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

Milton H. Ring and AAA Mini-Warehouse, LLC,
Petitioners,

MTT Docket Nos. 352930 and 355114

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J. Knoll

ORDER DENYING PETITIONERS' MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Petitioner, Milton H. Ring, seeks a refund of the Single Business Tax (SBT) paid for the years 2004, 2005, and 2006, and Petitioner, AAA Mini-Warehouse, LLC, seeks a refund of SBT paid for the years 2004, 2005, 2006, and 2007. Petitioners contend that they were not required to file SBT returns because their gross receipts for these years did not meet the $350,000.00 filing threshold established in MCL 208.39e(8). Respondent, Michigan Department of Treasury, contends that MCL 208.39e(8) does not apply to Petitioners because Petitioners, as members of a controlled group, are subject to MCL 208.73(5), which provides a threshold of $100,000. The Tribunal agrees with Respondent and the refunds are denied.

BACKGROUND

Petitioners timely filed SBT returns for the years at issue. On or around April 28, 2008, Petitioners filed Amended SBT returns claiming a refund of all taxes paid on the grounds that they did not have sufficient gross receipts to subject them to the SBT pursuant to MCL 208.39e(8). Respondent denied Petitioners' claims, issuing Single Business Tax Annual Return Notices of Adjustment on May 21, 2008, June 3, 2008, and July 9, 2008. The notices stated:

> If you are a member of an affiliated group, a controlled group of corporations or an entity under common control, the group must sum its members' adjusted gross receipts to determine if members of the group need to file. Do not include members whose adjusted gross receipts are less than $100,000; these members are not required to file an SBT return. . . . Note: Members whose adjusted gross receipts are less than $100,000 must include their business activity when figuring the small business credit on the C-8009.

Petitioners timely filed these appeals with the Tribunal on June 16, 2008 and July 28, 2008. On February 11, 2010, Petitioners and Respondent filed a Joint Motion to consolidate Docket No. 352930 with Docket No. 355114, which was granted by the Tribunal on February 25, 2010. On

April 2, 2010, Respondent filed a Motion requesting the Tribunal grant Summary Disposition in its favor. On April 6, 2010, Petitioners filed a Motion requesting the Tribunal grant Summary Disposition in their favor.

FINDINGS OF FACT

The Tribunal finds the following facts have been established:

1. Petitioners are members of a controlled group.
2. Petitioners' gross receipts for the years at issue were as follows:

	2004	2005	2006	2007
Milton H. Ring	294,023	301,640	331,903	N/A
AAA Mini-Warehouse, LLC	256,837	247,932	270,348	284,512

3. For each of the tax years, the controlled group of which Petitioners were members had combined gross receipts that exceeded $350,000.00.
4. Petitioners filed SBT returns for the tax years at issue.
5. Petitioners filed amended SBT returns for the tax years at issue seeking refunds based on the claim that they were not required to file because their gross receipts on a separate basis were less than the $350,000 threshold pursuant to MCL 208.39(e).
6. Petitioners seek refunds of:

	2004	2005	2006	2007
Milton H. Ring	2,514	2,579	2,839	N/A
AAA Mini-Warehouse, LLC	2,195	2,119	2,311	2,432

7. Respondent denied Petitioners' refund claims for all disputed tax years based on its determination that Petitioners' gross receipts exceeded the $100,000 threshold under MCL 208.73(5), in each year.
8. The parties agree that the facts in this case are undisputed.

PETITIONERS' CONTENTIONS

Petitioners move for summary disposition under MCR 2.116(C)(10), claiming they are not liable to pay Single Business Tax in the tax years at issue because Petitioners' gross receipts do not exceed the filing threshold as a matter of law, and there exists no dispute as to genuine issue of material fact.[1] Petitioners assert that "the plain language of the [statute] does not support Respondent's denial of Petitioners' refund claims and that Respondent has thereby failed to raise a defense against Petitioner's petition that can be legally sustained." *Id.* at p. 3.

Petitioners contend that they fall below the applicable filing threshold contained in MCL 208.39e(8). That statute reads as follows:

[1] Petitioners' Motion for Summary Disposition, (PM) p. 2

> Notwithstanding any other provision of this act and for tax years that begin after December 31, 2002, a person whose apportioned or allocated gross receipts are less than $350,000.00 for the tax year need not file a return or pay the tax as provided under this act.

Petitioners argue that the statute uses the word "person," a term defined in the Single Business Tax Act to include Petitioners both as individual corporate entities and together as a controlled group. MCL 208.6(1) provides:

> "Person" means an individual, firm, bank, financial institution, limited partnership, copartnership, partnership, joint venture, association, corporation, receiver, estate, trust, or any other group or combination acting as a unit.

