



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

ORLENE HAWKS
DIRECTOR

Nationwide Agribusiness Insurance
Company et al,
Petitioner,

MICHIGAN TAX TRIBUNAL

v

MOAHR Docket No. 21-000039

Michigan Department of Treasury,
Respondent.

Presiding Judge
Steven M. Bieda

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment (POJ) on August 22, 2022. The POJ states, in pertinent part, “[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal in writing, by mail or by electronic filing, if available, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions).”

Neither party has filed exceptions to the POJ.

The Administrative Law Judge (ALJ) considered the testimony and evidence submitted and made specific findings of fact and conclusions of law. The ALJ’s determination is supported by the testimony and evidence and applicable statutory and case law.

Given the above, the Tribunal adopts the POJ as the Tribunal’s final decision in this case.¹ The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the POJ in this Final Opinion and Judgment. As a result:

- a. The taxes, interest, and penalties, as levied by Respondent, are:

Assessment Number: VA6WA6K

Taxes	Interest	Penalties
\$43,352.00	\$12,758.53	\$10,838.00

Assessment Number: VA7AV7G

Taxes	Interest	Penalties
\$53,231.00	\$13,307.75	\$13,307.75

¹ See MCL 205.726.

b. The taxes, interest, and penalties, as determined by the Tribunal, are:

Assessment Number: VA6WA6K

Taxes	Interest ²	Penalties
\$43,352.00	\$12,758.53	\$10,838.00

Assessment Number: VA7AV7G

Taxes	Interest ³	Penalties
\$53,231.00	\$13,307.75	\$13,307.75

IT IS SO ORDERED.

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

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

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

² Interest to be computed in accordance with 1941 PA 122 (Revenue Act).

³ Interest to be computed in accordance with 1941 PA 122 (Revenue Act).

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: January 23, 2023

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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



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

ORLENE HAWKS
DIRECTOR

Nationwide Agribusiness Insurance Company et al, MICHIGAN TAX TRIBUNAL
Petitioners,

v

MOAHR Docket No. 21-000039

Michigan Department of Treasury,
Respondent.

Presiding Judge
Peter M. Kopke

PROPOSED ORDER DENYING PETITIONER'S
MOTION FOR SUMMARY DISPOSITION

PROPOSED ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DISPOSITION

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

On March 5, 2021, the Tribunal issued a Scheduling Order in the above-captioned cases, which, in pertinent part, ordered the parties to file motions for summary disposition by August 2, 2021, and responses to the opposing party's motion by September 2, 2021. The parties complied with the scheduling order.

The Tribunal has reviewed the Motions, the Responses, and the case file and finds that the granting Respondent's Motion for Summary Disposition and the denial of Petitioners' Motion for Summary Disposition is warranted at this time.

PETITIONERS' CONTENTIONS

Petitioners move for summary disposition under MCR 2.116(C)(10). In support of its Motion, Petitioners contend that they are entitled to summary disposition because they are a unitary business group ("UBG") under MCL 206.611(6). Petitioners and

affiliated insurance companies filed amended Michigan Corporate Income Tax (“CIT”) returns based upon Respondent’s guidance. The amended returns sought to apply credits of certain group members against the aggregate CIT liability. After some but not all refunds were processed, Respondent issued assessments against the issued refunds. Petitioners contend Respondent does this because it now claims that an insurance company can never be part of a UBG if there is a benefit to the UBG.

Petitioners contend that they and their affiliates satisfy the definition of a UBG under RAB 2018-12, participate in a cost-sharing agreement, and participate in reinsurance pooling together. They also contend they and their affiliates satisfy both the value-flow requirement and the dependent-operations requirement. Petitioners contend that a plain reading of UBG rules under CIT Act Chapter 10 indicates that those rules apply across the Act and not in the narrow scope posited by Respondent.¹

Petitioners contend that the CIT Act does not limit the application of MCL 206.611 and MCL 206.691 across the entirety of the Act. It relies on MCL 206.611(5) in support of its interpretation of a plain reading of the statute. Petitioners contend that no statutory text prohibits its interpretation and that Respondent’s reliance upon MCL 206.635(1) and MCL 206.637 is mistaken. Petitioners contend Respondent violates statutory construction rules and cites case law they contend supports their position.

