Apex Laboratories International Inc,
Petitioner,

v

City of Detroit,
Respondent.

MICHIGAN TAX TRIBUNAL

MOAHR Docket No.16-000724-R

Presiding Judge
Steven M. Bieda

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO NEXUS

ORDER DENYING PETITIONER'S MOTION FOR COSTS AND FEES

ORDER DENYING RESPONDENT'S MOTION FOR SANCTIONS

FINAL OPINION AND JUDGMENT

PREFACE

This case was remanded from the Court of Appeals. Oral argument on cross motions for summary disposition was held on October 20, 2020. Lynn Gandhi (P60466) and Maxwell Czerniawski (P76541) represented Petitioner, and Charles Raimi (P29746), represented Respondent.

Respondent subsequently filed a *Notice of Supplemental Authority Relevant to the Pending Nexus Motions* on January 27, 2021, and Petitioner responded by filing a document entitled *Petitioner's Notice of Supplemental Authority* on January 29, 2021. Both parties also have filed motions for attorney fees or sanctions, as well as having requested fees and costs at various times during this litigation. Respondent filed a

motion entitled *Respondent, City of Detroit's, Motion to Sanction Apex for Filing A Frivolous "Notice of Supplemental Authority" And Apex's Pattern Of Frivolous Filings*, on February 9, 2021, in which Respondent took umbrage in Petitioner's "continuing claim that its 'commercial domicile' was in Delaware," and for Respondent's pursuit of information pertaining to the Canadian closing issue.[1] Petitioner, had previously filed a pleading entitled *Petitioner Apex Laboratories International Inc.'s Response To Respondent City of Detroit's Supplemental Brief* on September 18, 2020, which along with responding to Respondent's supplemental brief, also requested an award of its costs and attorney fees for reasons fully articulated in the pleading. Petitioner also responded to Respondent's February 9, 2021 motion with a pleading entitled *Petitioner Apex Laboratories International Inc.'s Response In Opposition To Respondent City of Detroit's Motion For Sanctions,* on March 2, 2021, strongly arguing that Respondent had "no colorable grounds for this Tribunal to impose sanctions on Apex," asserting that Respondent's motion was "yet another frivolous salvo in the City's battle to distract from the actual issues in this matter," and asserting that the Tribunal should deny Respondent's requested relief and award Petitioner its costs and fees incurred in responding to it.[2]

[1] Respondent, City of Detroit's, Motion To Sanction Apex For Filing A Frivolous "Notice Of Supplemental Authority" And Apex's Pattern Of Frivolous Filings. February 9, 2021, Page 5.
[2] Petitioner Apex Laboratories International Inc.'s Response In Opposition To Respondent City of Detroit's Motion For Sanctions. March 2, 2021, page 7.

INTRODUCTION

This case was remanded to the Tribunal by the Court of Appeals for consideration of the issue of nexus in light of *S Dakota v Wayfair, Inc*. ___ US ____; 138 S Ct 2080; 201 L Ed 2d 403 (2018) (hereinafter *Wayfair*) which overruled *Quill Corp v North Dakota ex rel Heitkamp*, 504 US 298; 112 S Ct 1904; 119 L Ed 2d (1992). The Michigan Tax Tribunal, on May 1, 2017, granted Petitioner's Motion for Summary Disposition and denied Respondent's Motion for Summary Disposition. In the May 2017 opinion, the Tribunal found that the evidence presented supported Petitioner's position that Apex did not do business within the meaning of the Act, and therefore lacked the constitutional nexus with the City of Detroit necessary to subject it to the City of Detroit Income Tax. Furthermore, the previous ruling held that Petitioner did not have nexus with Respondent, and Petitioner lacked the physical presence sufficient to meet the commerce clause standard. The decision noted that Respondent had failed to establish that Petitioner had a "commercial domicile" within the city or sufficient "physical presence" to establish such a nexus.

The earlier 2017 Tribunal decision rejected Respondent's contention that Petitioner's use of a City of Detroit mailing address on its federal income tax returns and other documents established nexus with the City of Detroit. The Tribunal found "Petitioner's reasoning that the City of Detroit was listed for administrative convenience convincing."[3]

[3] Final Opinion and Judgment, Michigan Tax Tribunal, May 1, 2017.

The 2017 Tribunal decision centered on whether the Petitioner had a "nexus" with Respondent such that the assessment of the income tax against it was constitutionally valid.

Respondent appealed to the Michigan Court of Appeals, which affirmed the Michigan Tax Tribunal decision. Respondent applied to the Michigan Supreme Court for leave to appeal the May 17, 2018 decision of the Michigan Court of Appeals. During this pendency, the United States Supreme Court decided *S Dakota v Wayfair, Inc. which overtured Quill Corp v North Dakota ex rel Heitkamp* 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91 (1992).

In lieu of granting leave to appeal, the Michigan Supreme Court vacated the Court of Appeals previous opinion and remanded the case back to the Court of Appeals for "reconsideration in light of *S Dakota v Wayfair, Inc.*___US___;138 S Ct 2080, 2099; 201 L Ed 2d 403 (2018), which overruled *Quill Corp v North Dakota ex rel Heitkamp*, 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91 (1992)."[4] The Court of Appeals, in turn, remanded the case back to the Michigan Tax Tribunal.

In its remand, the Court of Appeals noted that the case "concerns the ability of a taxing entity to impose an income tax on a non-resident corporation."[5] The Michigan Tax Tribunal was directed to consider that in-light of *Wayfair,* whether the Tribunal should depart from its prior May 1, 2017 ruling that Petitioner lacked the required substantial nexus with Detroit such that Respondent could not assess Detroit Income Tax on Petitioner.

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[4] *Apex Laboratories Int'l, Inc v Detroit, 503 Mich 1034; 927 NW2d 243 (2019).*
[5] Michigan Court of Appeals, On Remand, No. 338218, January 2, 2020, page 2.

At issue is whether Petitioner has nexus in the wake of *Wayfair*, which overturned the physical presence requirement established in *Quill*. In *Quill*, the U.S. Supreme Court described the Due Process Clause and the Commerce Clause of the U.S. Constitution as analytically distinct.[6] In making this distinction, the *Quill* Court ruled that nexus under the Due Process Clause could be satisfied without physical presence, although the requirement was retained for Commerce Clause challenges. Moreover, it noted that the bright-line physical presence test originally established in *Bellas Hess* furthered the goal of avoiding undue burdens on interstate commerce and declined to overrule the requirement in the context of challenges to taxation of foreign corporations brought under the Commerce Clause.

Thus, in the case at bar, the Michigan Court of Appeals cited *Wayfair* and the U.S. Supreme Court's conclusion that *Quill* was incorrect; that physical presence is not necessary to establish substantial nexus. In particular, *Wayfair* overruled both *Quill* and *Bellas Hess*, establishing that substantial nexus could be established when a foreign seller "'avails itself of the substantial privilege of carrying on business' in that jurisdiction."[7] The crux of the decision is that nexus is a very fact specific determination, and, as a result of *Wayfair*, the Commerce Clause and Due Process Clause nexus standards are much closer together.

Although the previous decisions of both the Court of Appeals and this Tribunal did not specifically address the application of the Due Process Clause and Commerce Clauses to Respondent's assessment, the rulings focused on upon the physical

[6] 504 U.S. 298, 305, 1992.
[7] *Wayfair* at 2099, citing *Polar Tankers Inc. v. City of Valdez*. 557 U.S. 1, 11, 129 S. Ct. 2277 (2009).

presence requirement established by *Quill*. With the advent of *Wayfair*, the Court of Appeals vacated the Tribunal's original decision and remanded it for further proceedings. The Court of Appeals requested that the parties focus their arguments pertaining to *Wayfair, Quill*, and the Due Process Clause and Commerce Clause.

