



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

MARLON I. BROWN, DPA
DIRECTOR

Comerica Incorporated,
Petitioner,

MICHIGAN TAX TRIBUNAL

v

MTT Docket No. 17-000150

Michigan Department of Treasury,
Respondent.

Presiding Judge
Patricia L. Halm

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER PARTIALLY GRANTING PETITIONER'S MOTION FOR COSTS

INTRODUCTION

Comerica Incorporated (Petitioner) filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10). In the motion, Petitioner contends that it is entitled to judgment as a matter of law because there are no genuine issues of material fact relative to its entitlement to interest under MCL 205.30 on the funds withheld by Respondent in this matter. Petitioner also requested that it be awarded costs and attorney fees.

The Michigan Department of Treasury (Respondent) filed a response to the motion contending that Petitioner's Motion for Summary Disposition and request for costs and attorney fees should be denied, and that Respondent should be granted summary disposition pursuant to MCR 2.116(I)(2). Respondent agrees that there are no genuine issues of material fact relative to Petitioner's entitlement to interest under MCL 205.30, but it is Respondent, not Petitioner, that is entitled to judgment as a matter of law.

Thereafter, the parties' filed a joint motion requesting leave to file reply and surreply briefs to the motion and response. The motion was granted.

BACKGROUND

In its May 9, 2016, letter to Respondent, Petitioner explained that:

In November of 2013, [Respondent] commenced an audit on [Petitioner] related to its Michigan Business Tax Annual Returns for Financial Institutions for the December 31, 2008 through December 31, 2011 tax years. On April 17, 2015, [Petitioner] received the Notice of Preliminary Audit Determination. [Petitioner] then held various discussions with the auditor to go over the audit results, particularly the items that [Petitioner]

contests . . . [P]etitioner received the Audit Report of Findings dated February 24, 2016. [Petitioner] is in agreement with the audit adjustments, but for the following issues that it continues to contest: . . .¹

Petitioner's letter lists three issues that it continues to contest. According to the letter, Informal Conferences were scheduled for May 17, 2016. On December 14, 2016, Respondent issued the Decisions and Orders of Determination in Docket Nos. 20122043, 20140478, and 20140723.

On February 9, 2017, Petitioner filed the appeal in this matter. According to the petition, the docket numbers, assessment numbers, and audit periods/tax years at issue are:

1. Docket No. 20122043: Assessment Nos. TP34119 and TP73498, audit period/tax years 2008 and 2009,
2. Docket No. 20140478: Assessment No. UB35645, audit period/tax year 2010, and
3. Docket No. 20140723: Assessment No. UB54592, audit period/tax year 2011.²

At issue were Respondent's calculation of Petitioner's net capital for purposes of the financial institutions franchise tax under the Michigan Business Tax Act (MBTA) for the 2008-2011 tax years, and its disallowance of Petitioner's claimed Historic Preservation and Brownfield credits following the audit.

On May 31, 2018, the Tribunal entered a Final Opinion and Judgment in which it found that Respondent had improperly calculated Petitioner's tax base for the tax years at issue by including capital from Comerica-Michigan, a defunct subsidiary that merged with Comerica-Texas in 2007. The Tribunal also found that Petitioner failed to meet its burden of establishing that the disallowed credits were available to it as a matter of law.³ Accordingly, the Tribunal granted partial summary disposition in favor of Petitioner on the tax base issue, and partial summary disposition in favor of Respondent on the tax credits issue.

Both parties appealed the Tribunal's decision to the Michigan Court of Appeals. In a published opinion issued on April 16, 2020, the Court vacated the Tribunal's grant of partial summary disposition in favor of Petitioner, reversed its grant of partial summary disposition in favor of Respondent, and remanded the matter to the Tribunal for further proceedings consistent with its opinion.⁴ The Court found that Respondent erred in its calculation of Petitioner's tax base, but that the Tribunal's order relative to

¹ Petitioner's Motion for Summary Disposition, Exhibit G, Petitioner's May 9, 2016 letter to Respondent, at 1.

² Petition at 2.

³ The disputed credits were awarded to KWA I, LLC under the Single Business Tax Act (SBTA), assigned to Comerica-Michigan in 2005, and carried forward on Petitioner's MBT (Michigan Business Tax) returns for the tax years at issue following the merger of Comerica-Michigan and Comerica-Texas.

⁴ *Comerica Inc v Dep't of Treasury*, 332 Mich App 155; 955 NW2d 593 (2020).

recalculation of the tax base did not comport with recently established precedent.⁵ The Court also found that the Tribunal erred in finding that the credits did not transfer to Comerica-Texas by operation of law following its merger with Comerica-Michigan.⁶ Respondent sought leave to appeal the credit issue to the Michigan Supreme Court, which granted leave and affirmed the Court of Appeals' judgment on June 7, 2022.⁷

Following remand to the Tribunal, a status conference was held wherein the parties were granted 60 days to conduct discovery and engage in settlement negotiations. A second status conference was held following the close of discovery.