RESPONDENT’S RESPONSE TO PETITIONER’S CONTENTIONS

In support of its Response, Respondent contends that Petitioner’s Motion errs in two respects. First, Respondent argues that Petitioner’s reliance upon the general

¹ UBG is defined under MCL 206.611.

definition of UBG is undercut by the premiums and retaliatory tax appearing under Chapter 12 of the CIT Act, which applies to insurance companies. Respondent contends that Petitioner is therefore subject to the more specific entity-by-entity calculation required under Chapter 12² and that it is not appropriate to consider an insurance company under MCL 206.691 when the taxes and credits associated with insurance companies operate under Chapter 12. Respondent also argues that Petitioners' brief makes an unnecessary connection between the phrases "an insurance company" and "UBG." Respondent argues that Petitioners' interpretation of MCL 206.691 would fundamentally undermine administration of the retaliatory tax.

Second, Respondent argues that Petitioners' argument under *TCF* is irrelevant because that case addresses issues for financial institutions under Chapter 13 of the CIT Act. Also, it states that the comparison is not apt because a "financial institution" can be a UBG under Chapter 13, but an "insurance company" is only "an authorized user" and not a UBG.

Respondent also argues that Petitioner's brief erred in relying on Wilkinson's deposition because only legal issues can be considered on summary disposition. It also points to other depositions it claims puts Wilkinson's statements in context.

Respondent requests oral argument or the opportunity to respond to Petitioner's response to its Motion.

² Respondent cites MCL 206.635(1) and (2); MCL 206.643(3); and MCL 206.637(1).

RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends that the statute prohibits an insurance entity from claiming to be a UBG for purposes of premiums tax, retaliatory tax, or tax credits. Further, Respondent contends that insurers from various foreign states cannot be compared to the burdens a Michigan company would pay in the insurer's origin state.

Respondent contends that the structure of the CIT Act and insurance code make it inappropriate to allow insurance companies to group taxes and share credits.

Respondent states that the State of Michigan utilizes a retaliatory tax to ensure equal tax burdens on domestic and foreign corporations. Respondent argues that appropriate forms and schedules do not exist to support Petitioners' legal interpretation.

Respondent states that Petitioners are companies from various states and initially completed their respective returns appropriately. However, Respondent contends that Petitioners erred in their amended returns by filing on a unitary, group-wide basis, allowing the reduction of retaliatory tax calculations and utilization of unused nonrefundable credits contrary to law.

Respondent contends that the insurance premium tax is calculated on each individual insurance company and relies upon the CIT Act. Specifically, it contends that the indefinite article "an" as used in the CIT Act and the Insurance Code of 1956 supports its position and undercuts Petitioners' argument that the tax can be calculated against a UBG. Respondent further relies upon other sections of the CIT Act, such as calculations for standard taxpayers or financial institutions, as discernible from the omitted language Petitioner seeks in this chapter of the CIT. However, Respondent

contends that insurance companies were not statutorily included, because the gross premiums that comprise the tax base must be written by “an insurance company.” Respondent also contends that MCL 206.691 does not support Petitioners’ position because it is a general provision of the CIT Act and not as specific to the applicable issue as MCL 206.635 and MCL 500.476a. Respondent relies upon *D’Agostini Land Co LLC v Dep’t of Treasury*.³ It also relies upon MCL 206.637(1) and the lack of reference to a “unitary” group of insurance companies in the CIT Act.

Respondent contends that an alien or foreign insurer must pay the retaliatory tax in Michigan, as required under MCL 500.476a, and that this is a simple one-to-one calculation, despite Petitioner’s contention to the contrary. Respondent states it is designed in this manner to ensure that companies from both lower- and higher-taxing jurisdictions are calculated to be equal to the liability of a domestic insurance provider. Respondent contends the purpose of that analysis is frustrated if a unitary business group involving insurers from various states with various tax rates may pay the retaliatory tax.

PETITIONER’S RESPONSE TO RESPONDENT’S CONTENTIONS

In support of its Response, Petitioners contend that Respondent’s Motion misconstrues relevant statute by over-emphasizing portions of MCL 206.635 and MCL 206.637 while ignoring relevant statutory language under MCL 206.611 and MCL 206.691. It states this contention is contrary to MCL 8.3b, the Michigan Court of Appeals’ decision in *TCF*, and Wilkinson’s 2016 guidance. Petitioners contend that

³ *D’Agostini Land Co LLC v Dep’t of Treasury*, 322 Mich App 545, 561 (2018).

Respondent's interpretation of Chapter 12 of the CIT Act ignores the other pertinent portions of the statute relating to UBG in a manner not envisioned by the Legislature.

