STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Palace Sports and Entertainment, Inc.,
Petitioner,
v

MTT Docket No. 329191

Michigan Department of Treasury,
Respondent.

Tribunal Member Presiding
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

BACKGROUND

Petitioner is a Michigan Corporation with its principal place of business in Auburn Hills, Michigan during the tax years at issue. Petitioner filed single business tax returns for the 2001, 2002, and 2003 tax years and included income received from Ticketmaster pursuant to an agreement between Petitioner and Ticketmaster. Subsequently, Petitioner filed amended returns for the 2001, 2002, and 2003 tax years and deducted "the negotiated portion of the convenience and handling fees it received from Ticketmaster as royalty income, . . . and claimed refunds" totaling $52,103 for the tax years at issue. Respondent issued a Notice of Adjustment on or about August 12, 2005, denying the refund. Petitioner requested an informal conference, which was held on July 6, 2006. The hearing referee recommended that Petitioner's claim for refund be denied. The referee's recommendation was adopted by the Department of Treasury in a Decision and Order of Determination dated August 25, 2006. Petitioner filed a petition with the Tribunal appealing Respondent's Decision and Order on September 27, 2006.

On June 15, 2007, Petitioner filed a trial brief. Respondent filed a motion for summary disposition on June 15, 2007, and request for oral argument. Petitioner filed an answer to Respondent's motion for summary disposition, a cross motion for summary disposition, and request for oral argument on June 29, 2007. On July 7, 2007, Respondent filed a response to Petitioner's trial brief and motion for summary disposition. Oral argument was held on August 13, 2007. Petitioner was represented by Charles T. Wright, Senior Manager, Deloitte Tax LLP. Respondent was represented by Timothy J. Haynes, Assistant Attorney General.

INTRODUCTION

Petitioner is in the entertainment industry and operates an entertainment venue in Auburn Hills, Michigan. Petitioner entered into agreements with Ticketmaster, an international ticket sales facilitator, for the tax years at issue, giving Ticketmaster the exclusive right to sell off-site admissions to events at the Auburn Hills venue. Petitioner retained the right to sell tickets at its on-site box office.

PETITIONER'S CONTENTIONS

Petitioner contends that the payments made to Petitioner, required by the agreements entered into by Petitioner and Ticketmaster for the sale of tickets for events held in Petitioner's venues, are royalties paid by Ticketmaster to Petitioner and thus deductable from Petitioner's tax base for single business tax purposes.[1] Petitioner argues that, although the single business tax act does not define royalties, the payments herein involved meet the general definition of and standard for consideration as royalties, and are not a type of payment precluded by the courts from treatment as royalties. Petitioner further argues that the language in the agreements between Petitioner and Ticketmaster that labels the portion of the convenience charges and handling fees Ticketmaster is required to pay Petitioner as "royalties," requires Respondent to treat the payments as royalties

[1] MCL 208.9(7)(c)

for tax purposes. Petitioner cites the Supreme Court's language in *Frank Lyon Co v United States*, 435 US 561; 98 S Ct 1291 (1978) in support of its argument that absent a clear definition in the statute, the language of the contract controls:

> Where, as here, there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax avoidance features that have meaningless labels attached, the Government should honor the allocation of rights and duties effectuated by the parties.

Petitioner argued that based on *Frank Lyon Co,* the use of the label "royalties" in the agreement to describe certain payments to be made by Ticketmaster to Petitioner in this case is controlling. In further support of that position, Petitioner cited *V & J Foods of Michigan, Inc v Department of Treasury*, MTT Docket No. 295871, (2004), aff'd by Michigan Court of Appeals (2006) (unpublished opinion). *V & J Foods of Michigan, Inc* involved a franchise agreement between V & J Foods, Inc. and Burger King Corporation ("BKC") that required payment of a 3.5% "royalty" payment from the franchisee to the franchisor, BKC, for use of BKC's "marks and systems."[2] The Tribunal determined, and the Michigan Court of Appeals affirmed, that the contract should control where the term royalty was used to describe the payments made in exchange for use of BKC's name, logos, and systems.

