due process arguments must fail.

Respondent argues that the best outcome available to Petitioner is for the assessment to be cancelled. Respondent asserts that if Petitioner prevails, it would not be entitled to a refund because under MCL 205.27a(2), refund claims must be made within four years. In addition, the cases cited by Petitioner make it clear that previously

[20] *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 479; 838 NW2d 736 (2013).

unclaimed credits from closed tax years may only reduce a taxpayer's tax liability; the unclaimed credits may not result in a refund. However, that is not the situation in this case as Petitioner's claim is not based on unclaimed credits.

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.[21] In this case, Petitioner moves for summary disposition under MCR 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 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."[22]

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.[23] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[24] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[25] Where the burden of proof at trial on a

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[21] See TTR 215.
[22] *Lowrey v LMPS & LMPJ, Inc,* 500 Mich 1, 5; 890 NW2d 344 (2016). (Citation omitted).
[23] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[24] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[25] *Id.*

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.[26] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[27]

In this case, Respondent argues that Petitioner's Motion for Summary Disposition should be denied and that it should instead be granted summary disposition under MCR 2.116(I)(2). A grant of summary disposition under MCR 2.116(I)(2) is appropriate "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law."[28] Thus, under this rule the court may render judgment in favor of the opposing party.

CONCLUSIONS OF LAW

The Tribunal has carefully considered Petitioner's Motion, Respondent's Response, and Petitioner's Reply to the Response, and finds that denying Petitioner's Motion for Summary Disposition under MCR 2.116(C)(10) is warranted. The Tribunal further finds that Petitioner's Motion for Limited Discovery and Motion for Costs should also be denied.

At issue in this case is Final Assessment No. VA2XD3S, which "made a downward adjustment to the amount Petitioner claimed as an 'overpayment credited from prior period return' on line 42 of its Corporate Income Tax (CIT) 2012 return."[29] Petitioner argues that this adjustment was improper and that it is entitled to the ITC

[26] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[27] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[28] See also *Washburn v Michailoff*, 240 Mich App 669; 613 NW2d 405 (2000).
[29] Respondent's Response at 2, citing Respondent's Exhibit 1.

carryforward, which Petitioner acquired the right to claim as a result of DTG's merger with Petitioner. Petitioner further argues that Final Assessment No. VA2XD3S has been properly appealed and, as a result, its 2012 CIT Return is still open. Therefore, the Tribunal has jurisdiction to review its 2012 CIT Return, which includes the ITC that was carried forward from DTG's closed tax years. Respondent asserts that Petitioner's credit carryforward claim is nothing more than a collateral attack on DTG's closed assessments, which were not appealed, and that review of these credits is now barred under MCL 205.22(4).[30]

Act 122 of 1941, known as the Revenue Division of Department of Treasury Act,[31] or Revenue Act (Act), sets forth Respondent's responsibilities to administer and enforce various tax laws and also provides certain rights to taxpayers. A taxpayer's right to appeal an assessment imposed by Respondent is found in Section 22 of the Act, which, for the tax years at issue, states that "[a] taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision, or order."[32] Section 22 further provides that:

> An assessment is **final, conclusive, and not subject to further challenge** after 90 days after the issuance of the assessment, decision, or order of the department, and a person is not entitled to a refund of any tax, interest, or penalty paid pursuant to an assessment unless the aggrieved

[30] The parties do not dispute that DTG's 2009, 2010, and 2011 assessments were not appealed as provided for under MCL 205.22(1). As a result, these assessments are final and are not reviewable and will remain undisturbed.
[31] MCL 205.1 *et seq*.
[32] MCL 205.22(1) was amended by 2015 PA 79, which changed the time to appeal to the Tribunal from 35 days to 60 days.

> person has appealed the assessment in the manner provided by this section. [Emphasis added.][33]

Section 22 also provides that "[t]he assessment, decision, or order of the department, if not appealed in accordance with this section, is **final** and is **not reviewable in any court** by mandamus, appeal, or other method of **direct or collateral attack**."[34] [Emphasis added.]