PETITIONER'S CONTENTIONS

Petitioner contends that it is entitled to judgment as a matter of law because there are no genuine issues of material fact relative to its entitlement to interest under MCL 205.30 on the funds withheld by Respondent in this matter. Following the Supreme Court's decision, the parties recalculated Petitioner's tax liability for the years at issue and determined that Petitioner was entitled to a refund in the amount of \$10,894,317, of which \$10,859,537 had been paid as of the filing of Petitioner's Motion for Summary Disposition. Specifically, a refund of \$8,240,942 was issued to Petitioner on December 22, 2022, and a refund of \$2,618,595 was issued to Petitioner on January 13, 2023.⁸

Petitioner contends that it is entitled to the remaining \$34,780 principle due,⁹ and that it is also entitled to interest pursuant to MCL 205.30. This statute requires Respondent to "credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount or wrongfully collected *with interest* at the rate calculated under [MCL 205.23] for deficiencies in tax payments."¹⁰

⁵ The Tribunal determined that the appropriate method for recalculating Petitioner's tax base was "to look only at the net capital of Comerica-[Texas] for the current year, and previous years it was in existence (if less than 5 years), and average the net capital for those years." Final Opinion and Judgment at 18. The Court of Appeals held that "this methodology does not comply with our holding in *TCF National Bank*, and therefore, we must vacate the portions of the order regarding petitioner's tax base and remand this case to the tribunal." *Comerica*, 332 Mich App at 164-165, referencing *TCF Nat'l Bank v Dep't of Treasury*, 330 Mich App 596; 950 NW2d 469 (2019).

⁶ The Court held that "because the tax credits are property and fall within the ambit of the merger statute, we conclude that they transferred by operation of law when the merger of Comerica-Michigan and Comerica-Texas, two separate entities, occurred. In concluding that petitioner acted voluntarily and affirmatively in conducting the merger, the tribunal conflated the voluntary act of merger with the automatic transfer of assets resulting from that merger." *Comerica*, 332 Mich App at 172.

⁷ *Comerica, Inc v Dep't of Treasury*, 509 Mich 204; 984 NW2d 1 (2022).

⁸ Petitioner's Reply Brief, Exhibit A.

⁹ Petitioner's Motion for Summary Disposition at 8.

¹⁰ MCL 205.30(1). (emphasis added).

In its Motion for Summary Disposition, Petitioner requests that it be awarded “interest through June 30, 2023 of \$6,188,792.96, plus continuing interest at the statutory rate through the time of payment”¹¹

In its Reply Brief, Petitioner contends that it is:

[E]ntitled to interest as required by MCL 205.30(1) from 45 days after the filing of each of its tax returns, in the amount of \$6,154,346.75 through August 31, 2023 Alternatively, [Petitioner] is entitled to interest using one of the following trigger dates:

- a. 45-days after the August 15, 2015 letter, in the amount of \$3,926,784.37 through August 31, 2023
- b. 45-days after the May 9, 2016 letter, in the amount of \$3,576,160 through August 31, 2023
- c. 45-days after the petition was filed, in the amount of \$3,246,933.49 through August 31, 2023¹²

The Michigan Supreme Court has held that a taxpayer must take the following steps to trigger interest on a refund under MCL 205.30: “(1) pay the disputed tax, (2) make a ‘claim’ or ‘petition’ for a refund, and (3) ‘file’ the claim or petition.”¹³ Petitioner asserts that payment of the tax is not an issue in this case. When Petitioner filed its returns, it was entitled to a refund for the 2008, 2010, and 2011 tax years. Petitioner was not entitled to a refund for the 2009 tax year, and it paid the tax due. Petitioner contends that it made several “claims” for a refund, as reflected in (1) the initial filing of each of its tax returns for the years at issue, (2) Petitioner’s August 15, 2015 letter to Treasury, (3) Petitioner’s May 9, 2016 letter to Treasury, and (4) the petition filed in this case. Each of the foregoing documents were submitted to Treasury and are therefore considered “filed” for purposes of MCL 205.30.¹⁴

Petitioner argues that Letter Ruling No. 1990-30, cited by Respondent, actually supports Petitioner’s position in this matter, and Respondent’s arguments concerning the tax credits are irrelevant. Respondent argued at length about the consumption of credits, but the bottom line is that Petitioner claimed credits that Respondent disallowed during the audit. If the credits had not been disallowed, Petitioner’s tax liability would have been lower, and Respondent would have refunded or carried forward over \$4 million dollars. To say that Petitioner did not lose the use of this money is a fallacy considering that Respondent finally issued refunds in January 2023 that would have been issued over a decade ago in the ordinary course had the disputed credits not been disallowed.

¹¹ Petitioner’s Motion for Summary Disposition at 12.

¹² Petitioner’s Reply Brief at 7.

¹³ *Ford Motor Co v Treasury Dep’t*, 496 Mich 382, 385-386; 852 NW2d 786 (2014).

¹⁴ *Id.* at 395.

Petitioner requests that the Tribunal award costs and attorney fees as Respondent knew from the beginning that its position on net capital in this case was wrong. Respondent initially recognized Comerica Bank as one merged entity but changed its position without explanation in the second audit, splitting the entities in two and double counting the assets. Respondent refused to adjust the second audit to comply with its November 21, 2016 Notice to Taxpayers, in which it indicated that it would “no longer calculate net capital for years prior to the combination using both surviving and acquired entities’ net capital.”¹⁵ The notice was retroactive to “all open tax years,” and Respondent should have gone back and adjusted Petitioner’s audit to reflect this policy. Instead, Respondent took a contrary position and dragged Petitioner through years of litigation.

Respondent never adequately explained why it did not act in accordance with its own published guidance, and it now rubs salt into the wound by defaulting on its statutory obligation to pay interest. Respondent is required to audit taxpayers in a “fair and impartial” manner.¹⁶ It departed from that requirement in this case, and its persistence in advancing a position that it knew was wrong, based on its own published notice, should be sanctioned. The Court of Claims cases cited by Respondent are distinguishable from this appeal, and Respondent could not have reasonably believed that its position on net capital was warranted.¹⁷

RESPONDENT’S CONTENTIONS

Respondent agrees that there are no genuine issues of material fact relative to Petitioner’s entitlement to interest under MCL 205.30, but it is Respondent, not Petitioner, that is entitled to judgment as a matter of law. A balance of \$34,983 plus interest was outstanding as of the filing of Respondent’s response, but as of the filing of its surreply, all remaining amounts have been refunded to Petitioner. As such, the only issue in this case is whether interest on the refunds is due and owing. Respondent argues that Petitioner is not entitled to interest because its returns for the tax years at issue do not reflect a request for refunds that were not paid. Instead, the returns reflect (1) carryforwards, which were constructively received pursuant to Letter Ruling No. 1990-30, and (2) credits that were both nonrefundable as a matter of law, and fully consumed by 2008, with nothing to carry forward to 2009. As such, there was no forbearance on the use of these moneys, and there is no basis for interest under MCL 205.30.