Petitioner argued that, based on the above cases, and the fact that there is no ambiguity in the terms of the contract, the Tribunal should not look past the terms of the contract to determine that the payments in the instant case are royalties.

Notwithstanding the above argument, Petitioner also contends that the payments in the agreement are of a type that fall within the definition of a royalty, defined by the Michigan

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[2] Petitioner's Trial Brief, page 10

Supreme Court in *Mobil Oil Corporation v Department of Treasury*, 422 Mich 473; 373 NW2d 730 (1985) as:

> compensation or portion of the proceeds paid to the owner of a right, as a patent or oil or mineral right, for the use of it . . . an agreed portion of the income from a work paid to its author, composer, etc. usually a percentage of the retail price of each copy sold . . . a royal right, as over minerals, granted by a sovereign to a person or corporation . . . the payment made for such a right.[3]

Based upon this definition, Petitioner argued that a royalty is simply a payment made to the "owner of a right."[4] Petitioner asserted that the definition used by the Court did not require that the right be associated with copyright or patent but merely uses these rights as examples. Petitioner asserted that the agreement between Petitioner and Ticketmaster gives Ticketmaster the "*exclusive right* to sell all tickets for all Attractions"[5] (emphasis in original) and that Ticketmaster is paying Petitioner "a royalty for the exclusive right to sell Petitioner's tickets."[6] Petitioner asserts that the fact that Ticketmaster is paying for this right is evidenced by the fact that Petitioner reserves the right to sell tickets from its own facilities box office, without charging purchasers convenience or handling fees, the additional fees generate income in Ticketmaster's business and "pay a royalty to Petitioner for the exclusive right to sell its tickets." Petitioner contends that this arrangement results in a "licensing agreement"[7] between Petitioner and Ticketmaster and that Respondent "has no legal right to re-characterize the royalties received by Petitioner under the contract merely because royalties may be subtracted from the Petitioner's SBT base."[8]

[3] The Random House Dictionary (rev ed), page 1150.
[4] Petitioner's Trial Brief, page 13
[5] Petitioner's Trial Brief, page 10
[6] Petitioner's Trial Brief, page 11
[7] Petitioner's Trial Brief, page 11
[8] Petitioner's Trial Brief, page 11

In further support of its position, Petitioner cited a series of cases in which payments made were determined to be royalties. In *Detroit Lions, Inc v Department of Treasury*, 157 Mich App 207; 403 NW2d 812 (1986), the NFL entered into agreements with television networks giving the networks the right to broadcast post-season games. The NFL received payments from the networks which it distributed to League teams. Court determined that although the transaction involved "contained various elements that resembled a sale, . . . the transactions were more akin to a licensing arrangement, which made the resulting proceeds more characteristic of royalty payments."[9] Petitioner relies on the Court's holding that "the existence of a copyright or patent is not crucial" [10] to a finding that such a payment is a royalty, "[r]ather the nature of the transaction, . . . must justify the conclusion that a royalty is involved even in the absence of a copyright."[11] Petitioner argued that the existence of an intangible such as a copyright or patent, "is not a mandatory prerequisite for a finding that a payment constitutes a 'royalty' for SBT purposes."[12]

Petitioner asserts that the definition of royalty in *Columbia Associates, LP v Department of Treasury*, 250 Mich App 656; 649 NW2d 760 (2002), applies to its situation. Petitioner contends that the Michigan Court of Appeals held that a royalty is "(1) . . . a payment, (2) in the form of either the product itself or proceeds from the sale of the product, and (3) made in consideration for the use of that property."[13] Petitioner asserts that although the Court highlighted the fact that the fees were payments made for the use of copyrighted material, that fact was not the basis of the court's decision but only "strengthened the argument for considering these payments

[9] Petitioner's Trial Brief, page 14
[10] *Detroit Lions Inc v Department of Treasury*, 157 Mich App 207 at 218-19
[11] *Id* at 218-219
[12] Petitioner's Trial Brief, page 15
[13] Petitioner's Trial Brief, page 16