The Court noted that the original Tribunal Summary Disposition decision was based on wrong principle in the wake of the intervening *Wayfair* decision and the remand was for reconsideration to address the impact of the recently issued *Wayfair* decision. The Court of Appeals chose not to reverse the Tribunal's prior finding, noting that "[w]e believe that the most prudent course of action is to vacate the Tribunal's decision and to remand for further proceedings to allow the parties to focus their arguments concerning *Wayfair, Quill*, and the Due Process and Commerce Clauses, and to allow the Tribunal to make a ruling in the first instance."[8]

In remanding the case to the Tribunal, the Court of Appeals noted that prior briefings did not sufficiently address the application of the Due Process and Commerce Clauses, and the Tribunal's May 2017 judgment was based on the now-inapplicable standard of physical presence.[9]

Thus, the earlier decision of the Tribunal was vacated, and the case remanded back to the Tribunal for further proceedings on the above referenced nexus issue. The Tribunal reinstated the case on February 24, 2020.[10]

[8] Michigan Court of Appeals, On Remand, No. 338218, January 2, 2020, page 5.
[9] *Id.*
[10] Order Reinstating Case, Michigan Tax Tribunal, February 24, 2020.

Upon remand, this Tribunal granted Respondent's Motion Seeking Limited Discovery into Petitioner's contention that the transaction at issue "closed in Canada" on July 22, 2020.

BACKGROUND

This case involves the question of tax liability of Petitioner, Apex, for payment of Respondent's, City of Detroit, income taxes. At issue is whether the Petitioner can be subject to Detroit Income Tax for Petitioner's tax years covering the period of May 1, 2012, through April 30, 2013.

The tax assessment was imposed under Detroit City Code, Part III, Chapter 18, Article X, Ordinance Section 18-10-5(c), which incorporates the City of Detroit City Income Tax Act (CDIT), MCL 141.501 et seq. The CDIT applies to "the taxable net profits of a corporation doing business in the city, being levied on such part of the taxable net profits as is earned by the corporation as a result of work done, services rendered, and other business activities conducted in the city."[11]

The statute provides that "doing business" means the conduct of any activity with the object of gain or benefit, except that it does not include:[12]

(a) The solicitation of orders by a person or his representative in the city for sales of tangible personal property, which orders are sent outside the city for approval or rejected, and if approved, are filled by shipment or delivery from a point outside the city.

[11] MCL 141.614
[12] MCL 141.605

(b) The solicitation of orders by a person or his representative in the city, in the name of for the benefit of a prospective customer of a person, if orders by the customer to such person to enable the customer to fill orders resulting from the solicitation are orders described in paragraph (a).

(c) The mere storage of personal property in the city in a warehouse neither owned nor leased by the taxpayer.

Huron is a private equity firm that invests in lower middle-market companies. Huron invests in existing companies by raising funds and using the funds to form limited partnerships. In 2004, Huron raised funds to form The Huron Fund II, LP (Fund). The general partner of the Fund is Huron Capital Partners GP II. In 2006, Huron identified a viable investment opportunity and recommended to the Fund that it should invest in Labstat International, ULC (Labstat), a Canadian tobacco testing company located in Kitchener, Ontario.

Petitioner, Apex, is a Delaware corporation, incorporated in 2006, which was established during the acquisition of Labstat to hold the Fund's investment in Labstat. Although Petitioner maintains a mailing address in Wilmington, Delaware, Petitioner's 2013 annual report filed in the state of Delaware records Petitioner's "principal place of business" as 500 Griswold Street in Detroit, Michigan.

In 2010, Labstat paid a dividend to Petitioner and Petitioner filed a CDIT return and paid 1% CDIT on the income.[13] The transaction giving rise to the assessment of CDIT in 2012 was the sale of Labstat to Alaris Royalty Corp. On June 6, 2012, Petitioner sold its interest in Labstat which resulted in gain and dividends to Petitioner.

[13] The City of Detroit's income tax rate for 2010 was 1%.

Petitioner filed a City of Detroit income tax return and reported the 2012 gains and dividend income from the sale of Labstat. At the same time, State taxes on the transaction were also paid.[14]

The sale was the culmination of a months-long process, where emails were exchanged between Petitioner's directors, purportedly, according to the emails, in their capacity as Huron Capital Fund II (Huron) employees and from Huron email accounts – and various advisors – such as attorneys and accountants – pertaining to matters such as expenses that needed to be paid regarding Labstat. The emails also discussed various terms of the proposed sale, and reflected the various stages of negotiation of the sale.

The sale of Labstat was made final pursuant to a Securities Purchase Agreement entered into between 2329545 Ontario and Petitioner. The "Time and Place of Closing" was specified in the agreement to occur in Waterloo, Ontario, Canada. The documentary evidence submitted into evidence indicates that this sale occurred in Ontario, Canada. The Securities Purchase Agreement that outlined the sale of Labstat states that the closing of the sale was to occur in Ontario, Canada. Some of the signatures for the sale were obtained in Michigan as multiple transactions and signatures were necessary to effectuate the closing. Additionally, Email correspondence from the various parties involved in the Labstat closing confirmed that closing was to occur after documents and funds were received in a certain order and from the pertinent

[14] At the time of the 2012, Petitioner voluntarily paid City and State tax. At the time the City tax was at a rate of 1%. The state would ultimately refund the state tax based on Petitioner's assertion that there was no nexus, but while the case at bar was at the Court of Appeals, the State requested the refunded tax proceeds back. Apex subsequently filed a lawsuit in the Court of Claims contesting State Treasury's claim.

parties. A document entitled “Closing Agenda,” drafted for the Labstat closing confirmed this as well and noted that closing would occur in Ontario. The clear language of the documents anticipated that the closing of the sale of Labstat required a series of steps to be taken, and that the closing would ultimately occur in Ontario. The sale was of a Canadian entity to another Canadian entity by transfer of a share certificate.

Petitioner remitted $69,140 in CDIT for the fiscal year ending April 30, 2011. In July 2012, an estimated tax voucher was remitted in the amount of $339,000 for CDIT for the fiscal year ending April 30, 2013.

In March 2015, Petitioner received a Proposed Assessment from Respondent, concluding that Petitioner had nexus with the City of Detroit and indicating that Respondent had conducted an audit and had determined that Petitioner had miscalculated the income tax it owed for the 2010 and 2012 tax years. Respondent assessed Petitioner an additional $3,280.48 in tax, interest, and penalties for the 2010 tax year, and an additional $401,165.51 for the 2012 tax year.[15]

On April 1, 2015, Petitioner objected to the Proposed Assessment by letter arguing that it does not conduct business within the City of Detroit and lacked the required nexus necessary for the assessment of taxes by Respondent.

After the parties conducted discovery, on February 12, 2016, Respondent issued a second Notice of Proposed Assessment asserting Petitioner’s liability for income tax, assessed interest and penalty. Petitioner requested a refund of CDIT paid through its 2012 income tax return and amended 2010 income tax return and Respondent issued

[15] The City of Detroit’s income tax rate had increased from 1% to 2% in 2012.

an Audit letter denying the refund claim on March 17, 2016. As a result, Petitioner filed an appeal with the Tribunal on April 15, 2016.

Of note was the instructions, which indicated that if any notices under the agreement intended for Petitioner were to be sent "c/o" or "care of" Huron Capitol Partners, LLC, at the 500 Griswold, Detroit address, along with a copy to Petitioner's legal counsel in Detroit.

The agreement's "Closing Agenda" reiterated that the closing would occur in Waterloo, Ontario, and at the closing was a culmination of several actions that had to occur. The sales agreement's provisions required the Petitioner would receive a "5,000,000 earnout promissory note" from 2329545 Ontario, payment of which was contingent upon Labstat meeting specific financial targets after closing. Huron received an advisory fee from Petitioner as part of the sale.[16] The language of the documents planned for a number of steps to be taken and that the closing would ultimately occur in Waterloo, Ontario.

PETITIONERS CONTENTIONS

Petitioner contends that they are "a Delaware Corporation, had no office, property, or employees in Detroit; it made no sales and had no market in Detroit." For administrative convenience, Huron Capitol Fund II (a shareholder of Petitioner) accepted mail on Petitioner's behalf at their company's Detroit office. Petitioner contends that Respondent cannot impose a tax under the Due Process Clause. Petitioner contends that *Wayfair* held that there must be "some definite link, some

[16] Brian Demkowicz, a managing partner of Huron and President of Apex, testified at his deposition and averred via affidavit that the closing took place as scheduled in Canada, although Respondent asserts that emails exchanged by members of Huron and the law firm hired to assist with the transaction appear to indicate that Dembowicz was not physically present at the closing.

minimum connection, between a state and the person, property or transaction it seeks to tax." Petitioner contends that they lack substantial nexus with Respondent, lacked "purposeful direction toward Detroit, and the City cannot tax Apex under the Due Process Clause."