Further, Petitioner’s August 14, 2015 letter to Treasury is not sufficient to trigger interest as to the net capital and nonrefundable credit adjustments. The letter merely

¹⁵ November 21, 2016 Notice to Taxpayers. Instead, “when two or more financial institutions combine, only the surviving financial institution’s net capital for the years prior to the combination is used to calculate the surviving entity’s tax base.” *Id.*

¹⁶ Michigan Department of Treasury, *Taxpayers Rights Handbook*, at 18.

¹⁷ Petitioner contends that “the issues in those cases were whether 5-year averaging should be done at the UBG level or individual company level. There is no indication in those opinions that the Department attempted to manipulate the occurrence of a merger into the double-counting of net capital.” Petitioner’s Reply Brief at 6.

agrees with and requests a refund relating to the “gross business apportionment factor” adjustment made during the audit; it does not request a refund for the net capital or nonrefundable credit adjustments that were litigated in this case.¹⁸ The same is true of Petitioner’s May 9, 2016 letter, which reiterates that “the overall audit will result in a net refund due”¹⁹ in the amount Treasury had determined for the same apportionment adjustment. Petitioner ignores the recent ruling in *US Steel Corp v Dep’t of Treasury*,²⁰ which rejected a similar request that was “insufficiently definite and specific to constitute an explicit demand or request for a tax refund without resorting to reliance on the implications of expressing disagreement with defendant’s treatment of this particular entity.”²¹ Petitioner points to no other request for a refund, aside from its own returns, which requested carryforwards and nonrefundable credits.

Moreover, Respondent’s arguments, while ultimately determined to be legally inaccurate, were supported interpretations of the law that prevailed in both the Tribunal and the Court of Claims. Not only did the Tribunal find in Respondent’s favor on the credit issue in this case, but Respondent also prevailed on similar net capital issues in other cases pending in the Court of Claims.²² While the issues in the Court of Claims cases are not identical, they demonstrate that Respondent’s interpretation was an approach that prevailed in the Court of Claims on a related issue. The statute yielded different interpretations between the Tribunal, the Court of Claims, and the Court of Appeals, and the mere fact that these decisions were overturned on appeal does not mean that Respondent’s position was frivolous. Further, Treasury’s November 21, 2016 notice had no application in this matter and is not a proper basis for costs and attorney fees. Petitioner’s pejorative and self-serving recharacterization of the notice does not change its contents or meaning, or in any way indicate that Respondent sought to harass Petitioner or mount a defense without factual or legal merit. Petitioner fails to otherwise identify any harassment, embarrassment, or baseless facts or law that Respondent asserted, for which reason its claim should be denied. Additionally, Respondent should not be punished for doing its job. Respondent will not win every case, but it should not be stopped from pursuing cases in good faith because of fear of reprisals, such as the fees and costs Petitioner pursues here.

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.²³

A. Motions for Summary Disposition under MCR 2.116(C)(10).

¹⁸ Petitioner’s Motion for Summary Disposition, Exhibit F at 1.

¹⁹ Petitioner’s Exhibit G at 4.

²⁰ *US Steel Corp v Dep’t of Treasury*, __ Mich App __; __ NW3d __ (2023).

²¹ *Id.* at 9.

²² See *Flagstar Bancorp v Treasury*, Opinion and Order of the Court of Claims, issued July 9, 2018 (Case No. 16-000273-MT), and *TCF National Bank v Treasury*, Opinion and Order of the Court of Claims, issued July 10, 2018 (Case No. 16-000191-MT).

²³ See TTR 215.

MCR 2.116(C)(10) provides for summary disposition when “there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.”²⁴ The Michigan Supreme Court, in *Quinto v Cross and Peters Co.*,²⁵ provided the following explanation of MCR 2.116(C)(10):

MCR 2.116 is modeled in part on Rule 56(e) of the Federal Rules of Civil Procedure . . . [T]he initial burden of production is on the moving party, and the moving party may satisfy the burden in one of two ways.

First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving 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. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.²⁶

“A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.”²⁷ In evaluating whether a factual dispute exists to warrant trial, “the court is not permitted to assess credibility or to determine facts on a motion for

²⁴ *Id.*

²⁵ *Quinto v Cross and Peters Co.*, 451 Mich 358; 547 NW2d 314 (1996). (citations omitted).

²⁶ *Id.* at 361-363. (Citations omitted.)

²⁷ *West v General Motors Corp.*, 469 Mich 177; 665 NW2d 468 (2003).

summary judgment.”²⁸ “Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial.”²⁹

B. Summary Disposition under MCR 2.116(I)(2)

Summary disposition is appropriate under MCR 2.116(I)(2) “if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law.”³⁰ As such, the Tribunal may render judgment in favor of the non-moving party under this rule.

CONCLUSIONS OF LAW

The Tribunal has carefully considered Petitioner’s motion under MCR 2.116 (C)(10) and finds that granting the motion is warranted. As a preliminary matter, the Tribunal notes that the Court of Appeals instructed the Tribunal to enter an order on remand directing Respondent to recalculate Petitioner’s net capital in a manner consistent with its holding in *TCF National Bank*.³¹ As noted in the parties’ filings on remand, however, there is no remaining dispute as to Petitioner’s tax liability for the years at issue. The parties agreed as to Petitioner’s liability after the Supreme Court issued its decision, and as of the filing of Respondent’s surreply, all outstanding amounts have been refunded. As such, the sole remaining issue in this matter is whether interest is due and owing on Petitioner’s overpayments.