Petitioners argue that the CIT Act definition of UBG includes "insurance companies" and that those insurance companies are mandated to file combined returns. It relies upon MCL 8.3b and its interpretation in cited Michigan Court of Appeals cases. Petitioners contend that Respondent's readings of MCL 206.611(5) and MCL 206.651(g) are misconstrued. Petitioners state that Respondent's Motion wholly fails to confront the *TCF* decision, which Petitioners contend is analogous to the subject facts. They also point again to Wilkinson's guidance letter in 2016. Petitioners contend that Respondent misconstrues *D'Agostini* and that it supports Petitioners' position.

Regarding the retaliatory tax calculation, Petitioners contend this argument is not proper because it is raised for the first time in Respondent's Motion. They contend that raising the argument for the first time at this stage of litigation violates Respondent's Notice of Intent to Assess requirement under MCL 205.21 and relevant appellate opinions. Petitioners also reject the argument upon its merits, stating that nothing in MCL 206.643 prohibits the calculation of retaliatory tax on a unitary business group, and that calculating the retaliatory tax on a group-wide basis is possible based on Respondent's exhibits in its own Motion.

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.⁴ In this case, each party 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 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.⁵

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.⁶ The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.⁷ The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.⁸ 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.⁹ If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.¹⁰

⁴ See TTR 215.

⁵ See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

⁶ See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).

⁷ See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

⁸ *Id.*

⁹ See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

¹⁰ See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

CONCLUSIONS OF LAW

The Tribunal has carefully considered the parties' Motions and Responses under MCR 2.116(C)(10) and finds that granting Respondent's Motion and the denial of Petitioners' Motion is, as indicated above, warranted.

This case involves the calculation of tax under the Income Tax Act of 1967, MCL 206.1 *et seq.* Part II, Chapters 10 and 16 of the Act contain general rules and definitions. Part II, Chapter 12 of the Act controls the taxation of insurance companies in Michigan. Petitioners argue that under MCL 206.611(6) and MCL 206.691, they are permitted to file combined returns as a UBG for the purposes of calculating premiums tax and retaliatory tax. Respondent argues that MCL 206.635(1) and MCL 206.637 preclude Petitioner from filing combined returns for premiums and retaliatory taxes. As such, this case boils down to whether the more general provisions of the CIT Act that Petitioners cite control the ability of insurance companies to file combined returns for premiums and retaliatory taxes, or whether the more specific provisions of Chapter 12 of the CIT Act preclude the ability of insurance companies to file combined returns for premiums and retaliatory taxes.

MCL 206.611(6) defines a unitary business group as follows:

... a group of United States persons that are corporations, insurance companies, or financial institutions, other than a foreign operating entity, 1 of which owns or controls, directly or indirectly, more than 50% of the ownership interest with voting rights or ownership interests that confer comparable rights to voting rights of the other members, and that has business activities or operations which result in a flow of value between or among members included in the unitary business group or has business activities or operations that are integrated with, are dependent upon, or contribute to each other. Unitary business group includes an affiliated

group that makes the election to be treated, and to file, as a unitary business group . . .¹¹

MCL 206.691(1) concerns the filing of combined returns by a UBG and states in pertinent part:

. . . a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group. Each United States person included in a unitary business group or included in a combined return shall be treated as a single person, and all transactions between those persons included in the unitary business group shall be eliminated from the corporate income tax base, the apportionment formulas, and for purposes of determining exemptions, credits, and the filing threshold under this part. If a United States person included in a unitary business group or included in a combined return is subject to the tax under chapter 12 or 13, any corporate income attributable to that person shall be eliminated from the corporate income tax base and any sales attributable to that person shall be eliminated from the apportionment formula under this part.¹²

MCL 206.635 discusses taxes on direct premiums and states:

Except as otherwise provided under subsection (4) or (6), each insurance company shall pay a tax determined under this chapter.¹³

The tax imposed by this chapter on each insurance company shall be a tax equal to 1.25% of gross direct premiums written on property or risk located or residing in this state.¹⁴

MCL 206.637 concerns tax credits insurance companies may claim and states:

Except as otherwise provided under subsection (3), an insurance company may claim a credit against the tax imposed under this chapter . . .¹⁵

¹¹ See MCL 206.611(6).

¹² See MCL 206.691(1).

¹³ See MCL 206.635(1).