In this case, there is no dispute that Final Assessment No. VA2XD3S, involving Petitioner's 2012 CIT Return, was timely appealed in accordance with Section 22 and that Petitioner has properly invoked the Tribunal's jurisdiction over that assessment. However, the analysis regarding the Tribunal's jurisdiction in this case is not that simple. One component of Petitioner's 2012 CIT Return is the carryforward of ITCs from previous tax years.[35] In other words, while Petitioner's CIT Return is for the 2012 tax year, the credit Petitioner claims on the CIT Return was first claimed by DTG on a 2009 MBT Return and was subsequently carried forward on DTG's 2010 and 2011 MBT Returns. Petitioner asserts that "[a] credit carried forward from a closed tax year may be taken in an open tax year."[36] The Tribunal agrees. However, the question in this case is whether the tax returns of the closed tax years from which the credits are carried forward may be reopened, and the credits re-examined.

To determine whether (1) the 2009, 2010, and 2011 DTG final assessments are "final" and not reviewable by any court, or whether (2) Petitioner's appeal is a direct or collateral attack on the assessments, further review of MCL 205.22(4) is in order.

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[33] MCL 205.22(4).
[34] MCL 205.22(4).
[35] See line 42, Overpayment credited from prior period return (MBT or CIT), of Petitioner's 2012 CIT Amended Return, Petitioner's exhibit 7.
[36] Petitioner's Brief at 12.

Recently, in *Dep't of Talent & Economic Development/Unemployment Ins Agency v Great Oaks Country Club, Inc,*[37] Michigan's Supreme Court explained that:

> The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. Courts consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. . . . When statutory language is unambiguous, no further judicial construction is required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed.[38]

"Final" is not defined in the Act, and thus the Tribunal looks to a dictionary definition.[39] *Merriam-Webster's Collegiate Dictionary* defines "final" as "not to be altered or undone" or "of or relating to a concluding court action or proceeding."[40] "Review" and "collateral attack," however, have particular legal meanings, and thus a legal dictionary must be consulted.[41] *Black's Law Dictionary* defines "review" as "consideration, inspection, or reexamination of a subject or thing," and "[p]lenary power to direct and instruct an agent or subordinate, including the right to remand, modify, or vacate any action by the agent or subordinate, or to act directly in place of the agent or subordinate."[42] A collateral attack is "[a]n attack on a judgment in a proceeding other than a direct appeal. . . ."[43] [44]

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[37] *Dep't of Talent & Economic Development/Unemployment Ins Agency v Great Oaks Country Club, Inc*, ___ Mich ___; ___ NW2d ___ (2021) (Docket No. 160638), slip op at 11-12 (quotation marks, ellipsis, and citation omitted).
[38] *Id*. at ___.
[39] See *Spartan Stores, Inc v Grand Rapids*, 307 Mich App 565, 574; 861 NW2d 347 (2014).
[40] *Merriam-Webster's Collegiate Dictionary* (11th ed).
[41] See *Breakey v Department of Treasury*, 324 Mich App 515, 526; 922 NW2d 397 (2018).
[42] *Black's Law Dictionary* (11th ed).
[43] *Black's Law Dictionary* (11th ed).
[44] See also *Workers' Compensation Agency Director v MacDonald's Industrial Products, Inc* (On Reconsideration), 305 Mich App 460; 853 NW2d 467 (2014).

While there are no published appellate court opinions on point, there are relevant opinions concerning the finality of assessments. For example, in *Thumb Motorsports, LLC v Department of Treasury,*[45] the court held that:

> The language of MCL 205.22(4) and (5) is clear and unambiguous. Quite simply, a taxpayer may appeal an assessment, but the taxpayer must do so in the time period required by MCL 205.22. If a taxpayer fails to appeal an assessment [within] the required time period, the assessment becomes final and conclusive as to that specific assessment. After expiration of the time for an appeal, review of the assessment is then foreclosed "by any court by mandamus, appeal, or other method of direct or collateral attack," MCL 205.22(4), and the taxpayer may not receive a refund of any tax paid pursuant to the assessment, MCL 205.22(5).

In *Martin Sprocket & Gear, Inc v Department of Treasury,*[46] the Court of Appeals considered the Court of Claim's jurisdiction in a case in which the petitioner did not timely appeal its MBT assessment and thereafter attempted to claim a refund. The court held that:

> [T]he final assessments are "final and [are] not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack. MCL 205.22(4). Accordingly, the final assessments finally and conclusively established plaintiff's tax liability under the [MBT] Act . . . for the tax years ending in June 2008 and June 2009.
>
> Plaintiff's claim for a refund, if successful, would set aside the final assessments by reducing its [MBT] tax liability as previously established by the final assessments. This constitutes a collateral attack prohibited by MCL 205.22(4).[47]

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[45] *Thumb Motorsports, LLC v Department of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued November 17, 2016 (Docket No. 329121) at *3.
[46] *Martin Sprocket & Gear, Inc v Department of Treasury,* unpublished per curiam opinion of the Court of Appeals, issued October 21, 2014 (Docket No. 317760).
[47] *Id*. at *1.