In that regard, the Revenue Act³² governs refunds of erroneously assessed taxes. Specifically, MCL 205.30 states, in pertinent part:

(1) The department shall *credit or refund* an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest at the rate calculated under [MCL 205.23] for deficiencies in tax payments.

(2) A taxpayer who paid a tax that the taxpayer claims is not due *may petition the department for refund* of the amount paid within the time period specified as the statute of limitations in [MCL 205.27a]. If a tax return reflects an overpayment or credits in excess of the tax, the declaration of that fact on the return constitutes a claim for refund. *If the department agrees the claim is valid*, the amount of overpayment, penalties, and interest shall be first applied to any known liability as provided in [MCL 205.30a], and the excess, if any, shall be refunded to the taxpayer or credited, at the

²⁸ *Cline v Allstate Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued June 21, 2018 (Docket No. 336299), citing *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994).

²⁹ *Id.*

³⁰ *Id.* See also *Washburn v Michailoff*, 240 Mich App 669; 613 NW2d 405 (2000).

³¹ *Comerica*, 332 Mich App at 164-165.

³² MCL 205.1 *et seq.*

taxpayer's request, against any current or subsequent tax liability. Except claims for refunds, other than those made under part 1 of the income tax act . . . that have not been approved, denied, or adjusted within 1 year of the date received may be treated as denied at the election of the taxpayer, and may be appealed by the taxpayer in accordance with [MCL 205.22].

(3) The department shall certify a refund to the state disbursing authority who shall pay the amount out of the proceeds of the tax in accordance with the accounting laws of the state. *Interest at the rate calculated under [MCL 205.23] for deficiencies in tax payments regarding those refunds shall be added to the refund commencing 45 days after the claim is filed or 45 days after the date established by law for the filing of the return, whichever is later.* Interest on refunds intercepted and applied as provided in [MCL 205.30a] shall cease as of the date of interception. Refunds for amounts of less than \$1.00 shall not be paid.³³

In *Ford Motor Co v Dept of Treasury*,³⁴ the Michigan Supreme Court held that a taxpayer must take the following steps to trigger interest on a refund under MCL 205.30: “(1) pay the disputed tax, (2) make a ‘claim’ or ‘petition’ for a refund, and (3) ‘file’ the claim or petition.”³⁵ The Court further held that “although a ‘claim’ or ‘petition’ need not take any specific form, it must clearly demand, request, or assert a right to a refund of tax payments made to the Department of Treasury that the taxpayer asserts are not due.”³⁶ Additionally, “in order to ‘file’ the claim or petition, a taxpayer must submit the claim to the Treasury in a manner sufficient to provide the Treasury with adequate notice of the taxpayer's claim.”³⁷

Petitioner contends that there is no issue relative to the first element, i.e., payment of taxes. Petitioner states that it paid the tax due for the 2009 tax year, and was entitled to a refund for the 2008, 2010, and 2011 tax years at the time it filed its returns for those years. The record in this case establishes that Petitioner's tax returns for the 2008, 2010, and 2011 tax years reflect overpayments, and that Petitioner requested that the overpayments be utilized as a credit forward.³⁸ The record also

³³ *Id.* (emphasis added.) MCL 205.23(2) provides for interest “at the current monthly interest rate of 1 percentage point above the adjusted prime rate per annum.” “Adjusted prime rate” is defined as “the average predominant prime rate quoted by not less than 3 commercial banks to large businesses, as determined by the department of treasury.” *Id.* The statute further states that “the adjusted prime rate is to be based on the average prime rate charged by not less than 3 commercial banks during the 6-month period ending on March 31 and the 6-month period ending on September 30. One percentage point shall be added to the adjusted prime rate, and the resulting sum shall be divided by 12 to establish the current monthly interest rate. The resulting current monthly interest rate based on the 6-month period ending March 31 becomes effective on the following July 1, and the resulting current monthly interest rate based on the 6-month period ending September 30 becomes effective on January 1 of the following year.” *Id.*

³⁴ *Ford Motor Co*, 496 Mich 382.

³⁵ *Id.* at 385–386.

³⁶ *Id.* at 386.

³⁷ *Id.* See also *Sagar Trust*, 204 Mich App 128, 132; 514 NW2d 514 (1994).

³⁸ Petitioner's 2008 MBT return, which is dated December 30, 2009, indicated a total tax liability of \$6,403,864 before credits. After application of nonrefundable credits in the amount of \$6,186,562,

reflects that Petitioner utilized the entire amount of its credit forward from previous tax years in calculating its 2009 tax liability, and owed \$993,722 in additional tax for that tax year. Petitioner paid this amount on December 17, 2010.

Respondent did not directly address this first element in its response, and inasmuch as the record also indicates that Respondent issued refunds totaling approximately \$10,894,317,³⁹ the Tribunal finds no genuine issue of material fact as to Petitioner's payment of the disputed taxes.⁴⁰ Clearly, there can be no refund of taxes that were not paid, and Respondent failed to set forth any arguments, facts, or evidence establishing otherwise.

As for the second element, i.e., making a claim or petition for a refund, Petitioner cites four instances in which it believes it made such a request: (1) the initial filing of each of its tax returns for the years at issue, (2) its August 15, 2015 letter to Treasury, (3) its May 9, 2016 letter to Treasury, and (4) the petition filed in this case. Relative to the returns, the Tribunal finds that Respondent's argument regarding the nonrefundable nature of the Brownfield Redevelopment and Historic Preservation credits is without merit. While it is true that those credits were not refundable as a matter of law, and Petitioner disputed Respondent's disallowance of those credits, Petitioner was not seeking a refund of the credits themselves. Instead, Petitioner was, as noted in its reply, seeking a refund of the tax overpayments reflected on its returns after application of those credits to its tax liability.