¹⁴ See MCL 206.635(2).

¹⁵ See MCL 206.637(1).

Section 476a of the Insurance Code of 1956, MCL 500.1 *et seq*, controls the conduct of alien or foreign insurers in Michigan.¹⁶ Specifically, a foreign insurer must pay retaliatory tax if a Michigan insurer conducting the same amount of business in that foreign insurer's home state would pay more tax in that foreign insurer's home state than the foreign insurer would pay in Michigan.

There is no question Petitioners satisfy the elements of a UBG. Nationwide Mutual Insurance Company controls, directly or indirectly, more than 50% of the ownership interest with voting rights.¹⁷ Petitioners also satisfy both the relationship and control requirements of the UBG.¹⁸ However, this case does not concern whether Petitioners are a UBG. This case concerns whether Petitioners, as a UBG, may file combined returns as a UBG to reap the benefits of claiming MAIPF tax credits. So, even though Petitioners satisfy the requirements of a UBG, the question of whether they may file returns as a UBG turn on statutory interpretation.

The primary goal of statutory interpretation is to give effect to the intent of the Legislature.¹⁹ To ascertain the Legislature's intent, a reviewing court should focus first on the plain language of the relevant statutes.²⁰ Respondent cited the definition of "taxpayer" under MCL 206.611(5), which is "a corporation, insurance company, financial institution, or unitary business group, *whichever is applicable under each chapter*, that is liable for a tax, interest, or penalty under this part."²¹ There is no question Petitioners are

¹⁶ See MCL 500.476a.

¹⁷ See MCL 206.611(6)

¹⁸ See MCL 206.611(6).

¹⁹ See *Lafarge Midwest, Inc. v City of Detroit*, 290 Mich. App. 240, 246, 801 N.W.2d 629 (2010).

²⁰ See *Fisher Sand & Gravel Co. v Neal A. Sweebe, Inc.*, 594 Mich. 543, 560, 837 N.W.2d 244 (2013).

²¹ See MCL 206.611(5) (*emphasis added*)

taxpayers. However, the italicized language indicates that the entity being taxed depends on the type of tax being assessed. Therefore, an entity may be taxed as a UBG if the provision for which the tax is assessed allows for it. However, if a provision does not allow for UBGs to file jointly, then an entity must file individually.

Petitioners' main argument is that MCL 206.611(6) and MCL 206.691, as general provisions of the CIT Act, guide the ability of Petitioners to file combined returns for premiums and retaliatory taxes. There is no doubt MCL 206.691 is applicable to corporate taxpayers and UBGs subject to a corporate income tax base. But Respondent correctly stated MCL 206.691 makes no reference to premiums and retaliatory taxes. The Legislature intended this provision to concern general corporate income taxes, and not every subcategory of taxes. If the Legislature intended for this provision to apply to all taxes, it would have said so in this provision.²² Therefore, although MCL 206.691 requires UBGs to file combined returns for taxpayers subject to a corporate income tax base, it does not require UBGs to file combined returns for premiums and retaliatory taxes.

Respondent cited Chapter 12 of the CIT Act, which imposes corporate taxes on insurance companies. MCL 206.635(1) states "*each* insurance company shall pay a tax equal to 1.25% of gross direct premiums written on property or risk located or residing in this state"²³ [Emphasis added.] MCL 206.637 states "*an* insurance company may claim a credit against the tax imposed under this chapter"²⁴ [Emphasis added.] MCL 206.635 is the relevant statute for taxes on direct premiums. There are no

²² See *SBC Health Midwest v City of Kentwood*, 500 Mich. 65, 73, 894 N.W.2d 535, 539 (2017).

²³ See MCL 206.635(1)

²⁴ See MCL 206.637(1).

references made to UBGs regarding paying premium taxes or UBGs claiming MAIPF tax credits. UBGs not being mentioned in these statutes has meaning. It means the Legislature did not intend to have premiums tax calculated on a group wide basis. The Legislature's failure to mention UBGs is presumed to be intentional.²⁵ This Tribunal, nor any court, is permitted to write into a statute.