'royalties.'"[14] Petitioner asserts that, applying the "key characteristics of 'royalties' developed in *Columbia Associates, LP*,"[15] the portion of the convenience and handling fees would clearly be considered royalties as they are a payment in the form of proceeds from the sale of a product "(i.e., proceeds from the sale of tickets), (3) made in consideration for the use of the property (in this case intangible property, the exclusive right to sell Petitioner's tickets)."[16]

Petitioner argues that Respondent's conclusion that the convenience charges and handling fees are commissions is unsupported and contends that "the Department seems to erroneously believe that Petitioner charges convenience fees, handling fees, and inside charges to every customer and requires Ticketmaster to collect these fees and retain a portion as commission."[17] Petitioner argues that Ticketmaster uses these "operating proceeds to pay royalties to Petitioner as well as other operating expenses."[18]

RESPONDENT'S CONTENTIONS

Respondent filed a motion for summary disposition asserting that, based upon the filings and joint stipulation of facts, there is no genuine issue of material fact and that the payments received by Petitioner from Ticketmaster are not royalties excludable from Petitioner's single business tax tax base.

Respondent agreed with Petitioner that, because royalties is not defined in the single business tax act, the Supreme Court in *Mobil Oil Corporation v Department of Treasury*, 422 Mich 473; 373 NW2d 730 (1985), looked to other sources for definitions of the term. In addition to using The

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[14] Petitioner's Trial Brief, page 17
[15] Petitioner's Trial Brief, page 17
[16] Petitioner's Trial Brief, pages 17-18
[17] Petitioner's Trial Brief, page 19
[18] Petitioner's Trial Brief, page 19

Random House College Dictionary[19] definition, the Court looked to Black's Law Dictionary which defined royalties as,

> Compensation for the use of property, usually copyrighted material or natural resources, expressed as a percentage of receipts from using the property or as an account per unit produced. A payment which is made to an author or composer by an assignee, licensee or copyright holder in respect to each copy of his work which is sold, or to an inventor in respect of each article sold under the patent. Royalty is a share of product or profit reserved by owner for permitting another to use the property. . . . [20]

Respondent argued that the payments made by Ticketmaster to Petitioner "do not fall within the common understanding of the term royalties,"[21] and that Petitioner did not grant Ticketmaster the right to use a copyright, trademark, or patent, and thus, there is no claim that the payments are related to mineral, gas, or oil transactions.

Respondent asserted that the Court in *Mobil Oil Corporation*, further stated that "[i]n light of this common understanding of 'royalties' as being a payment received by the transferor in patent, copyright, mineral and oil and gas transactions, it seems probable that the Legislature also used the term in this manner."[22] Respondent contends that the courts applied these criteria when determining that royalties included payments made pursuant to a license to broadcast copyrighted television shows[23] and network affiliation fees paid to satellite programming networks for use of copyrighted material.[24]

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[19] See footnote 3
[20] Black's Law Dictionary (5th ed), page 1195.
[21] Respondent's Brief in support of its Motion for Summary Disposition, page 6
[22] *Mobil Oil Corporation v Department of Treasury*, 422 Mich 473; 373 NW2d 730 (1985)
[23] *Field Enterprises v Department of Treasury*, 184 Mich App 151; 457 NW2d 113 (1990)
[24] *Columbia Associates LP v Department of Treasury*,250 Mich App 656; 649 NW2d 760 (2002)

Respondent argued that during the years at issue, Petitioner entered into "agency contracts granting Ticketmaster the exclusive right to distribute as PSE's[25] agent all tickets for events at PSE's facilities."[26] Respondent asserted that Petitioner "did not grant Ticketmaster a copyright, or the right to use a copyright, trademark, patent, work of authorship, or intellectual property"[27] and that the parties specifically agreed that "use of the other party's trademarks, service marks, and trade names worldwide in connection with the sales and distribution of tickets under the agreements would be royalty-free."[28]

Respondent contended that these payment were part of the compensation package paid to Petitioner by Ticketmaster which was also required to pay a signing bonus, purchase suites at Petitioner's venues, provide an advertising allowance to Petitioner, and make charitable contributions to certain charities. Additionally, "acting as PSE's ticket agent, Ticketmaster agreed to provide PSE with all hardware, software, and ticket systems, supplies and training . . . source coding . . ."[29] to allow ticket purchasers to search Petitioner's website before linking to Ticketmaster's to purchase tickets.