Petitioner's tax liability was \$217,302. The return reflects overpayment credited from prior return(s) in the amount of \$1,858,237 and estimated tax payments in the amount of \$300,000, for total payments of \$2,158,237. After application of the carryforward amount and estimated payments, the return reflects an overpayment of \$1,940,935, to be credited forward. Petitioner's 2009 MBT return, which is dated December 13, 2010, indicates a total tax liability of \$8,747,232 before credits. After application of nonrefundable credits in the amount of \$2,919,044, Petitioner's tax liability was \$5,828,188. The return reflects overpayment credited from prior return(s) in the amount of \$2,262,028 and estimated tax payments of \$2,600,000, for total payments of \$4,862,028. After application of the carryforward amount and estimated payments, the return reflects tax due in the amount of \$993,722, which was paid on December 17, 2010. Petitioner's 2010 MBT return, which is dated November 21, 2011, indicates a total tax liability of \$7,678,796 before credits. After application of nonrefundable credits in the amount of \$2,548,731, Petitioner's tax liability was \$5,130,065. The return reflects overpayment credited from prior return(s) in the amount of \$0 and estimated tax payments of \$6,550,000, for total payments of \$6,550,000. After application of the carryforward amount and estimated payments, the return reflects an overpayment in the amount of \$1,419,935, to be credited forward. Petitioner's 2011 MBT return, which is dated November 30, 2012, indicates a total tax liability of \$7,922,287 before credits. After application of nonrefundable credits in the amount of \$2,081,386, Petitioner's tax liability was \$5,840,901. The return reflects overpayment credited from prior return(s) in the amount of \$1,419,935 and estimated payments of \$5,000,000, for total payments of \$6,419,935. After application of the carryforward amount and estimated payments, the return reflects an overpayment in the amount of \$579,034, to be credited forward.

³⁹ It appears that there may a slight disagreement between the parties in terms of the amount of the final refund payment; however, there is no disagreement that the entire refund has been paid.

⁴⁰ The Tribunal notes that Respondent's response fails to address several of the arguments raised by Petitioner and reads more like a cross-Motion for Summary Disposition than a response to the filed motion. Some of Respondent's arguments do speak, however, to Petitioner's claim that its original MBT returns and August 15, 2015, and May 9, 2016 letters to Respondent constitute claims for a refund within the meaning of MCL 211.30(2), whether directly or indirectly.

Respondent also contends that because Petitioner requested carryforwards of its overpayments instead of cash refunds, it is deemed to have constructively received the refunds. In support of its position, Respondent cites Letter Ruling No. 1990-30, which states:

Under Michigan law, you have the option of receiving the overpayment as a cash refund or applying the overpayment to your 1989 tax liability. [MCL 205.30(2); MSA 7.657(30)(2)]. In either event, you are deemed to have received a refund, either actually (refund) or constructively (credit). The doctrine of constructive receipt applies where income not actually reduced to a taxpayer's possession is credited to, or set apart for the taxpayer.⁴¹

A "letter ruling" is defined as "a formal document issued by the department to a specific taxpayer on a specific tax matter related to a future transaction."⁴² While such rulings do not have the force of law, "agency interpretations are granted 'respectful consideration,' and if persuasive, should not be overruled without 'cogent reasons.'"⁴³ The Tribunal finds no such reasons in this case, as MCL 205.30(2) plainly states that "if a tax return reflects an overpayment or credits in excess of the tax, *the declaration of that fact on the return constitutes a claim for refund.*"⁴⁴ The statute further states that "if the department *agrees the claim is valid*, the amount of overpayment, penalties, and interest shall be first applied to any known liability as provided in [MCL 205.30a], and the excess, if any, *shall be refunded to the taxpayer or credited*, at the taxpayer's request, *against any current or subsequent tax liability.*"⁴⁵ The Tribunal agrees with Respondent that in either scenario, the overpayment is available to the taxpayer, and that credits and carryforwards are properly considered as having been "received" when declared on a tax return. Thus, while the Tribunal agrees with Petitioner that its 2008, 2010, and 2011 returns constitute claims for refunds, it also agrees with Respondent that Petitioner's request to carry the overpayments forward for the purpose of having them applied to its subsequent tax liabilities results in constructive receipt of the requested refunds.

However, in this case, Respondent made adjustments to each of Petitioner's returns and issued intents to assess for all of the tax years at issue.⁴⁶ Each of these

⁴¹ Letter Ruling 1990-30.

⁴² MCL 205.6a(b).

⁴³ *CMS Energy Corp v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued October 15, 2013 (Docket No. 309172), citing *In re Complaint of Rovas against SBC Mich*, 482 Mich 90; 754 NW2d 259 (2008). See also *Leland v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued November 15, 1996 (Docket No. 174046), citing *ADVO-Systems, Inc v Dep't of Treasury*, 186 Mich App 419; 465 NW2d 349 (1990) and *Bd of Education of Oakland Schools v Superintendent of Public Instruction*, 401 Mich 37; 257 NW2d 73 (1977).

⁴⁴ MCL 205.30(2). (emphasis added).

⁴⁵ *Id.* (emphasis added).