Petitioners contend since MCL 8.3(b) allows a singular word to extend to and embrace the plural number, "insurance company" can mean a group of insurance companies. This is correct. MCL 206.635 and MCL 206.637 can be modified so singular "insurance company" can be made plural to "insurance companies."²⁶ However, Respondent argued, correctly, that Petitioners' argument that "insurance company" may be modified to "UBGs" is a stretch. This Tribunal agrees. UBGs are totally different from insurance companies. UBGs do not write premiums nor do any other functions that an insurance company does. UBGs are simply a creation of Tax law. Again, if the Legislature intended for UBGs to be included in these statutes, it would have written them in.²⁷

Petitioners cited *TCF National Bank v Department of Treasury* to bolster their position that UBGs should be allowed to file combined returns for premiums tax. The dispute in *TCF* involved whether a UBG was considered a single taxpayer for the purposes of Michigan's franchise tax on financial institutions under the Michigan Business Tax Act ("MBTA").²⁸ Petitioners contended that like this case, Treasury's

²⁵ See *SBC Health Midwest*, 500 Mich. App. at 73, 894 N.W.2d at 539.

²⁶ See MCL 8.3(b),

²⁷ *Id.*

²⁸ See *TCF Nat'l Bank v Dept. of Treasury*, 330 Mich. App. at 599.

argument was the reference to the singular phrase “every financial institution” in the MBTA required that the tax calculations for financial institutions had to be performed on an entity-by-entity basis, essentially reading the UBG provision out of the MBTA.²⁹ The Court of Appeals ruled against the Treasury, stating the plain language of the definitional provision for “financial institution” established that a “financial institution” may be a type of bank, or an entity owned by such a bank that is a member of the UBG, or a UBG made up of either or both of these two type of entities.³⁰ However, Respondent’s response is the correct interpretation of *TCF* as it relates to the present case. Respondent explained that in *TCF*, UBGs were included in the definition of “financial institutions.”³¹ In the CIT Act, the definition of “insurance company” is as follows:

[A]n authorized insurer as defined in section 108 of the insurance code of 1956, 1956 PA 218, MCL 500.108. . . .³²

An “authorized” insurer is defined in MCL 500.108 and states:

“Authorized” insurer means an insurer duly authorized, by a subsisting certificate of authority issued by the commissioner, to transact insurance in this state.³³

As seen above, the definition of “insurance company” does not include UBGs, while the definition of “financial institutions” in *TCF* did include UBGs. Had the Legislature wanted to include UBGs in the definition of “insurance companies” for the purposes of the CIT Act, it would have written it in as they did in the MBTA for financial institutions. The fact

²⁹ See Petitioner’s Brief at 15.

³⁰ *Id* at 608.

³¹ See MCL 208.1117(5).

³² See MCL 206.607(5).

³³ See MCL 500.108(1).

they did not do so shows the Legislature's intent was for premiums and retaliatory taxes to be calculated on an entity-by-entity basis.

Petitioner and Respondent both cite *D'Agostini Land Company v Department of Treasury*. In *D'Agostini*, Petitioner, which was a UBG, was denied a small-business alternative credit claimed under the MBTA.³⁴ In the MBTA, the small business alternative credit can be claimed by "any taxpayer" with gross receipts not exceeding \$20,000,000 and adjusted net income not exceeding \$1,300,000.³⁵ In addition, there were several disqualifying factors. The pertinent factor in this case was as follows:

An individual, a partnership, a limited liability company, or a subchapter S corporation is disqualified if the individual, any 1 partner of the partnership, any 1 member of the limited liability company, or any 1 shareholder of the subchapter S corporation receives more than \$180,000.00 as a distributive share of the adjusted business income minus the loss adjustment of the individual, the partnership, the limited liability company, or the subchapter S corporation.³⁶

One of the members of Petitioner's UBG was an S corporation who was disqualified under the above provision, so Treasury denied the whole UBG the tax credit.³⁷ The Court of Appeals ruled this was incorrect, since the statute stated broadly that *any* taxpayer could claim the credit, and the disqualifications were to more specific types of taxpayers.³⁸ Since UBGs were not expressly included in the disqualifications, then they were not inferred to be in these disqualifications since "any taxpayer" can claim the credits.

³⁴ See *D'Agostini v Department of Treasury*, 322 Mich. App. 545, 548, 912 N.W.2d 593, 594 (2018).

³⁵ See MCL 208.1417(1).

³⁶ See MCL 208.1417(1)(a).

³⁷ *Id* at 552.

³⁸ *Id* at 559.