Respondent argued that the fact that the agreement refers "to the negotiated portion of the Customer Convenience Charges and Handling Fees . . as 'royalties' is not controlling"[30] and that the substance of the transaction determines the tax treatment of the payments. Respondent asserted that, although there is some support for the principal that the rights and duties

[25] Palace Sports and Entertainment
[26] Respondent's Brief in support of its Motion for Summary Disposition, page 1
[27] Respondent's Brief in support of its Motion for Summary Disposition, page 1
[28] Respondent's Brief in support of its Motion for Summary Disposition, page 1
[29] Respondent's Brief in support of its Motion for Summary Disposition, page 3
[30] Respondent's Brief in support of its Motion for Summary Disposition, page 7

enumerated by parties to an agreement should be honored, the Courts in *Connors & Mack Hamburgers, Inc v Department of Treasury*, 129 Mich App 627, 629-630; 341 NW2d 846 (1983), and *Mourad Brothers, Inc v Department of Treasury*, 171 Mich App 792, 799; 431 NW2d 98 (1988), held that this principle "does not apply absent a contractual agreement concerning the tax implications of any allocation"[31] absent specific provision stating whether the franchisor or the franchisee will claim the franchise fee for single business tax purposes. In the agreements between Petitioner and Ticketmaster, there are no specific provisions regarding the single business tax treatment of the payments.[32]

Respondent argued that, contrary to Petitioner's assertion, *Frank Lyon Company v United States,* 435 US 561; 98 S Ct 1291; 55 L E2d 550 (1978), is unpersuasive and not controlling. Respondent contends that in *Frank Lyon Company*, the Court dealt with "the doctrine of 'substance over form' that requires the court to recognize the economic realities of a transaction rather than the particular form the parties employed."[33] In further distinguishing the cases, Respondent argued that *Frank Lyon Company* involved a "**multi-party transaction** with economic substance that is compelled or encouraged by business or regulatory realities, is imbued with tax-independent consideration . . . and is not shaped solely by tax-avoidance features that have meaningless labels attached."[34] (Emphasis in original) Respondent states that this matter involves a "simple two-party (not multi-party) transaction.[35]

[31] Respondent's Response to Petitioner's Trial Brief page 1
[32] Respondent's Brief in support of its Motion for Summary Disposition, page 1
[33] Respondent's Response to Petitioner's Trial Brief, page 2
[34] Respondent's Response to Petitioner's Trial Brief, page 2
[35] Respondent's Response to Petitioner's Trial Brief, page 3

Respondent argued that, as *V & J Foods of Michigan v Department of Treasury,* unpublished opinion per curiam of the Court of Appeals issued May 23, 2006 (Docket No. 259460), is an unpublished opinion, it is non-binding and thus not controlling or precedential. Notwithstanding this, Respondent asserted that the facts in that case are clearly distinguishable as "there was no dispute the transaction [in *V & J Foods of Michigan*] involved payment of a true royalty for the use of the Burger King System and the Burger King Marks."[36] The issue before the Court in that case was only what portion of the payments involved were to be allocated as royalties. Respondent argued that in the instant case, there is no agreed payment for use of a trademark, patent, or copyright material.

Respondent disagreed with Petitioner's position regarding the Court's holding in *Stratton-Cheeseman Management Co v Department of Treasury*, 159 Mich App 719; 407 NW2d 398 (1987). Respondent asserted that the Court's holding in that case was that "[i]t is the substance of a transaction rather than the terms applied by the parties which determines how to characterize the payment for tax purposes," which further supports Respondent's position.