⁴⁶ As noted in the Informal Conference Recommendations, the adjustments made for the 2008 and 2009 tax years were reflected in Intents to Assess TP34119 and TP73498, which were issued sometime prior to October 10, 2012. The adjustments made for the 2010 tax year were reflected in Intent to Assess UB35645, which was issued on February 12, 2014, and the adjustments made for the 2011 tax year were reflected in Intent to Assess UB54592, which was issued on February 20, 2014. With the exception of

intents to assess, i.e., bills for taxes due, constitute an effective denial of the claimed “refund,” and as a result, the overpayments were no longer “set apart” or “available” to Petitioner, and there could be no constructive receipt of the same, just as there would be no receipt of a cash refund. Consequently, Respondent’s argument that “Petitioner was not deprived of moneys for which it sought a refund, for which reason no interest is due,”⁴⁷ is erroneous and without merit. There was clearly a forbearance of Petitioner’s money by Treasury between the dates it issued the Intents to Assess, effectively denying Petitioner’s claim to the overpayments, and the dates it issued the refunds.

However, Petitioner’s argument that the original returns constitute the requisite claim or petition for a refund is negated by MCL 211.30(2). As Respondent contends, it is only required to refund the overpayments if it “agrees the claim is valid.” In *Sagar*, the Court held that “[t]he statute clearly provides that, as long as the department determines that a claim for refund is valid, interest begins to accrue forty-five days after the claim is filed.”⁴⁸ In *Ford Motor*, the Court further explained that:

[I]nterpreting the word “file” in MCL 205.30(3) as requiring a taxpayer to provide the Treasury with adequate notice of the taxpayer’s claim or petition for a refund is consistent with the purpose of the 45–day waiting period between submission of the claim or petition and the start of interest accumulation on the refund. Specifically, MCL 205.30(2) states that a refund shall be paid “[i]f the [Treasury] department *agrees that the claim is valid . . .*” Therefore, MCL 205.30(3) creates a 45–day waiting period so that the Treasury can investigate the taxpayer’s claim for a refund and determine its validity before interest begins accumulating. In order to give effect to the legislative intent regarding the 45–day waiting period, the Treasury must be permitted to investigate the claim, and, in order to investigate the claim, the Treasury must have adequate notice of the claim⁴⁹

In this case, Respondent did not agree that Petitioner’s claims were valid, and it issued the intents to assess accordingly.⁵⁰ As such, following Respondent’s denial of the claimed overpayments and carryforwards, the carryforwards contained on the 2008, 2010, and 2011 tax returns were no longer considered valid refund claims, and Petitioner was required to file a renewed “claim or petition” for refund.

The Court’s application of the law in *Ford* provides further insight into what is required for a refund claim. In *Ford*, the Court rejected the taxpayer’s argument that expression of its disagreement with Treasury’s determination was sufficient to constitute

Intent to Assess UB35645, which shows tax due in the amount of \$690,296, neither party provided copies of the Intents to Assess. The Informal Conference Recommendation issued in Treasury Docket No. 20122043 indicates, however, that Petitioner requested an informal conference for Intents to Assess TP34119 and TP73498 by letter dated October 10, 2012.

⁴⁷ Respondent’s Response Brief at 6.

⁴⁸ *Sagar*, 204 Mich App at 131-132.

⁴⁹ *Ford Motor*, 496 Mich at 395-396. (Emphasis in original).

⁵⁰ See MCL 208.1513 and MCL 205.21.

a claim when considered in conjunction with the other information that was known to Treasury. The Court reasoned that “although expressing disagreement with a tax assessment may *imply* that the taxpayer may seek a refund, an expression of disagreement alone is not a demand for, request for, or assertion of a right to a refund.”⁵¹ The Court also found that “a request for an informal conference could . . . constitute a claim or petition for a refund under the statutory language *if* the request includes a demand or request for or an assertion of a right to a refund.”⁵² Ford’s Informal Conference Request contained no such demand, however, and the Court ultimately found that its August 25, 2006 letter, which “withdrew [its] request for an informal conference and informed the Treasury that [it] would file an action in the Court of Claims,”⁵³ constituted the requisite claim for refund under MCL 205.30. The Court reasoned as follows:

Although a taxpayer need not file a lawsuit under MCL 205.22 in order to make a “claim” or “petition” for a refund, we conclude that the reference to this statute in plaintiff’s August 25, 2006 letter constituted a claim or petition for refund under MCL 205.30. By referring to MCL 205.22 in expressing plaintiff’s decision to institute a formal legal action in a court of law, the August 25, 2006 letter indicated that plaintiff was at that time “claim[ing] a refund” as distinctly contemplated by MCL 205.22. In other words, by notifying the Treasury that plaintiff would resolve the dispute in the Court of Claims pursuant to MCL 205.22, the August 25, 2006 letter asserted a right to a refund by affirmatively notifying the Treasury that plaintiff was making what MCL 205.22 itself terms a “claim” for refund. Therefore, plaintiff’s August 25, 2006 letter satisfied the second requirement necessary to trigger the 45-day waiting period before interest begins to accrue under MCL 205.30: plaintiff made a “claim” or “petition” by informing the Treasury that it intended to file suit in the Court of Claims pursuant to the procedures delineated in MCL 205.22.⁵⁴

Moreover, the Supreme Court has held that “a taxpayer is not required to make the claim on a specific Treasury form or in any other specific manner in order to satisfy statutory requirement for a making a claim MCL 205.30.”⁵⁵ Instead, they “must only demand or request the refund or assert an existing right to the refund.”⁵⁶ As restated by the Court, and noted above, “[a]lthough a ‘claim’ or ‘petition’ need not take any specific form, it must clearly demand, request, or assert a *right to a refund of tax payments made to the Department of Treasury that the taxpayer asserts are not due.*”⁵⁷ The plain language specifically refers to “tax payments,” and the Court even clarified “that the statutory language only requires a ‘claim’ or a ‘petition’ for a *refund*; it does not require a

⁵¹ *Id.* at 398. See also *NSK Corp v Dep’t of Treasury*, 481 Mich 884; 748 NW2d 884 (2008).