The Tribunal has also issued decisions in which a refund claim was made after the time to appeal the underlying assessment has expired. For example, in *Jenks v Michigan Department of Treasury,*[48] the Tribunal held that:

> The statutory language plainly states that if an assessment is not appealed it is **final** and is **not reviewable by appeal** or other method of direct or **collateral attack**. Further, a taxpayer is **not entitled to a refund of any tax, interest, or penalty paid pursuant to an assessment**, unless the underlying assessment was appealed pursuant to statute. Here, the original assessments were not appealed; thus, a subsequent refund claim is a collateral attack on the earlier, un-appealed final assessments, which is prohibited under MCL 205.22(4).

While these cases are not binding precedent, the Tribunal finds them relevant and persuasive.

Finally, in *Curis Big Boy v Department of Treasury,*[49] the Court of Appeals upheld the Tribunal's decision to dismiss the petitioner's appeal because the petitioner failed to file its appeal with the Tribunal within the time provided in MCL 205.22. In finding that the Tribunal had not made an error of law, the court held that "[t]he Tax Tribunal had no authority to grant petitioner's request for a delayed appeal. The tribunal **was divested of jurisdiction** over this matter when the thirty-day[50] period expired."[51] [Emphasis added.]

For these reasons, the Tribunal finds that because DTG's final assessments for the 2009, 2010, and 2011 tax years were not timely appealed, they cannot be *altered or undone*. These final assessments finally and conclusively established DTG's MBT

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[48] See *Jenks v Michigan Department of Treasury*, (Docket No. 15-004522), issued March 11, 2016.
[49] *Curis Big Boy v Department of Treasury*, 206 Mich App 139; 520 NW2d 369 (1994).
[50] At the time Curis Big Boy filed its appeal at the Tribunal, MCL 205.735(2), Section 35 of the Tax Tribunal Act, provided that, unless specified otherwise, "the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition with 30 days after the final decision, ruling, determination, or order that the petitioner seeks to review . . . ."
[51] *Id*. at 142-143.

liability, which included the disallowance of the ITCs. The Tribunal further finds that the Legislature's intention when enacting MCL 205.22(4) was to prevent reexamination of decisions in an effort to *remand, modify, or vacate* them, either directly or collaterally. Given this, Respondent's decisions to disallow DTG's ITC claims must stand. The result is that there was no ITC to carryforward and that Petitioner's 2012 ITC claim now equals $0.

Turning to the cases cited by Petitioner, the Tribunal finds these cases unpersuasive. In *Phillips Stevens*, the issue presented was whether the petitioner was allowed to carry forward the unused portion of its ITC from the 2005 tax year to the 2006 and 2007 tax years. In that case, Treasury audited the taxpayer's 2006 and 2007 Single Business Tax (SBT) returns and disallowed the ITC carry forward. According to Treasury, the legal question presented was "whether the purchase and sale of a membership interest in Petitioner qualifies for the ITC."[52] The Tribunal explained that, in determining whether the taxpayer could carry forward the ITC, the "Tribunal is first charged with determining whether Petitioner was entitled to claim the ITC in the 2005 tax year . . . ." It went on to state that the:

> [S]tatute of limitations has run regarding whether Petitioner's 2005 Single Business Tax Return is deficient due to an improper ITC application. MCL 205.27a(2). As such, the Tribunal has no jurisdiction over this issue. However, the Tribunal has proper jurisdiction over whether the ITC carry forward was properly applied to Petitioner's 2006 and 2007 tax return and concludes that the carry forward is invalid.

[52] *Phillips Stevens*.

Unfortunately, the parties did not dispute the Tribunal's authority to review the 2005 SBT, even though the statute of limitations had run, and the Tribunal provided no analysis regarding its authority over a closed tax year. *Phillip Stevens* is thus unhelpful.