In response to Petitioner's assertion that the courts have stated that royalty transactions have certain elements,[37] and that "the existence of a copyright or patent is not crucial"[38] to the determination that a payment is a royalty, Respondent notes that "[n]ot every payment made in consideration for the use of another's property is a royalty."[39] Respondent contended that "PSE's argument that this is a royalty transaction because it is using PSE's property in the form of the

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[36] Respondent's Response to Petitioner's Trial Brief, page 4
[37] See page three.
[38] Respondent's Response to Petitioner's Trial Brief, page 7
[39] Respondent's Response to Petitioner's Trial Brief, page 8

exclusive right to sell tickets would apply to an exclusive distributor's right to sell . . . for a manufacturer – a transaction typically involving a commission, but not a royalty."[40]

Respondent contended that the agreement is ambiguous at best, and the economic reality of the transactions and contract are not consistent with royalty payments.

FINDINGS OF FACT

Petitioner is a Michigan corporation with its principal place of business in Auburn Hills, Michigan. Petitioner operates sports and entertainment facilities including the Palace of Auburn Hills, Pine Knob (now DTE Energy Music Theatre), Meadowbrook Music Festival, and the St. Pete Times Forum. On June 30, 2000, Petitioner entered into an agreement with Ticketmaster granting Ticketmaster the exclusive right to distribute tickets to events held at Petitioner's facility. The parties entered into an amended and restated agreement on September 1, 2003. The sale of the tickets generated business income for Ticketmaster.

Ticketmaster sold tickets through retail ticket centers, telephone, IVR, computer, and the Internet. Petitioner reserved the right to sell tickets through its facilities' box offices. Ticketmaster charged purchasers the face value of tickets plus convenience charges, handling fees, and inside charges. Ticketmaster remitted to Petitioner a negotiated portion of the convenience charges and handling fees after deducting the Inside Charges. Ticketmaster retained the remaining portion of the convenience charges and handling fees. Purchasers who buy tickets at Petitioner's box offices do not pay the convenience charges and handling fees. The payments by Ticketmaster to Petitioner which were made pursuant to the agreements were enumerated under the heading "Royalties."

[40] Respondent's Response to Petitioner's Trial Brief, page 8

Petitioner did not grant Ticketmaster the right to use any copyright, trademark, or patent, or original work of authorship. Petitioner did not provide Ticketmaster with any property, software, programs, or equipment for use in its ticketing service on behalf of Petitioner.

Petitioner included as income in its tax base the amounts represented by the negotiated portion of convenience charges and handling fees remitted from Ticketmaster pursuant to the agreements for the 2001, 2002, and 2003 tax years. Petitioner filed amended single business tax returns for those tax years on which it did not include the negotiated portion of convenience charges and handling fees remitted from Ticketmaster pursuant to the agreements and claimed a refund for overpaid taxes. Petitioner made no assertions, and offered no evidence or testimony, as to its treatment of those payments for federal tax purposes. Respondent denied Petitioner's refund claim.

STANDARD OF REVIEW UNDER MCR 2.116(C)(10)

Under MCR 2.116(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. *Smith v Globe Life Insurance,* 460 Mich 446, 454-55; 597 NW2d 28 (1999). In *Quinto v Cross & Peters Co,* 451 Mich 358, 362-63; 547 NW2d 314 (1996), the Michigan Supreme Court set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

> In reviewing a motion for summary disposition under MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, admissions and documentary evidence filed 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 affidavits or other documentary evidence show 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 motion by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the non moving party to establish that a genuine issue of disputed material fact remains unsettled. *Id.* When 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 recited in pleadings, but must provide support beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is property granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992). In the event, however, it is determined an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14, 18; 469 NW2d 436 (1991).

In the instant case, the parties have stipulated to all of the relevant facts. There is no genuine issue of material fact. The Tribunal has considered both Petitioner's and Respondent's Motions for Summary Disposition under the criteria for MCR 2.116(C)(10), and based on the stipulated facts and other documentary evidence filed with the Tribunal, determines that consideration of these motions is appropriate under MCR 2.116(C)(10).

CONCLUSIONS OF LAW

In general, the single business tax act imposes tax on the entity that consumes the capital. MCL 208.9(7)(4) provides for the deduction of all royalties "to the extent deducted in arriving at federal taxable income." The firm making the royalty payments typically uses the rights acquired in its business activity. The firm that receives royalty income is not taxed on that income, but rather the royalties are part of the payor's tax base. *Mobil Oil Corporation*, at 477; also see *Town & Country Dodge, Inc v Department of Treasury*, 420 Mich 226, 235; 362 NW2d 618 (1984); *Detroit Lions, Inc v Department of Treasury*, 157 Mich App 207, 214; 403 NW2d 812 (1986); and *Field Enterprises v Department of Treasury*, 184 Mich App 151, 154; 457 NW2d 113 (1990), lv den 437 Mich 1020 (1991).