⁵² *Id.* at 399. (emphasis added).

⁵³ *Id.* at 400.

⁵⁴ *Id.* at 400-401.

⁵⁵ *Ford Motor Co*, 496 Mich 382, 393.

⁵⁶ *Id.* (internal quotation marks and alterations omitted).

⁵⁷ *Id.* at 386. (emphasis added).

taxpayer to also ‘claim’ or ‘petition’ for interest itself in order to satisfy the requirements in MCL 205.30.”⁵⁸

With this, it must be determined whether Petitioner’s August 14, 2015, or May 9, 2016 letters to Treasury constituted the requisite claim for refund under MCL 205.30. Beginning with the August 14, 2015 letter, Petitioner states in the second paragraph of the letter that:

Comerica, Inc. (‘Taxpayer’) is in agreement with the MBT audit adjustments detailed in the April 17th Notice of Preliminary Audit Determination specifically affecting Taxpayer’s financial institution gross business apportionment factor for the 2008 through 2011 MBT tax years. These apportionment factor adjustments were originally outlined in the amended MBT returns submitted by Taxpayer as part of the MBT audit on or about March 4, 2015. Please proceed with finalizing the MBT audit with respect to those adjustments. *Taxpayer respectfully request[s] that the overpayment reflected on the 2008-2011 MBT audit be refunded to Taxpayer.*⁵⁹

However, later in the letter, Petitioner disagrees with other provisions of the Determination, and requests that the Informal Conferences previously held in abeyance be commenced.

In its argument regarding Petitioner’s August 14, 2015 letter, Respondent states that “this letter did not request a refund *as to the net capital or credit issues*, but instead a refund relating to an apportionment adjustment made during audit.”⁶⁰ Respondent subsequently reiterated this point, stating that “Petitioner’s letter says nothing about a refund for the *net capital or nonrefundable credit adjustments* that were litigated in this case.”⁶¹ The Tribunal finds no merit in these arguments as there is nothing in the plain language of MCL 211.30 that indicates a refund request must be specific to disputed or denied items. However, the August 14, 2015 letter is problematic as it requests a refund before the audit is complete. In other words, until the audit is complete, Respondent has yet to determine whether Petitioner’s claim, in its entirety, is valid. Until the audit is complete, there has been no determination as to whether Petitioner owes additional taxes or whether it is entitled to a refund. As a result, requesting a refund in the middle of an audit is pointless. Given the above, the Tribunal finds that Petitioner’s August 14, 2015 letter to Treasury, while containing language necessary to request a refund, was premature.

As for Petitioner’s May 9, 2016 letter to Treasury, the Tribunal finds that this letter does not constitute a claim for refund within the meaning of MCL 205.30. This letter, which states that its purpose “is to provide additional support for the Informal

⁵⁸ *Id.* at 394.

⁵⁹ Petitioner’s Motion for Summary Disposition, Exhibit F at 1.

⁶⁰ Respondent’s Response Brief at 4.

⁶¹ *Id.* at 14.

Conference,” is very similar to the Informal Conference Request discussed in *Ford*. It is also very similar to the Holdings Memo rejected by the Court of Appeals in *US Steel* based on the precedent established by the Supreme Court in *Ford and NSK Corp*. The letter expresses clear disagreement with Respondent’s findings and outlines the reasons for the disagreement; however, the Tribunal finds no demand or request for a refund or even an assertion of a right to a refund. The closest the letter gets to such a request is found in the next to last paragraph on page 4, wherein Petitioner states that “[s]hould the final outcome of this protest result in tax due in any year of the audit, Taxpayer disagrees with the assessment of interest and/or penalty on such years, as the overall audit will result in a net refund due.”⁶²

Finally, Petitioner cites the petition filed in this case on February 9, 2017, as a claim for refund under MCL 205.30. As with Petitioner’s argument regarding payment of taxes, this argument was not addressed in Respondent’s response. Upon review of the petition, the Tribunal finds no explicit demand or request for a refund. The introductory paragraph states that Petitioner is seeking “a re-determination of the enclosed Informal Conference Recommendations and Decisions and Orders of the Michigan Department of Treasury . . . as to (i) the calculation of net capital for purposes of the financial institutions franchise tax for the audit period . . . , and (ii) the denial of carryover Brownfield Credits and Historic Preservation Credits” The prayer for relief found in paragraph 57 requests that the Tribunal:

(a) vacate the proposed assessments listed . . . in paragraph 1, or any substituted assessments in lieu thereof, and allow the full use of any remaining credits of the Petitioner, without limitation, through the filing of MBT returns until such credits are fully utilized, (b) vacate the calculations of the Department which will result in a double counting of net capital for the purposes of the Michigan franchise tax on financial entities, and recognize the well-established, and continuing net capital of Comerica-[Michigan], and then Comerica-Texas, in the historic amount of \$5 billion; and (c) direct that any continuing credits be ordered in the manner determined by the Michigan Court of Appeals in *Ashley Capital LLC v MDOT*, supra.⁶³

Notwithstanding the lack of an explicit claim or demand for a refund, the Tribunal finds that the petition constitutes a claim for a refund within the meaning of MCL 205.30 based on the Supreme Court’s holding in *Ford*. Clearly, if expressing one’s decision to institute a formal legal action in a court of law under MCL 205.22 is sufficient to constitute a claim for a refund under MCL 205.30, actually filing such an action would be sufficient to constitute such a claim.⁶⁴

⁶² *Id.*

⁶³ Petition, ¶ 57.

⁶⁴ Though the Tribunal is a quasi-judicial administrative agency and not a traditional court of law, it was granted concurrent jurisdiction with the Court of Claims over assessments, decisions and orders of the Department of Treasury by the Michigan Legislature. See MCL 205.721 and MCL 205.22.