Petitioner also relies on *McLane*. There, Treasury concluded after an audit that the taxpayer was owed a credit for the 2008-2010 tax years and issued a check for the amount of the credit, which the taxpayer cashed.[53] Thereafter, Treasury adjusted the taxpayer's 2011 return, disallowing a carryforward of the credit that had been refunded.[54] As the *McLane* court stated, the primary dispute was "whether [Treasury] could adjust the return, or whether the four-year statute of limitations set forth in MCL 205.27a(2) of the Act prohibited [Treasury] from doing so."[55] The taxpayer argued, in part, that disallowing the 2010 credit carryforward on the 2011 return was an impermissible collateral attack on the 2008-2010 MBT audit.[56]

In rejecting this argument, the Court of Claims held "there was nothing plaintiff could carry forward to its 2011 MBT return. The adjustment of the carryforward credit on the 2011 MBT return was nothing more than an acknowledgment of what the audit determined, i.e., that the $711,415 credit carryforward was no longer available because it had been paid to plaintiff."[57] The Court of Claims held that "the prohibition on collateral attacks found in MCL 205.22(4) does not prohibit defendant from taking additional action if necessary to impose the correct liability on a taxpayer."[58] [59]

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[53] *McLane*, pp 1-2.
[54] *Id*. at 2.
[55] *Id*.
[56] *Id*. at 13.
[57] *Id*. at 13.
[58] *Id*., citing *Tyson Foods, Inc Dep't of Treasury*, 276 Mich App 678, 690; 741 NW2d 579 (2007).
[59] An argument could be made that if, after cashing the refund check, Petitioner was allowed to carry forward that same credit amount, it would be unjustly enriched, having benefited twice from the credit.

Both *McLane* and the case relied upon by the Court of Claims, *Tyson Foods*, considered Respondent's authority to make adjustments. As the Court of Appeals explained in *Tyson Foods*, "MCL 205.22 concerns the finality of an assessment with respect to an appeal and does not address defendant's authority to issue a second single business tax assessment to a corporate taxpayer for the same tax period."[60] Therefore, the Tribunal does not find *McLane* persuasive in this case.

Petitioner also relied on *Hill v Comm'r.*[61] In that case, the Federal Tax Court's decision was governed by Section 6214(b) of the Tax Code, which provides, in pertinent part that:

> The Tax Court in redetermining a deficiency of income tax for any taxable year *** shall consider such facts with relation to the taxes for other years *** as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year *** has been overpaid or underpaid.

Thus, the Tax Code explicitly grants the Tax Court the authority to do what Petitioner requests in this case: to review the facts from closed tax years in order to determine the tax in the year under consideration. However, the Act does not contain language equivalent to that of the Tax Code that would permit this type of review. In fact, Section 22(4) of the Act states just the opposite. Specifically, Section 22(4) states if an assessment is not appealed, the assessment "is final and not reviewable by any court . . . ." This statement of finality applies not only to the assessment's ultimate tax liability but to all of the components that go into determining that liability. Moreover, to permit the 2009, 2010, and 2011 tax returns, and specifically the ITC claims, to be re-

[60] *Tyson Foods*, 276 Mich App at 690.
[61] *Hill v Comm'r*, 95 TC 437 (1990).

examined to determine whether there is an ITC to be claimed on Petitioner's 2012 tax return, is nothing more than "[a]n attack on a judgment in a proceeding other than a direct appeal." DTG did not timely appeal the assessments that disallowed the ITCs; Petitioner may not now attack those assessments collaterally.

Finally, Petitioner relies on another Federal Tax Court case, *Mennuto v Comm'r,*[62] and an IRS letter ruling.[63] In *Mennuto*, the court stated that "[t]he fact that a net operating loss carryover is applied to the calculation of income for the open year, whereas the investment credit carryover directly affects the calculation of the tax, does not enlarge petitioners' rights; the critical element is that the deficiency being determined is for a year on which the period of limitations has not run."[64] The IRS letter ruling also concludes that evaluating a credit in a closed year is appropriate to determine the proper amount of a carryforward in an open year. However, as in *Hill*, neither of these cases address the statute at issue here, MCL 205.22(4), and whether reviewing the carryforward in a closed year constitutes a "collateral attack."

To the extent that Petitioner raises due process and equal protection claims, the Tribunal's review is de novo and thus Petitioner has an opportunity to be heard. However, it is important to note that even though Petitioner raised these claims, the Tribunal does not have jurisdiction to hear constitutional questions.[65]

To summarize, because the assessments relative to DTG's 2009, 2010, and 2011 tax years were not appealed as provided for under MCL 205.22(1), these assessments are final and are not reviewable by the Tribunal under MCL 205.22(4).