The SBT does not define, in general, the term royalty, although definitions and explanations are provided for certain specific types of royalties and franchise fees.[41] The single business tax act does provide that "[a] term used in this act and not defined differently shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes in effect for the tax year unless a different meaning is clearly required."[42]

The Michigan Supreme Court discussed the definition of royalties in the context of the single business tax act in several cases. In *Zenith Data Systems Corp and Health Co, Inc v Department of Treasury*, 218 Mich App 742; 555 NW2d 264 (1966), the Court of Appeals held that there was no definition of royalty in the federal tax law used in a directly comparable context to the single business tax act.[43] *Mobil Oil Corp, supra* at 484; and *Town & Country Dodge, supra* at 239-240. The Supreme Court in *Mobil Oil Corp,* looked to extrinsic sources, including dictionaries, to help discern the meaning of term royalties as used in the single business tax act. Both parties have relied on the definitions found in *Mobil Oil Corp* in support of their positions. The

[41] MCL 208.9(4)(g) and MCL 208.9(7)(c)
[42] MCL 208.2(2)
[43] See also *Mobil Oil*, *supra* at 484; and *Town & Country Dodge*

definition used by the Court in that case taken from *The Random House Dictionary* (rev ed), p 1150 was

> compensation or portion of the proceeds paid to the owner of a right, as a patent or oil or mineral right, for the use of it . . . an agreed portion of the income from a work paid to its author, composer, etc. usually a percentage of the retail price of each copy sold . . . a royal right, as over minerals, granted by a sovereign to a person or corporation . . . the payment made for such a right.

The Court further relied on the following definition from *Black's Law Dictionary*,

> Compensation for the use of property, usually copyrighted material or natural resources, expressed as a percentage of receipts from using the property or as an account per unit produced. A payment which is made to an author or composer by an assignee, licensee or copyright holder in respect to each copy of his work which is sold, or to an inventor in respect of each article sold under the patent. Royalty is a share of product or profit reserved by owner for permitting another to use the property. . . . [44]

It is uncontested that the compensation in this matter is not related to the existence of any copyright, patent, or oil or mineral right. It is uncontested that the compensation in this matter is not related to payment to an author or composer for sale of copies of his or her work nor is it related to compensation to an inventor in respect to each article sold under a patent.

Petitioner and Ticketmaster entered into agreements effective for the tax years at issue that allow Ticketmaster to sell tickets to Petitioner's events. Petitioner retained the rights to sell tickets at its box offices. Ticketmaster was the only other entity authorized to sell tickets. As part of the agreements, Ticketmaster was required to sell tickets to Petitioner's events at the same price Petitioner sold those tickets at its box office, but Ticketmaster was entitled to charge purchasers additional convenience charges, handling fees, and inside charges. Ticketmaster used all of its own equipment, programs, and processes for the sale of tickets. The negotiated portion of the

[44] Black's Law Dictionary (5th ed), page 1195.

convenience fees and handling charges that Ticketmaster was required, by agreement, to pay to Petitioner was provided for in sections of each agreement labeled "Royalties" or "Royalties to PSE."

Petitioner asserted that the labeling of the payments to Petitioner as royalties in the agreement is dispositive. Therefore, Petitioner is entitled to a refund for taxes paid in 2001, 2002, and 2003 that were based upon including in its tax base those payments from Ticketmaster based upon the negotiated portion of convenience charges and handing fees labeled "Royalties" or "Royalties to PSE." The payments are, by contract, royalties, and as such should be deducted from Petitioner's tax base for single business tax purposes. Petitioner argues that the cases provided that the common definition of royalties is not exclusive and seek to include the payments made in this matter as royalties because they so name them. Petitioner further asserts that if the parties say the income is royalty income, that designation cannot be questioned but must be accepted by the Tribunal without examination or inquiry, without any analysis as to how the payments fit into any accepted category or the general definition. Petitioner supports this argument by asserting that because this specific type of payments is not excluded in any definition, the payments are royalties because Petitioner calls them royalties. This argument is not convincing and is insufficient to meet Petitioner's burden of proof. To allow Petitioner to determine that certain income is royalty income because they call it royalty income, which would provided Petitioner with significant tax advantages, would have an absurd result.