Petitioner also contends that they lacked nexus with Respondent "under the Commerce Clause because it was neither physically nor virtually present within Detroit."[17] Petitioner contends that during the tax years at issue, "Apex had no employees, real or personal property in Detroit; it did not maintain a website or otherwise hold itself out as a business in Detroit; it did not advertise or market goods or services to Detroiters, and made no sale of goods or services in the Detroit market." Petitioner contends that "Apex's lone activity was to hold and sell Labstat stock acquired by Huron's Fund, which had nothing to do with Detroit marketplace." Petitioner contends that the taxing power asserted by the Respondent bears no relation to any protection, opportunities or benefits provided to Petitioner.[18] Petitioner contends that "Apex's only 'contact' with the City was through its officers and members of the board of directors that were employed by Huron."[19] Petitioner contends that these "few officers and directors – necessary to satisfy the minimum corporate governance requirements – were merely Huron members and employees appointed to Apex's board as paper officers and directors."[20] Petitioner also notes that the use of the Detroit office as a mailing address was not sufficient to establish a physical presence, and that record

[17] *Wayfair* at 138 S Ct at 2095.
[18] Transcript page 23.
[19] Petitioner's Brief on Nexus, page 2.
[20] Petitioner's Brief on Nexus, page 2

testimony was enough to establish that the mail was sent to the Detroit address because one of Huron Capital's Partners was the general manager of the fund, and that they handled ministerial functions, such as filing a tax return when necessary, and any other annual reporting that was required. Petitioner pointedly noted that "Respondent can point to no authority establishing such precedence, as there is no jurisdiction anywhere that has been so brazen to assert nexus on such de minimis grounds."[21]

Petitioner thus contends that its "*de minimis* connections with Detroit could not be more different from *Wayfair's* pervasive role in South Dakota, and demonstrate that *Wayfair* does not change this Tribunal's prior conclusion that Apex lacked nexus with Detroit." Thus, Petitioner asserts that "Apex did not have the requisite nexus with the City under the jurisdictional standards articulated by the U.S. Supreme Court, or under the Act's definition of 'doing business,' to be taxed by the City."[22]

Petitioner argues that the "record evidence" establishes a lack of nexus whether considering pre- or post-Wayfair.[23] "Neither Michigan nor federal law supports the imposition of CDIT upon Apex. The City may not independently expand its jurisdiction simply due to a desire to increase its revenues. Upholding the City's assessment would turn the concept of jurisdiction to tax – nexus – upside down."[24] Petitioner further asserts that the "taxing power asserted by the City of Detroit bears no relation to any protection, opportunities or benefits given to Apex. Apex didn't benefit from any laws of

[21] October 20, 2020 Hearing on Summary Disposition, Transcript, page 29.
[22] Petitioner's Brief on Nexus, page 2.
[23] Petitioner's brief on nexus, page 2
[24] Petitioners Brief on Nexus pages 2-3.

the City of Detroit because it didn't conduct business in the City of Detroit pursuant to the standard of the ordinance."[25]

Petitioner contends that *Wayfair* dealt with sales tax nexus of an online retailer with over "$100,000 in sales or 200 transactions in South Dakota."[26] A "quantity of business [that] could not have occurred unless the seller availed itself of the substantial privilege of carrying on business [there]."[27] Petitioner contends that "Apex – a Delaware corporation – had no office, property, or employees in Detroit; it made no sales and had no market in Detroit. For administrative convenience, Huron Capital Partners LLC ("Huron"), the managing partner of the General Partner of Huron Capital Fund II (Apex's shareholder), accepted mail on Apex's behalf at Huron's Detroit office for the few ministerial functions required by Apex's existence. Apex had no purposeful direction toward Detroit, and the City cannot tax Apex under the Due Process Clause."[28] Additionally, Petitioner asserts that "Apex lacked nexus with Detroit under the Commerce Clause because it was neither physically nor virtually present within Detroit."[29] Petitioner further asserts that "Apex had no employees, real or personal property in Detroit; it did not maintain a website or otherwise hold itself out as a business in Detroit; it did not advertise or market goods or services to Detroiters, and made no sales of good or services in the Detroit marketplace."[30]

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[25] October 20, 2020, Hearing on Summary Disposition, Transcript, page 23.
[26] Petitioner's Motion for Summary Disposition, October 6, 2020, page 2.
[27] *Id.*, quoting Wayfair at 2099.
[28] *Id.*, page 2, citing *Burger King Corp v Rudzewicz*, 471 US 462, 472-73 (1985).
[29] *Id.*, citing Wayfair, 138 S Ct at 2095.
[30] *Id*. at 2.

Petitioner contends that Apex had "de minimis" connections to Respondent.[31] That "Apex's *de minimis* connections with Detroit could not be more different from Wayfair's pervasive role in South Dakota, and demonstrate that Wayfair does not change this Tribunal's prior conclusion that Apex lacked nexus with Detroit."[32]

After oral argument, Respondent filed a Notice of Supplemental Authority, and On January 29, 2021, Petitioner filed Petitioner's Notice of Supplemental Authority both in support of its Motion for Summary Disposition, and to address what Petitioner characterized as "inaccurate statements of law contained in Respondent City of Detroit's (the "City") Notice of Supplemental Authority."[33]

Petitioner contends that while Respondent argues "that the nexus issue in *Apex v Treasury* is 'substantially identical to the nexus issue here.'"[34] Petitioner contends that Respondent is incorrect, asserting that "Regulation 5.1 to the City of Detroit's Income Tax Ordinance (Exhibit 4 to Apex's Brief on Nexus) clearly exempts from the definition of 'doing business' the 'Maintenance, by a corporation, of a resident agent in the city[.]' MCL 206.621 (1), the controlling statute in *Apex v Treasury*, contains no such provision."[35] Petitioner further notes that "the Opinion and Order of the Court of Claims finding nexus turned on the Court's conclusion that Apex's officers and directors acted as agents of Apex. The explicit exemption of agents from the definition of 'doing

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[31] De minimis activities are those that, when taken together, establish only a trivial connection with Michigan or the taxing state and do not establish nexus. Petitioner's Exhibit 3, from Petitioner's Brief Regarding Nexus, Department of Treasury, Revenue Administrative Bulletin 2014-5, January 29, 2014, Michigan Corporate Income Tax Nexus Standards, citing *Wisconsin Dep't of Revenue v William Wrigley*, Jr. Co, 505 US 214 (1992); *Quill Corp v North Dakota*, 504 US 298 (1992), page 14.
[32] Petitioner's Motion for Summary Disposition, October 6, 2020, page 2.
[33] Petitioner's Notice of Supplemental Authority, January 29, 2021, page 1.
[34] *Id.* at 2.
[35] *Id.* at 2-3.

business' in the City of Detroit thus renders the result in *Apex v Treasury* inapplicable to the instant matter."[36] Furthermore, Petitioner notes that Respondent also asserted that Apex's officers and directors acted as agents of Apex and that the "explicit exemption of agents from the definition of 'doing business' in the City of Detroit thus renders the result in Apex v Treasury inapplicable to the instant matter."[37]

Petitioner also refutes Respondent's statement that "The apportionment provisions of the Corporate Income Tax Act were (and are) completely different than those of the City Income Tax Act. City's Notice, p 2. While true that the Court of Claims' apportionment analysis under MCL 206.621 (2) is focused solely on the sales factor, the same conclusion is compelled by MCL 141.620, which uses an equally-weighted three-factor formula, and likewise focuses on profits earned as a result of sales made in the City of Detroit."[38] Petitioner notes that the Court of Claims decision noted that "the sale of Labstat stock was 'plaintiff's only sale or source of revenue,' and 'There can be no dispute from the documentary evidence submitted that this sale occurred in Ontario, Canada.' Exhibit A, p 8."[39] Thus, according to Petitioner, "[t]he payroll and property factor for City apportionment would also be zero, as the Court of Claims held 'plaintiff did not have any employees of its own, nor did it own, use, or lease any real property in this state.' Exhibit A, p 2." Plaintiff thus asserts that if the Tribunal wishes to consider the issue of apportionment, "Apex will demonstrate that the same result as in Apex v

[36] *Id.* at 3.
[37] *Id.* at 3.
[38] *Id.* at 2.
[39] *Id.*

Treasury is compelled in this case: payroll, property, and sales factors of zero, resulting in no tax liability."[40]

Petitioner makes an additional argument, asserting that the Justices in the *Wayfair* decision examined the South Dakota statute and held that its application could only be applied prospectively, which Petitioner noted was important in terms of the constitutionality of the statute.[41]

The crux of Petitioner's argument is that *Wayfair* requires beyond a minimum connection and that substantial nexus by virtue of an economic marketplace targeted towards the residents of the jurisdiction must be present. Thus, as Petitioner concludes, "this case has not been impacted by the U.S. Supreme Court's decision in *Wayfair* due to the lack of a virtual presence and the lack of Detroit marketplace."[42] Petitioner thus contends that it is entitled to a refund of taxes paid in error, along with the cancellation of the City's assessment in full.