Petitioners and Respondent both misinterpreted *D'Agostini*. Petitioners asserted that like *D'Agostini*, Treasury also did not provide forms to use for filing a tax return in the way the taxpayer in that case contended was proper but was not considered to be dispositive in that case. The Tribunal agrees, but this is not the main takeaway from *D'Agostini*. Respondent asserted that *D'Agostini* supports the Legislature's decision to narrowly frame the calculation of premium tax on a single entity basis. Although *D'Agostini* does support Respondent's position, it is not for this reason. The present case is different from *D'Agostini* because there is no list of exclusions in MCL 206.637(1). The statute only refers to "an insurance company" claiming a credit. MCL 206.637(1) refers to a specific entity who may claim a credit, and there are no exclusions in this statute because this statute pertains to insurance companies only. The statutory canon of *expressio unis est exclusio alterius* means "the express mention of one thing generally implies the exclusion of similar things that were not mentioned."³⁹ Here, the legislature only included insurance companies in MCL 206.637(1). This implies financial institutions, corporations, LLCs, and UBGs are not permitted to receive these tax credits since they were not expressly stated.

Petitioners allege that Respondent cannot bring up the retaliatory tax issue since it was not included as a reason for the assessment in the Notice of Intent to Assess, and Respondent is barred from bringing up this issue at this stage in the legal process. The Tribunal has jurisdiction over any proceeding provided by law.⁴⁰ Therefore, the Tribunal has authority to consider any issue brought up in these proceedings, therefore

³⁹ See *Houghton Lake Area Tourism v Wood*, 255 Mich App 127, 151 (2003).

⁴⁰ 205.731(e).

an analysis of the retaliatory tax is warranted, particularly given Petitioners' ability to respond to that issue when raised.

Petitioners asserted that the newer statute, more specifically the CIT Act's authorization of unitary filings by groups of insurance companies, prevails over the older statute creating the retaliatory tax. The Tribunal disagrees for the same reasons as why UBGs may not file combined returns for the purposes of the premiums tax. Respondent asserted MCL 500.476(a) concerns the retaliatory tax for insurance companies and refers only to *insurance companies* paying this tax.⁴¹ As this is indeed the older statute as Petitioners stated, in the newer CIT Act, had the Legislature wanted UBGs to file jointly for the retaliatory tax, it would have said so in MCL 206.691.⁴² MCL 206.691 makes no reference to retaliatory taxes, therefore Respondent is correct that MCL 500.476a controls how these taxes are filed, and shall be filed by an individual insurance company.

Petitioners discuss extensively in both their brief and response that Mr. Lance Wilkinson, Administrator of Tax Policy for the Department of Treasury, encouraged group filing for purposes of the premium tax. Mr. Wilkinson stated, "an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group."⁴³ In Respondent's response, Respondent stated the Wilkinson Letter does not adopt Mr. Wilkinson's filing methodology.⁴⁴ In addition, Mr. Wilkinson gave testimony indicating he was not aware of what Petitioners' goal was

⁴¹ See MCL 500.476(a).

⁴² See MCL 206.691.

⁴³ See Petitioner's Brief at 8.

⁴⁴ See Respondent's Response at 4.

concerning the posture of their premiums and retaliatory tax filings. Nevertheless, even if Mr. Wilkinson did encourage filing combined returns as a UBG for premium and retaliatory taxes, his advice is not legal precedent and has no bearing on how statutes are interpreted. The relevant statutes are clear that Petitioners are not permitted to file as a UBG for premium and retaliatory taxes and reap the benefits of claiming MAIPF tax credits. Therefore, the assessments issued by Respondent must be upheld.

PROPOSED JUDGMENT

IT IS ORDERED that Petitioners' Motion for Summary Disposition is DENIED.

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

IT IS FURTHER ORDERED that Assessment Numbers VA6WA6K and VA7AV7G are AFFIRMED.

EXCEPTIONS

This POJ was prepared by the Michigan Office of Administrative Hearings and Rules. The parties have 20 days from the below "Date Entered by Tribunal" to notify the Tribunal and the opposing party in writing, by mail or by electronic filing, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions). Exceptions are limited to the evidence submitted prior to or at the hearing and any matter addressed in the POJ. There is no fee for filing exceptions.

The opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions.⁴⁵

A copy of a party's written exceptions or response must be sent by mail or electronic service, if agreed upon by the parties, to the opposing party and proof must be submitted to the Tribunal that the exceptions or response were served on the opposing party. Exceptions and responses filed by *facsimile* will not be considered.

Entered: August 22, 2022
ajs

By



⁴⁵ See MCL 205.762(2) and TTR 289(1) and (2).

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