As for the third and final element of MCL 205.30, i.e., *filing* the claim or petition for a refund, the Tribunal finds that there is no dispute that the petition filed in this case was provided to Respondent.⁶⁵

As such, and in light of the above, the Tribunal finds no genuine issue of material fact relative to Petitioner's entitlement to interest under MCL 205.30 for the tax years at issue. Pursuant to MCL 205.30(3), "[i]nterest . . . shall be added to the refund commencing 45 days after the claim is filed or 45 days after the date established by law for the filing of the return, whichever is later."⁶⁶ As the Tribunal has found that Petitioner's refund claim was made on February 9, 2017, when it filed the petition in this matter, interest is properly added in this case commencing on March 26, 2017, which is 45 days after February 9, 2017.

It appears to the Tribunal based on Petitioner's interest calculations, which extend through August 31, 2023, as of its most recent filing, that Petitioner believes interest continues to accrue even after a refund is made. However, pursuant to the plain language of MCL 205.30(3), interest is "added to the refund."⁶⁷ Based upon this language, the Tribunal finds that interest only accrues up to the date the refund is issued. As such, interest on the refund shall be calculated from March 26, 2017, through (1) December 22, 2022, for the \$8,240,942 refund, (2) January 13, 2023, for the \$2,618,595 refund, and (3) August 23, 2023, for the \$34,780 refund.

As for Petitioner's requests for costs, the Tribunal finds that it "may, upon motion or its own initiative, award costs in a contested case"⁶⁸ The Michigan Court Rules and Administrative Procedures Act provide the Tribunal with some criteria in determining whether an award of costs is appropriate, but the Court of Appeals has held that costs are entirely within the Tribunal's discretion, and it is not limited to circumstances where the requesting party shows good cause or the action or defense was frivolous.⁶⁹ The Tribunal is nevertheless generally hesitant to award costs, and usually reserves such action for cases in which frivolity or other good cause exists.

"A claim is frivolous when (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party, or (2) the party had no reasonable basis upon which to believe the underlying facts were true, or (3) the party's position was devoid of arguable legal merit."⁷⁰ "A court must determine whether a claim or defense is frivolous on the basis of the circumstances at the time it was asserted."⁷¹ "[A] claim is

⁶⁵ See Proof of Service dated February 16, 2017.

⁶⁶ *Id.*

⁶⁷ *Id.* (emphasis added).

⁶⁸ TTR 209. See also MCL 205.752.

⁶⁹ See *Aberdeen of Brighton, LLC v Brighton*, unpublished per curiam opinion of the Court of Appeals, issued October 16, 2012 (Docket No. 301826), which noted that "[t]he term 'may' is permissive and is indicative of discretion." *Id.*, citing *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 276 NW2d 734 (2007).

⁷⁰ *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266-267; 548 NW2d 698 (1996), citing MCL 600.2591(3)(a).

⁷¹ *Meisner Law Group, PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 732; 909 NW2d 890 (2017).

devoid of arguable legal merit if it is not sufficiently grounded in law or fact, such as when it violates basic, longstanding, and unmistakably evident precedent.”⁷²

Given the specific facts and circumstances presented, as discussed herein, the Tribunal agrees with Respondent that its initial defense in this case was sufficiently grounded in fact and warranted by existing law. Respondent’s arguments, while ultimately determined to be legally inaccurate, were interpretations of the law that prevailed in two separate forums, including this Tribunal.

However, the Tribunal is not persuaded that the same can be said of the arguments made on remand regarding Petitioner’s entitlement to interest under MCL 205.30. On remand, Respondent’s arguments largely ignore the uncontroverted facts of the case, including its initial denial of Petitioner’s claims for carryforwards on its returns. While Respondent addressed Petitioner’s claim that the August 14, 2015, and May 9, 2016 letters triggered interest, it did not address Petitioner’s claim that the petition filed in this case triggered interest. Even more glaring, however, Respondent ignores the fact that it ultimately issued Petitioner a refund in excess of \$10 million following the Supreme Court’s decision in this case. This fact alone negates the basic premise underlying each argument presented, i.e., that “Petitioner was not deprived of moneys for which it sought a refund, for which reason no interest is due.”⁷³ As such, the Tribunal is satisfied that an award of costs and attorney fees is warranted related to the proceedings on remand.

Therefore,

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

IT IS FURTHER ORDERED that Respondent shall pay Petitioner statutory interest under MCL 205.30 on its MBT overpayments for the 2008-2011 tax years. Interest shall be calculated on the refunded amounts as follows: (1) from March 26, 2017, through December 22, 2022, for the \$8,240,942 refund, (2) from March 26, 2017, through January 13, 2023, for the \$2,618,595 refund, and (3) from March 26, 2017, through August 23, 2023, for the \$34,780 refund, within 45 days of entry of this order.

IT IS FURTHER ORDERED that Petitioner’s Motion for Costs is PARTIALLY GRANTED.

IT IS FURTHER ORDERED that Petitioner shall submit a bill of costs and attorney fees to the Tribunal and Respondent within 21 days of entry of this order. The Bill of Costs shall be limited to costs and attorney fees incurred following remand of this matter to the Tribunal by the Supreme Court on January 5, 2023.

⁷² *Adamo Demolition Co v Dep’t of Treasury*, 303 Mich App 356, 369; 844 NW2d 143 (2013). (quotation marks and citations omitted).

⁷³ Respondent’s Response at 6.

IT IS FURTHER ORDERED that Respondent may file a response to the Bill of Costs within 21 days of the date of service.

By Patricia L. Haem

Entered: March 18, 2025
ejg

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 provided by those parties, attorneys, or authorized representatives.

By: Tribunal Clerk