RESPONDENT'S CONTENTIONS

Respondent also filed a *Motion For Partial Summary Disposition As To Nexus.* Respondent contends that there is no genuine issue as to any material fact and that Respondent is entitled to judgment as a matter of law. Respondent's case, as well as its Motion for Summary Disposition, is based on Respondent's contention that Petitioner was doing business and had nexus to the City of Detroit. Respondent asserts that Petitioner's "commercial domicile" was in the city, as this is where Petitioner managed its business and had a business office.[43] Respondent argues that Petitioner's

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[40] *Id.*
[41] Oral Argument Video Teleconference Hearing, October 20, 2020, page 24.
[42] Oral Argument Video Teleconference Hearing, October 20, 2020, page 14.
[43] Oral Argument Video Teleconference Hearing, October 20, 2020, page 45.

commercial domicile is not Delaware because it has no office in Delaware and paid no Delaware income tax.[44] Respondent contends that Petitioner only paid tax in the state of Michigan and neither in Delaware nor Canada, (where Labstat was located). Respondent claims that Petitioner's officers, directors, and other agents actively managed the business in Detroit and that Apex was created as a separate corporation for important tax and business reasons.[45] Respondent strenuously asserts that Petitioner is not a passive holding company, deriding Petitioner's conclusory claims to the contrary, and noting that "Apex has never offered any legal rationale for its position that Apex's agents were not 'really' Apex's agents." Noting that its agents were also employees of, and received paychecks from, Huron Capitol.[46]

Respondent further argues that Petitioner paid Huron $1 million for services occurring in the City and Petitioner and its unitary business affiliates enjoyed City of Detroit services.[47] As stated by Respondent during oral argument, "Huron Capital had one and only one business office, that was 500 Griswold in Detroit. So, all of its employees that were purchased under this $1 million agreement, every day, worked in that office in the City of Detroit on behalf of Apex."[48]

Respondent offers an alternative argument as well, asserting that even if Petitioner was domiciled out of state, Petitioner's activities in the City of Detroit exceed those required for nexus. In support of this contention, Respondent cites RAB 2014-5[49], which defines physical presence. Under this definition, Respondent contends that

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[44] *Id.* at 46.
[45] Respondent, City of Detroit's, Brief in Response to Apex's Nexus Brief, June 23, 2020, page 7.
[46] Respondent, City of Detroit's, Brief in Response to Apex's Nexus Brief, June 23, 2020, page 10.
[47] Respondent, City of Detroit's, Brief in Response to Apex's Nexus Brief, June 23, 2020, pages 12-13.
[48] Oral Argument Video Teleconference Hearing, October 20, 2020, page 36.
[49] Revenue Administrative Bulletin, 2014-5

Petitioner had agents in the City of Detroit conducting activities, to wit, the negotiation and closing of the sale of Labstat, on its behalf. This, Respondent states that its "agents acting in a representative capacity," physical presence created nexus with the City of Detroit.

Respondent argues that the City Income Tax Act defines "doing business" in the broadest possible terms, namely, "the conduct of any activity with the object of gain or benefit."[50] As to Petitioner's argument that City Regulations 5.1 (a) and (e) support its position, Respondent "agrees that Apex's resident agent was in Delaware, which is irrelevant to nexus" as to Reg 5.1 (a), which excludes from the definition of "doing business" the "maintenance, by a corporation, of a resident agent in the city." Furthermore, Respondent concedes that "Reg 5.1 (e) is irrelevant by its terms because Apex did not own any property in Detroit unrelated to its business activities."[51]

Respondent asserted that "Apex's agents spent months and months and months of activity in the City of Detroit managing, negotiating and ultimately effectuating the sale of the Labstat stock."[52] Respondent asserts that these agents "were intimately involved in running Labstat and they were intimately involved in the 2012 transaction." [53] This included negotiating the sale including a $35 million purchase agreement and a contingent promissory note.[54] Respondent strongly refutes Petitioner's characterization of Apex's activities as ministerial, noting that "negotiating a $35 million transaction, signing and negotiation execution documents, paying a million dollars for the services of

[50] Respondent, City of Detroit's, Brief in Response to Apex's Nexus Brief, June 23, 2020, page 25.
[51] Respondent, City of Detroit's, Brief in Response to Apex's Nexus Brief, June 23, 2020, page 25.
[52] *Id.* at 34.
[53] *Id.*
[54] *Id.* at 36.

Huron Capital employees, excuse me, that's not ministerial. That's major league business activity."[55]

Respondent also asserts that Petitioner's contention that taxation is prohibited under the Due Process and Commerce Clause of the United States Constitution is inapplicable because "those provisions are designed to protect interstate commerce, avoid double taxation and protect entities from taxation,"[56] without minimum contacts. Respondent argues that these issues do not exist and thus nexus is not precluded where Petitioner's commercial domicile and physical presence was within the taxing jurisdiction.[57]

Respondent also contends that nexus is also established because Petitioner was part of Huron's Detroit unitary business; therefore, 100% of Petitioner's income would be attributable to the City of Detroit.

Respondent makes an additional argument, noting that based on email correspondence, Petitioner "made exactly the same nexus argument for avoidance of state tax that [Petitioner] now makes for avoidance of [C]ity tax…[Petitioner] paid its full state tax liability and has never requested a refund."[58]

Respondent asserts that Petitioner had physical presence and its commercial domicile in the City, and was doing business in Detroit and had nexus under *Wayfair,* having necessarily "availed itself of the substantial privilege of carrying on business" in

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[55] *Id.* Page 38.
[56] Respondent's brief at page 19.
[57] *Id.*
[58] On April 10, 2017, Petitioner submitted documentation indicating that the State of Michigan had issued a refund of Petitioner's state tax. Petitioner maintains that the State "has concurred in the lack of nexus and has issued refunds in full."

the City.[59] Noting that it clearly met the Wayfair standard, with the Apex transaction having produced $37 million of business activity in the City, including $1 million paid to Huron Capitol for the services of its Detroit employees. Respondent noted that these "business activities were carried out in an entire floor of the Guardian Building, which, of course, receives all City services." Respondent thus concludes that "Apex clearly met the *Wayfair* nexus standard."[60]

Respondent also asserted that in the case at bar, the commerce clause is irrelevant, as "[i]t is axiomatic that before there can be a commerce clause tax concern, there must be interstate commerce and a concern over 'multiple or unfairly apportioned taxation.' Apex only did business in Detroit, was not engaged in interstate commerce, and was never threatened with 'multiple or unfairly apportioned taxation.'" Respondent noted that "[o]ther than U.S. federal tax, Apex only paid tax to Detroit and Michigan. Apex paid no tax to Delaware, Canada or any other jurisdiction."[61] Respondent concluding that "[t]here is no possible concern implicating the commerce clause, which is irrelevant."[62]

On October 20, 2020, the Tribunal heard oral arguments on the two motions via a video teleconference hearing. The testimony referred to, and expounded on, the briefs previously submitted.