Further, the cases cited by Petitioner do not support Petitioner's conclusion. *Mourad Brothers*, *V & J Foods*, *Detroit Lions*, and *Connors and Mack* all involve true royalties paid for use of trademarks, copyrighted materials, or proprietary systems. Those are not the facts in this case. *Mobil Oil Corporation* dealt with oil and gas royalties, a very specific and limited determination. Again, not the facts here. In *Frank Lyon Co,* the Court was very clear that the multi-party nature of the transaction and that the agreement was "imbued with tax-independent considerations, and is not shaped solely by tax avoidance features that have meaningless labels attached," was critical to its decision. Here, there are only two parties involved. And, Petitioner argued just the opposite of the position in *Frank Lyon Co*. Petitioner argued that the labels are controlling, not meaningless. And, based on the testimony and evidence, the Tribunal can only conclude that the sole purpose for the amendment of Petitioner's single business tax returns for the tax years at issue was to provide Petitioner with a claim for refund. This is the exact result the Court was cautioning against.

The elements of a royalty transaction, as provided by the Court in *Michigan United Conservation Clubs v Department of Treasury*, 239 Mich App 70, 79; 608 NW2d 141 (1999), affirmed by equal division 463 Mich 995, 625 NW2d 783 (2001), are (1) a payment, (2) in the form of either a product or proceeds from the sale of the product, and (3) that the payments are made in consideration for the use of the product. And while the courts have held that the list is not exclusive, Petitioner has the burden of proof to establish that, if payments are not associated with what would customarily be considered an activity that would produce a royalty, the payments otherwise meet the Court's criteria. There is no provision in the agreements that identifies what product Ticketmaster is receiving, selling, or using to generate the proceeds from which it pays Petitioner. The agreement does not provide direction for the tax treatment of these payments and the payments are not identified as being made for the use of any product, copyright, trademark, rights, or authored materials. And Petitioner offered no evidence or testimony that the transactions involved have similar or analogous characteristics.

At hearing, Petitioner asserted that the product is the exclusive right to sell tickets and that the fact that Petitioner reserves the right to sell tickets from its own facilities' box offices, without convenience charges or handling fees, is evidence that the payments from Ticketmaster are royalties. Except for these statements, Petitioner provides no case law or statutory provision to support its contention that this exclusive right to sell results in royalties paid to them or to explain how the criteria for treatment as royalties is met simply because Petitioner is able to sell tickets at its own box offices. Nor is Petitioner's assertion that this type of payment is not precluded from being treated as a royalty sufficient to include this as a product, the proceeds of the sale of which results in royalties.

Notwithstanding the Tribunal's conclusion that the payments herein claimed as royalties are not royalties, the fundamental threshold under the single business tax act to allow deduction of royalties from a taxpayer's single business tax tax base for the tax years at issue, is that the taxpayer included those royalties in federal taxable income for the same tax year. At no time, not in its petition, not in its trial brief, not in its response to Respondent's motion for summary disposition, and not in its oral argument, did Petitioner assert that the payments deducted in its amended returns as royalties were added to its federal taxable income as royalties for the tax years at issue.

In this matter, the parties have filed cross motions for summary disposition. The Tribunal has considered affidavits, pleadings, depositions, admissions, arguments, and documentary evidence filed and presented by the parties. MCR 2.116(G)(5). The Tribunal agrees with the parties that the affidavits and other documentary evidence, and arguments, establish that there is no genuine issue in respect to any material fact. Based on this determination, the Tribunal concludes that Respondent is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

JUDGMENT

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

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

MICHIGAN TAX TRIBUNAL

Entered: August 18, 2010 By: Rachel Asbury