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[62] *Mennuto v Comm'r*, 56 TC 910 (1970)
[63] See IRS Letter Ruling 201548006 (November 27, 2015).
[64] *Mennuto*, 56 TC at 923.
[65] See *Spranger v City of Warren*, 308 Mich App 477, 484; 865 NW2d 52 (2014).

Because this was the sole issue presented by Petitioner, the Tribunal finds that it lacks jurisdiction in this matter. For this reason, Petitioner's Motion for Summary Disposition under MCR 2.116(C)(10) is denied, meaning that Petitioner's request that the Tribunal allow the $549,750 "overpayment credited from prior period return" is also denied.[66] Finally, the Tribunal finds that Respondent is entitled to Summary Disposition as a matter of law under MCR 2.116(I)(2).[67]

In its Motions for Limited Discovery and Award of Costs, Petitioner states, in pertinent part, that Respondent has supplemented its response to Petitioner's Motion for Summary Disposition, adding a one-page document. Petitioner argues that despite being put on notice that Petitioner had submitted supplemental documentation, Respondent did not acknowledge these documents. Respondent now seeks to include one page of a 34-page fax sent by Petitioner to Respondent on April 29, 2013. Respondent does not include other documents submitted on that day, or on June 19, 2021, August 14, 2012, and March 5, 2013. Given this, Petitioner asserts that there are questions about what documents Respondent possesses and why they were not produced previously. Petitioner argues that the Tribunal should also award costs for Respondent's violation of MCR 1.109(E)(5) because Respondent's response to Petitioner's Motion for Summary Disposition fails to acknowledge that Petitioner submitted supplemental documentation on several occasions.

On June 24, 2021, Respondent filed a response in opposition to Petitioner's Motion for Limited Discovery and Award of Costs. In the response, Respondent states,

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[66] Petitioner's Brief at 19.
[67] Given this, the Tribunal finds it unnecessary to address Respondent's argument that MCL 205.27a(2) prevents Petitioner from receiving a refund as a result of this case.

in pertinent part, that it discovered, as a result of Petitioner's February 16, 2021 Reply Brief, that a supplemental chart had been supplied to Respondent in 2013. Respondent argues that "Petitioner's argument in favor of additional discovery is based on a mischaracterization of Treasury's obligations related to its prior briefing."[68] Moreover, Petitioner could have conducted its own discovery but chose not to do so. Respondent asserts that it did not violate MCR 1.109(E)(5), and that Petitioner's motions should be denied.

With respect to Petitioner's Motion for Limited Discovery, the Tribunal finds that a party "may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case. . . ."[69] In this motion, Petitioner seeks to discover the information Respondent has in its possession that Petitioner provided to Respondent. What information Petitioner did or did not provide Respondent is irrelevant, as the Tribunal's review is de novo,[70] meaning that it only reviews whether Petitioner is entitled to the relief requested based on the evidence provided to the Tribunal. Therefore, Petitioner's Motion for Limited Discovery is denied, and because that motion is denied, the Tribunal also denies Petitioner's Motion for Costs.

JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition under MCR 2.116(C)(10) is DENIED.

IT IS FURTHER ORDERED that Petitioner's Motion for Limited Discovery is DENIED.

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[68] Respondent's Response at 9.
[69] MCR 2.302(B)(1).
[70] See MCL 205.735a(2).

IT IS FURTHER ORDERED that Petitioner's Motion for Costs is DENIED.

IT IS FURTHER ORDERED that Respondent is GRANTED Summary Disposition under MCR 2.116(I)(2).

IT IS FURTHER ORDERED that the case is DISMISSED.

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 Tribunal with the required filing fee within 21 days from the date of entry of the final decision. 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. You are required to serve a copy of the motion 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. Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.

A claim of appeal must be filed with the Michigan Court of Appeals 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." You are required to file a copy of the claim of appeal with filing fee with the Tribunal in order to certify the record on appeal. The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.

By Patricia L. Haem

Entered: October 8, 2021
plh

PROOF OF SERVICE

I certify that a copy of the foregoing was sent on the entry date indicated above to the parties or their attorneys or authorized representatives, if any, utilizing either the mailing or email addresses on file, as provide by those parties, attorneys, or authorized representatives.

By: Tribunal Clerk