The record was supplemented by additional briefs filed by Respondent and Petitioner in late January 2021. Respondent filed a *Notice of Supplemental Authority Relevant to the Pending Nexus Motions* on January 27, 2021. This included a January

[59] Respondent Brief Addressing Nexus, page 14.
[60] Respondent's Brief on Nexus, page 15.
[61] *Id*., page 21.
[62] *Id.*

25, 2021 *Opinion and Order of the Court of Claims*, which Respondent contends offers support of Respondent's motion for summary disposition as to nexus. The proffered Court of Claims decision pertains to the dispute on whether Apex owed State of Michigan Corporate Income Tax on Apex's sale of its stock in Labstat.[63] Respondent asserts that "the nexus issue in that case was substantially identical to the nexus issue here. Specifically, the controlling statute in each case was MCL 206.621(1), quoted both in the City's briefs and at pages 4-5 of the attached decision. Nexus is created under the statute if any agent of the taxpayer engages in any activity on behalf of the taxpayer in the jurisdiction for more than 1 day during the tax year."[64] Respondent asserts that "[t]he Court of Claims held that Apex met the nexus test based on the Detroit activities of its agents. The City of Detroit's briefs include those same arguments and several others not mentioned in the Court of Claims' decision"[65] and that the Court of Claims "decision confirms that in 2012, Apex had nexus to the City of Detroit."[66]

The Court of Claims decision, rendered January 25, 2021, and submitted by Respondent, found that the term "physical presence" used in MCL 206.621(1) is defined by statute to mean "any activity conducted by the taxpayer or on behalf of the taxpayer by the taxpayer's employee, agent, or independent contractor acting in a representative capacity." MCL 206.621(2)(b). The Court of Claims noted that "physical presence 'does not include the activities of professionals providing services in a professional capacity or

[63] It is noted that Respondent also provided testimony regarding this separate controversy entailing the same transaction but with State of Michigan taxes during oral argument. See Oral Argument Video Teleconference Hearing, October 20, 2020, pages 48-51.
[64] Respondent, City of Detroit's, Notice of Supplemental Authority Relevant to the Pending Nexus Motions. January 27, 2021, page 2.
[65] *Id.*
[66] *Id.*

other service providers if the activity is not significantly associated with the taxpayers ability to establish and maintain a market in this state.' MCL 206.621(2)(b)."[67]

Respondent further asserts that while the Court of Claims held that Apex, despite having nexus, "did not owe state tax based on the apportionment provisions of the Corporate Income Tax Act, the apportionment provisions of the Corporate Income Tax Act were (and are) completely different than those of the City Income Tax Act."[68]

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.[69] In this case, both the Petitioner and Respondent move 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 if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[70]

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the

[67] Apex Laboratories International Inc. v Department of Treasury, State of Michigan, Case No. 19-000095, page 5.
[68] Respondent, City of Detroit's Notice of Supplemental Authority Relevant to the Pending Nexus Motions, January 27, 2021. Page 2.
[69] See TTR 215.
[70] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

parties in the light most favorable to the non-moving party.[71] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[72] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[73] Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.[74] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[75]

SCOPE OF REVIEW ON REMAND

This case was returned from the Court of Appeals which ruled that "[w]e believe that the most prudent course of action is to vacate the Tribunal's decision and to remand for further proceedings to allow the parties to focus their arguments concerning *Wayfair, Quill*, and the Due Process and Commerce Clauses, and to allow the Tribunal to make a ruling in the first instance."[76] The decision further stated that the Court of Appeals "can determine from the existing record that the Tribunal's previous decision was based on 'adoption of a wrong principle' in light of the United States Supreme Courts' repudiation of *Quill, Bellas Hess*, and the physical presence rule,"[77] with the Court concluding that "we are not compelled by *Wayfair* or our Supreme Court's order to

[71] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[72] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[73] *Id.*
[74] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[75] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[76] Michigan Court of Appeals, On Remand, No. 338218, January 2, 2020, page 5.
[77] *Id.*

reverse the Tribunal so as to hold that Apex does owe the challenged taxes, nor do we believe that it to be appropriate for us to do so."[78]

As to the scope of the Tribunal's review on remand, both parties interpreted the Court of Appeals order differently.

Petitioner asserts a narrow scope of review on remand and argues that this Tribunal should follow the now vacated Tribunal and Court of Appeal's decisions, and simply consider Wayfair under those previous decisions' analysis of the purported facts and law. Petitioner contends that this was the directive provided by the Michigan Supreme Court to the Court of Appeals, and that was the directive within the Court of Appeals language on the remand to the tribunal in-light of reconsideration in the wake of Wayfair. In making this assertion, Petitioner concedes and recognizes that under the Court of Appeals remand, both the Court of Appeals decision and the Tribunal's prior May 2017 order granting summary disposition have been vacated to address the impact of *Wayfair* and the over-turning of the *Quill* and *Bellas Hess* precedents.

Respondent asserts that the prior Tribunal and Court of Appeals decisions have been vacated. Respondent notes that when a "superior tribunal vacates a lower tribunal decision, the vacated decision is a nullity: 'Because our entire opinion in the earlier decision was vacated, the law of the case doctrine does not apply, and we must reconsider each issue. *Hill v. Ford Motor Co*., 183 Mich App. 208, 212, 454 N.W.2d 125 (1989). *City of Troy v. Papadelis*, 226 Mich App 90, 94 (1997)."[79]

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[78] *Id.*

[79] Respondent, City of Detroit's Motion and Brief Seeking Limited Discovery Into Apex's Contention That The Apex Transaction "Closed In Canada." July 2, 2020, page 7, and Respondent, City of Detroit's Brief Addressing Nexus Pursuant To The Tribunal's February 24, 2020 Scheduling Order, May 21, 2020, page 1.

Respondent thus contends that the higher courts would not have vacated the lower decisions if they believed that the only concern here was the failure to consider *Wayfair*. "They would simply have remanded with direction to consider *Wayfair*."[80]

This Tribunal finds both the plain language of the remand order as well as Respondent's argument compelling, so that while the primary emphasis of the remand was to reconsider the case in-light of Wayfair, the language of the order indicates that this Tribunal needs to examine the issues anew.

CONCLUSIONS OF LAW

This Tribunal has been charged with determining whether the *Wayfair* decision would have changed the result of this Tribunal's previous determination that was decided prior to *Wayfair* and was based on the "physical presence" standard enunciated in *Quill Corp. v North Dakota.* This case has a complicated history, and the Tribunal has reviewed the Motions, responses, copious amounts of evidence, testimony, and post-oral argument supplemental materials, and finds that denying Respondent's Motion for Partial Summary Disposition and granting Petitioner's Motion for Summary Disposition is warranted. The Tribunal further finds the evidence presented supports Petitioner's stance that it did not have nexus with Respondent, City of Detroit, thus was not required to pay CDIT for the 2010 and 2012 tax years. In addition, the Tribunal finds that this case is a case of first impression and involved a public purpose in applying the new nexus standard as directed by the Court of Appeals. In that regard, this Tribunal finds that both parties have vigorously and competently represented their positions. However,

[80] Respondent, City of Detroit's Motion and Brief Seeking Limited Discovery Into Apex's Contention That The Apex Transaction "Closed In Canada." July 2, 2020, page 7.

neither party has proven that its request for costs and attorney fees is warranted. Therefore, both Petitioner's and Respondent's requests for costs and attorney fees are denied.

ANALYSIS

The U.S. Supreme Court's landmark decision in *South Dakota v. Wayfair et al* was a culmination of years of eroding the "physical presence" standard set in the 1992 case of *Quill Corp. v North Dakota*[81] which held that the Dormant Commerce Clause barred states from compelling retailers to collect sales or use taxes in connection with mail order or Internet sales made to their residents unless those retailers had a physical presence in the taxing state.[82] *Quill Corp. v North Dakota* used a two-tier analysis that found sufficient contact to satisfy due process but not the dormant commerce clause requirements. The *Quill* decision struck down a state statute requiring an out-of-state mail order company with neither outlets nor sales representatives in the state to collect and transmit use taxes on sales to state residents, but *Quill* did so based on Commerce Clause rather than due process grounds. *Quill* was subsequently overturned by *Wayfair*.

Prior to *Wayfair*, nexus had been determined by sufficient "physical presence," which could be achieved through a brick-and-mortar office, or the presence of even a single employee in the state.[83] *Wayfair*, however, changed that. In *Wayfair*, Justice

[81] *Quill Corp. v North Dakota*, 504 U.S. 298 (1992)
[82] In *Quill*, the Court reexamined the physical presence rule. The case involved a challenge to North Dakota's "attempt to require an out-of-state mail-order house that has neither outlets nor sale representatives in the State to collect and pay a used tax on good purchased for use within the State." 504 U.S. at 301. The *Quill* majority concluded that the physical presence rule was necessary to prevent undue burdens on interstate commerce and it grounded the physical presence rule in *Complete Auto's* requirement that a tax have a "substantial nexus." *Quill* 504 U.S. at 311-313.
[83] The *Quill* decision created two distinct nexus tests based on the U.S. Constitution's due process clause and commerce clause, respectively. The due process nexus test under *Quill* survived *Wayfair*. This test is not dependent on a seller's physical presence within a state. Instead, a remote seller can meet the due process nexus requirement through "purposeful direction" of its efforts toward a state to solicit business.

Kennedy noted that *Quill's* physical presence rule as "arbitrary, formalistic," "anachronistic," and "unfair and unjust" to both states and brick-and-mortar retailers,[84] and that "[e]ach year, the physical presence rule becomes further removed from economic reality."[85] Indeed, the *Quill* ruling had protected businesses selling in multiple states from having to collect sales tax in each state unless the business had a physical presence, such as a brick-and-mortar building. The *Wayfair* Court thus decided that while the Due Process and Commerce Clause standards "may not be identical or coterminous," the standards are "closely related," and there are "significant parallels" between the two standards.[86]

While the *Quill* decision involved sales tax collection, the *Quill* physical presence standard was ultimately applied to non-sales tax situations, and indeed, it was utilized in the May 2017 Tribunal decision for Summary Disposition.

In the wake of *Wayfair*, while the physical nexus is still good law, the Supreme Court ruled that a business could acquire an economic nexus regardless of where the business, employees or warehouses are located. If the sales, or "economic activity" in that particular state are substantial enough, tax liability would ensure.

Thus, under *Wayfair,* this would require sellers in their state that exceeded a dollar or transaction threshold to collect sales tax on the state's behalf, regardless if

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This is a fairly flexible standard, primarily about "the fundamental fairness of government activity" with the relevant question being whether the remote seller has purposefully availed itself of the economic market in the forum state, thus a remote seller that avails itself of a state's economic market to any significant degree will satisfy the due process requirement. *Quill*, 504 U.S. at 308, 312. The commerce clause nexus test created under *Quill* did not survive *Wayfair.* This test was a bright-line test that required a seller to have a physical presence in a state before the state could impose a duty to collect use taxes. *Id*. at 317.

[84] *Wayfair*, 138 S.Ct. at 2092, 2095.

[85] *Id*.

[86] *Wayfair*, 138 S. Ct. 2080, at 2093.

they had a physical presence there. While these statutes were in clear violation of *Quill*, South Dakota's challenge of the ruling in *Wayfair*, in which the state took a popular online retailer of home goods to the U.S. Supreme Court, ultimately overturned *Quill* with its judgment that physical presence was no longer required for a remote seller to collect sales tax. Hence, if a company has economic nexus with a state, even if the retailer or seller does not have physical presence in the state, it is presumed to be liable for the collection of sales tax in that state. It is noted that *Wayfair* does not replace the physical presence standard, but rather adds another standard. Accordingly, if a business does not meet a state's economic threshold but has a physical presence there, the business would still have sales tax collection obligations. It is noted that some taxing entities, like in the case of *Wayfair*, statutorily set economic thresholds describing what level of economic activity has to occur in order to trigger tax liability.[87] The State of Michigan, for example, has adopted a similar economic nexus threshold for sales and use tax.[88] Consequently, meeting either the economic threshold or the physical presence standard is enough to trigger the requirement to collect and remit taxes.

The *Wayfair* decision impacts nexus, and thus impacts tax compliance for any organization operating across state borders. While the *Wayfair* decision specifically addressed whether a state could subject a remote seller to its sales and use tax, the analysis performed by the U.S. Supreme Court under the Commerce Clause applies not only to all state's sales and use taxes, but like the *Quill* decision it overturned, to all taxes, thus *Wayfair's* impact is not just limited to sales taxes.

[87] For example, Michigan's remote seller economic nexus threshold for sales and use tax is seller's gross receipts from sales that "exceed $100,000.00 in the previous calendar year" or the seller has 200 or more separate transactions in the previous year. See RAB 2021-22, approved December 21, 2021.
[88] *Id.*

In the wake of *Wayfair*, while the physical nexus is still good law, the Supreme Court ruled that a business could acquire an economic nexus regardless of where the business, employees or warehouses are located. If the sales, or "economic activity" in that particular state are substantial enough, tax liability would ensue.

Prior to delving into the application of *Wayfair* to the case at bar, this Tribunal takes special notice of the post-hearing supplemental material submitted by Respondent and Petitioner and notes that the Court of Claims dealt with the application of the state's Corporate Income Tax Act (CITA) involving the same transaction at issue here.[89] The Court of Claims found that there was "no genuine issue of material fact and that plaintiff did have a physical presence in this state the tax year in issue." The Court of Claims, similar to this Tribunal's earlier decision granting summary disposition, acknowledged the lack of employees, ownership of office spaces (which belonged to Huron), and that regular business operations were not conducted in the state during the period at issue. In analyzing the provisions of the CITA, the Court of Claims noted that "physical presence can, under MCL 206.621(2)(b), arise from the taxpayer's agents acting in a representative capacity in this state."[90] The Court further held that Apex was a corporation with officers acting on its behalf. "Corporations may act only through their officers and agents, and 'an agency relationship exists between a corporation and its officers.' *Barclae v Zarb*, 300 Mich App 455, 472; 834 NW2d 100 (2013)." The Court of Claims concluding that "caselaw requires the conclusion that, when plaintiff's officers

[89] MCL 206.623(1) of the CITA imposes a 6% tax on corporate income allocated or apportioned to this state.
[90] *Apex Laboratories International Inc. v. Department of Treasury, State of Michigan*, Case No. 19-000095-MT, January 25, 2021, page 5.

were acting for plaintiff, they were doing so in a representative capacity, as agents."[91] Diminishing reliance on this case, the Court of Claims in Apex, while finding physical presence by Petitioner's officers under the provisions of the State's corporate income tax, also found them to be "agents" of Petitioner, a classification of the officers that specifically excludes their activities under the CDIT in the case at bar.

This Tribunal, examining the provisions of the City Income Tax and nexus upon remand from the Court of Appeals finds that Petitioner's activities as a passive holding company were by design minimal. Petitioner, Apex Laboratories International, Inc., (Apex) is a registered Delaware corporation that was formed to hold stock and debt in Labstat. Petitioner had no office, property, or employees in Detroit, nor did it make any sales or have a market in Detroit. Nor did Petitioner conduct regular business operations in Detroit within the tax years at issue. The record is clear that Apex was created merely to hold Labstat's stock and not for any other purpose. Petitioner performed all activities expected of it by its parent, Huron Capital.

Moreover, Petitioner's board of directors was comprised of various Huron employees. Deposition testimony of these directors established that they did not perform regular activities for Petitioner, and that their primary roles were to take the necessary steps to continue Petitioner's continued corporate existence.

Deposition testimony also established that Petitioner's listing of 500 Griswold address on documents was for "administrative convenience," because its directors (Huron employees) were located at that address, making it easier for the mail to be received at that location. The evidence consists of record testimony that mail was sent

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[91] *Id.*

to the Detroit address because Huron's Capitol's Partner was the general partner of the fund, and that certain functions, such as filing tax returns as necessary, and other annual reporting was conducted out of that office.

Additionally, the Tribunal does not find the phrase "commercial domicile" relevant to the determination of whether Petitioner has nexus with the City of Detroit, as this term does not appear in the City Income Tax Act and is otherwise irrelevant to the determination of whether Petitioner was doing business in the City of Detroit. Similarly, the unitary business principle is an apportionment concept and not a method to determine nexus. The Tribunal finds that Respondent's reliance on the unitary business concept misplaced as the City Income Tax does not include that concept, nor is there any language that would allow a unitary business to create a nexus link to a corporation. Thus, the Tribunal rejects Respondent's reliance on both the "commercial domicile" concept as well as Respondent's argument that nexus can be established if Petitioner is part of Huron's unitary business.

Although the record is clear that the primary activities related to the sale of Labstat's stock were *not* finalized in Detroit; they were finalized in Canada, the officers and directors of Petitioner, who were located in Detroit, did assist in preparing closing documents and in executing the closing documents.[92] Evidence also shows that these officers and directors obtained for Petitioner, and not for the parent company Huron, a five million dollar promissory note during the course of the Labstat sale and

[92] The purchase agreement called for a closing in Canada. However, Apex emails and Honigman time records show that Petitioner's agents signed the closing papers in Detroit in advance of the June 2, 2012 closing date.

negotiations. Thus, the record shows that the officers and directors had taken multiple actions on behalf of Petitioner on a number of occasions related to the sale of Labstat.

In reviewing this case on remand, this Tribunal gives deference to the aforementioned sister case heard in the Court of Claims, *Apex Laboratories International, Inc. v. Department of Treasury*, State of Michigan. This case dealt with the same transaction at issue here, except it pertained to the imposition of the State Corporate Income Tax. In that case, the Court of Claims found that the officers and directors of Petitioner, who were employees of Huron and not Petitioner, are sufficient to establish a physical presence in the city during the tax year at issue. The Opinion and Order of the Court of Claims, offered by Respondent in its Notice of Supplemental Authority, found nexus on the Court's conclusion that Apex's officers and directors acted as agents for Petitioner.[93] The Court of Claims found that under the governing state statute in that case, Petitioner had physical presence in the state, as physical presence can, under MCL 206.621(2)(b) arise from the taxpayer's agents acting in a representative capacity in this state. Thus, the Court of Claims concluded that Apex was a corporation with officers who acted on its behalf and finding that "Corporations may act only through their officers and agents, and that 'an agency relationship exists between a corporation and its officers.'" [94]

Respondent has also taken the position that "[b]lack letter agency law holds that Apex's many Detroit agents necessarily acted for Apex (the owner and seller of the Labstat stock) in managing Labstat over the years and then arranging, negotiating, and

[93] Petitioner's Notice of Supplemental Authority, page 2.
[94] *Id.*

managing the complex sale of the Labstat stock."[95] A contention with which this Tribunal agrees. Thus, the activities of Petitioner's agents could be sufficient to establish nexus in this case, except for an exclusion for the activities of those agents contained in the City of Detroit's Income Tax Ordinance.

The language of Regulation 5.1 to the City of Detroit's Income Tax Ordinance, which differs from the governing statute at issue in the Court of Claims case, bars the imposition of the city income tax. Regulation 5.1 clearly exempts from the definition of "doing business" the "Maintenance, by a corporation, of a resident agent in the city[.]"[96] In other words, even though the physical presence test is otherwise met, the application of the City statute, which excludes "agents" results in Petitioner in the case at bar having no tax liability to the Respondent.

In applying *Wayfair* to the facts of this case, we get a similar result. A notable difference between *Wayfair* and the case at bar is that this case pertains to the imposition of the City of Detroit Income Tax and not the collection of state sales taxes as was the case in *Wayfair*. Additionally, it is noted that the *Wayfair* decision itself makes no mention of its applicability to the imposition of taxes other than sales/use taxes.[97] The case at bar is a case of first impression for the Tribunal in applying *Wayfair*,

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[95] Respondent, City of Detroit's Motion for Partial Summary Disposition As To Nexus, October 6, 2020, page 4.

[96] Regulation 5.1 to the City of Detroit's Income Tax Ordinance (included in Petitioner's Brief on Nexus, Exhibit 4) exempts from the definition of "doing business" by a resident agent in the city. In contrast, the controlling statute in MCL 206.621(1), the controlling statute in Apex v Treasury, contains no such provision.

[97] Worth noting as well, the U.S. Supreme Court has never decided whether the bright-line physical presence test required for sales and use taxes by *Quill* applies to other taxes. In *Quill*, the Court stated that it had never, in its review "of other types of taxes," required physical presence. *Quill*, 504 US at 314.

and the application and interpretation of *Wayfair* to other taxes has not been found in other published opinions.[98]

In Wayfair, the U.S. Supreme Court held that the purpose of the Commerce Clause[99] is to prevent economic discrimination, not create "market distortions," and the effect of *Quill*, which it overturned, was "a judicially created tax shelter for businesses that limit their physical presence." This was an important consideration of the *Wayfair* Court, and it was acknowledged that remote businesses were at a competitive advantage because they could avoid regulatory burdens and sell goods at lower prices. Thus, the Court in *Wayfair* noted that modern e-commerce and the ability of out-of-state sellers to maintain a "continuous and pervasive virtual presence" in the taxing jurisdiction only exacerbated the advantage of remote businesses. Thus, the physical presence rule set forth in *Quill* was overruled and a business need not have a physical presence in a taxing state in order for the state to impose a duty to collect and remit sale and use taxes. Hence, for purposes of the sales and use tax at issue in *Wayfair*, substantial nexus analysis under the Commerce Clause, the Court in *Wayfair* replaced the physical presence rule with an economic nexus rule. The *Wayfair* Court held that the South Dakota law at issue satisfied this test because the law only applied to sellers who, on an annual basis, "deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and

[98] Although it is widely recognized that the physical presence test of *Quill* has been applied to other taxes.
[99] There are two general principles that guide courts adjudicating Commerce Clause challenges to state regulations of interstate commerce and "mark the boundaries" of those regulations: (1) "state regulations may not discriminate against interstate commerce"; and (2) "[s]tates may not impose undue burdens on interstate commerce." *Wayfair* 138 S. Ct. 2080, 2081.

services into" the state.; and (2) the remote sellers were large national online retailers that "maintained an extensive virtual presence."

A key principle of *Wayfair* is that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[100].

Wayfair, as noted, dealt with sales taxes, with the seller located in one state and the buyer in another. The *Wayfair* decision rejected the physical presence test as "arbitrary" and "formalistic," thus overruling *Quill* by acknowledging that physical presence was not a constitutional prerequisite for the imposition of state sales tax collection on remote sellers. However, the *Wayfair* Court did not clearly articulate what nexus a business must have with a state before it is obligated to collect sales taxes for that state. While the *Wayfair* Court approved the South Dakota statute at issue as "clearly sufficient" to establish the required nexus, it did not address how low the threshold can go before a business cannot be obligated to collect and remit sales taxes. The *Wayfair* Court only stated that sufficient nexus arises when the business "avails itself of the substantial privilege of carrying on business' in that jurisdiction."

Wayfair's lack of clarity makes this analysis somewhat challenging, as the majority opinion in *Wayfair* maintains that there remains a difference between the nexus required to satisfy the Due Process Clause versus the nexus needed under the dormant Commerce Clause analysis. Under prior precedents, the dormant Commerce Clause nexus is higher; the *Wayfair* decision, unfortunately, does not address exactly how much higher. Although the dormant Commerce Clause is not expressly addressed in

[100] *Wayfair* at 2093.

the *Wayfair* decision, the *Wayfair* Court did find that the imposition of the sales tax obligation on remote sellers was not discriminatory because the tax was imposed at the same rate regardless of whether the sale occurred in-state or remote via Internet sales. The *Wayfair* Court also pointed out several aspects of the South Dakota law that it found to avoid imposing an undue burden on interstate commerce, specifically a "safe harbor" provision for remote sellers that make only a few sales within the state. Additionally, the law is explicitly not retroactive, a point asserted by Respondent in this case, and, of lesser applicability or relevance here, the state was part of the Streamlined Sales and Use Tax Agreement, which sought uniformity across the states and was designed to reduce administrative costs and to simplify compliance.

In applying *Wayfair* to this case which does not involve sales taxes, a couple of considerations noted in the *Wayfair* decision are applicable in our review, first of all, and perhaps most importantly is the whether the Petitioner "avails itself of the substantial privilege of carrying on business" in Respondent's jurisdiction. In *Wayfair*, the out-of-state seller did not have a physical presence in the state but did have a substantial volume of remote sales that fulfilled the threshold amount set forth in the South Dakota law at issue. The sales were also continuous and directed to the state. The sales occurred in South Dakota, and the imposition of the tax was directly related to the sales activity the seller engaged in that state. *Wayfair's* presence was substantial and pervasive, and directly related to the South Dakota marketplace. In contrast, in the case at bar, Petitioner's activities and exposure to Detroit were not continuous, and Petitioner's activities as a passive holding company were by design minimal. Petitioner did not sell any goods or services in the Detroit marketplace. While the facts clearly

show that Petitioner's board of directors was comprised of various Huron employees, deposition testimony established that these directors did not perform regular activities for Petitioner, and that their primary purpose was to take necessary steps to continue Petitioner's continued corporate existence. Moreover, Petitioner's listing of 500 Griswold, Detroit, was used as an address because its agents were located at that address, and this made it easier for them to fulfill their ministerial duties such as receiving mail at that location. Finally, in what can be as somewhat analogous to the "safe harbor" enunciated in *Wayfair*, Regulation 5.1 specifically excludes from taxation the activities of agents, thus the statutory authority to impose a tax based on these activities as "agents" is absent[101].

What we have is similar to our earlier analysis related to physical presence. The evidence indicates that Petitioner performed all activities expected of it by its parent, Huron Capital. The record is unambiguous that the activities directly related to the legal consummation of the sale of Labstat's stock were *not* performed in Detroit but were performed in Canada. In addition, Petitioner is a Delaware company, and the record is clear that it was created merely to hold Labstat's stock and not for any other purpose.

Thus, in contrast to the case in *Wayfair*, here the Petitioner did not avail itself of the Detroit marketplace, its contacts with Respondent were minimal, those of its agents were excluded by Respondent's own statutory framework, and overall did not rise to the level of directed economic activity that occurred in *Wayfair*. Therefore, Petitioner lacked nexus with Respondent under the Commerce Clause because it was neither physically

[101] In Wayfair, the Supreme Court noted several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce. One of these features was a "safe harbor to those who transact only limited business" in the state. *Wayfair* slip op. 23.

nor virtually present within Detroit. The facts show that during the tax years at issue, Petitioner had no employees, real or personal property in Detroit; nor did it maintain a website or otherwise hold itself out as a business in Detroit. More compellingly, unlike the facts in *Wayfair*, Petitioner did not advertise or market goods or services to Detroiters, nor did it make any sale of goods or services in the Detroit market. In contrast to *Wayfair*, where the seller had substantial sales in South Dakota, in the case at bar, the facts show that Petitioner's lone activity was to hold and sell Labstat stock acquired by Huron's Fund, which had nothing to do with Detroit marketplace as the sale was consummated in Canada.

Petitioner's only contact with Respondent City was through its "officers and members of the board of directors that were employed by Huron."[102] Although these officers and directors, which Petitioner described as "necessary to satisfy the minimum corporate governance requirements" and "were merely Huron members and employees appointed to Apex's board as paper officers and directors"[103] played an important and significant role, they were agents for Petitioner, and the exclusion of the activities of "agents" for purposes of the Detroit City Income Tax would result in the same exclusion as resulted in a Pre-*Wayfair* analysis.[104]

Viewed overall, Petitioner's connections with Respondent are substantially different from *Wayfair's* pervasive role in South Dakota, and that the *Wayfair* decision does not change this Tribunal's prior conclusion that Petitioner lacked nexus with Respondent. Thus, this Tribunal finds compelling Petitioner's assertion that it did not

[102] Petitioner's Brief on Nexus, page 2
[103] Petitioner's Brief on Nexus, page 2
[104] It is noted that both parties refer to these officers as "agents" throughout the numerous pleadings and testimony.

have the requisite nexus with Respondent under the jurisdictional standards articulated by the U.S. Supreme Court, or under the Act's definition of ''doing business," to be taxed by the City.[105] Most importantly, the sale of Labstat stock was Petitioner's only sale or source of revenue, and that the sale of the Labstat stock was consummated in Ontario, Canada, thus the facts show that Petitioner lacked substantial nexus with Respondent, that it lacked "purposeful direction toward Detroit," and thus precludes Respondent from imposing a tax on Petitioner under the Due Process Clause.

This Tribunal also finds merit with Petitioner's argument that the Justices in the *Wayfair* decision explicitly found that the application of the South Dakota statute could only be prospective.[106] The *Wayfair* court adopted a reliance standard and would not approve of taxing authorities going after back taxes with the adoption of a new nexus test.[107] Consequently, even if Petitioner had been found to have sufficient nexus under a *Wayfair* analysis, any taxation resulting from the application of a new nexus standard to economic activity occurring prior to the adoption of the new standard would not pass constitutional muster.

In short, this Tribunal contends that the *Wayfair* decision requires beyond a minimum connection and that substantial nexus by virtue of an economic marketplace targeted towards the residents of the jurisdiction must be present, and that Petitioner is

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[105] Petitioner's Brief on Nexus, page 2.
[106] "Reliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent. See *Kimble v. Marvel Entertainment, LLC,* 576 U.S. ___,___-___(2015) (slip op., at 9-10)." *Wayfair* slip op. at 20.
[107] "The law at issue requires a merchant to collect the tax only if it does a considerable amount of business in the State; the law is not retroactive;" *Wayfair* slip op. at 21. The Supreme Court noting that the South Dakota statute "includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce….. the Act ensures no obligation to remit the sales tax may be applied retroactively." *Wayfair* slip op. at 23.

correct that this case has "not been impacted by the U.S. Supreme Court's decision in *Wayfair* due to the lack of a virtual presence and the lack of Detroit marketplace."[108] The facts, as presented into evidence, are clear that Petitioner did not avail itself of the substantial privilege of carrying on business in the city of Detroit, and that the record establishes a lack of nexus whether considering a pre- or post-*Wayfair* analysis. Additionally, and most importantly, those activities which could establish nexus, specifically the activities of agents, are excluded by Respondent's own statutory and regulatory exclusion.

Therefore, for the reasons stated above, the Tribunal concludes that no genuine issue of material fact remain regarding whether Petitioner is responsible for the taxes at issue and the Tribunal finds that granting Petitioner's Motion for Summary Disposition and denying Respondent's Motion for Partial Summary Judgment is appropriate as Petitioner has proven that it has no nexus with the City of Detroit under either a Pre- or Post-*Wayfair* analysis to justify the imposition of taxes on the dividends and gains at issue in this appeal. Though Petitioner was "doing business," under the broad definition set forth in MCL 141.605, under Respondent's statutory regulations excluding agents, Petitioner had no physical presence or minimum connection with the City of Detroit, nor did Petitioner "substantially avail" itself of the Detroit marketplace. As to the issue of apportionment, because of the exclusion of the activities of agents, this is similarly not an issue. A finding that the activities and presence of Petitioner's agents are excluded by Respondent's own regulations, results in no finding of physical or economic presence that would have resulted in any tax liability.

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[108] Transcript, October 20, 2020, page 14.

Petitioner is entitled to a refund of taxes, interest and penalties paid in error, along with the cancellation of the City's assessment in full. As a result, Respondent's request for costs and attorney's fees shall be denied. Petitioner also requested fees and costs. This Tribunal does not find that Petitioner's request for attorney fees or costs is substantiated and that as this case involves a case of first impression and an important public policy issue, this request is also denied.

JUDGMENT

IT IS ORDERED that Respondent's Motion for Partial Summary Disposition is DENIED.

IT IS FURTHER ORDERED that Petitioner's Motion for Summary Disposition is GRANTED.

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

IT IS FURTHER ORDERED that Respondent's Motion for Sanctions is DENIED.

IT IS FURTHER ORDERED that the CDIT Assessment is CANCELLED.

IT IS FURTHER ORDERED that Respondent shall issue a refund of the taxes paid by Petitioner within 35 days of entry of this Final Opinion and Judgment.[109]

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.

[109] See MCL 141.693(3).

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 _____

Entered: August 19, 2022

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_____