Petitioners contend that, "being an individual and a Limited Liability Company, [they] constitute 'persons' within the meaning enunciated by the statute."[2] Petitioners also direct particular attention to the word "Notwithstanding," which Petitioners take the definition from "Duhaime's Legal Dictionary as: 'In spite of, even if, without regard to or impediment by other things.'" *Id.* Petitioners assert that this definition of "Notwithstanding" shows that the language in MCL 208.39e(8) is plain and unambiguous because, when interpreting "notwithstanding," with the Duhaime's definition, the statute reads "In spite of (notwithstanding) any other provision of this Act and for the tax years that begin after December 31, 2002, a person whose gross receipts are less than $350,000 is not liable to pay a Single Business Tax or to file a return."(PWA p. 3)

Petitioners argue that "the Tribunal should 'avoid a construction that would render any part of a statute surplusage or nugatory.'"(PWA p. 4, citing *DaimlerCrysler Corp v Department of Treasury*, COA Case No. 262518) Petitioners contend that "Respondent seeks a constructive interpretation of the statute . . . which would render the phrase 'notwithstanding any other provision of this act and for tax years beginning after December 31, 2002' meaningless, and would have this Tribunal look instead to MCL 208.73(5)."(PWA p. 4) Petitioners do not agree that construction is allowed in the instant matter since the statutory language is plain and unambiguous. Petitioners state further, "there is no more ambiguity created by reading MCL 208.39e(8) and MCL 208.73 together than there is in reading the differing provisions contained within MCL 208.73 together." *Id.*

Petitioners contend that Respondent, "in addressing the singular issue pertinent to the matter before this Tribunal has merely re-stated an argument that has already been rejected by this Tribunal and by the Court of Claims." (PM p. 2) Petitioners cite two Tribunal Small Claims decisions: *Sharp Base Co v Department of Bureau of Tax Policy*, MTT Docket No. 0321220, and *LBC Realty, LLC v State of Michigan Department of Treasury*, MTT Docket No. 0330061. Petitioners also cite a Court of Claims decision: *B&G Properties, LLC v Michigan Department of Treasury*, COC Case No. 07-12-MT.

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[2] Petitioner's [sic] Written Argument in Support of Summary Disposition, (PWA) p. 3

RESPONDENT'S CONTENTIONS

Respondent filed its Motion for Summary Disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). Respondent asserts that the provision relied upon by Petitioner, MCL 208.39e(8), "does not apply to members of an affiliated group, members of a controlled group of corporations, or entities under common control."[3] Respondent argues that such members or entities "are subject to the more specific filing threshold found in MCL 208.73(5)." *Id.*

Respondent contends that MCL 208.73(1) sets forth the general filing threshold for persons whose apportioned or allocated gross receipts plus adjustments are less than certain set amounts provided in MCL 208.73(1)(a)-(e). (RB p. 7) In contrast, Respondent argues that MCL 208.73(5) sets forth the more specific filing threshold for members of an affiliated group, members of a controlled group of corporations, and entities under common control. *Id.* Once enacted by Public Act 531 of 2002, MCL 208.39e(8) raised the general filing threshold to $350,000 for persons whose apportioned or allocated gross receipts are less than the threshold amount. *Id.*

Respondent relies on MCL 205.3(f) in affording itself authority to interpret and explain state tax laws. In interpreting the statutes in question, Respondent is guided by the rules of statutory construction and interpretation expressed by the Supreme Court of Michigan and the Michigan Court of Appeals. (RB p. 6) Respondent cites the Court of Appeals as stating:

> A Legislature is presumed to be aware of all existing statutes when enacting a new statute. Statutes that appear to conflict should be read together and reconciled, if possible. When two statutes lend themselves to an interpretation that avoids conflict, that interpretation should control. The interpretation should give effect to each statute without repugnancy, absurdity, or unreasonableness. When two statutes conflict, the one that is more specific to the subject matter prevails over the more general statute.[4]

Respondent cites *People v Valentin*, 457 Mich 1, 6; 577 NW2d 73 (1998), to show that "[s]tatutory language, unambiguous on its face, may be rendered ambiguous through its interaction with and relationship to other statutes." Respondent asserts that "[p]rovisions of a statute that could be in conflict must, if possible, be read harmoniously,"[5] and "an act must be construed 'as a whole to harmonize its provisions and carry out the purpose of the legislature.'"[6] Respondent also asserts that Michigan courts do not allow repeal by implication. Specifically:

> *Repeal by implication is not permitted if it can be avoided by any reasonable construction of the statutes.* If by any reasonable construction two statutes can be reconciled and a purpose found to be served by each, both must stand. The duty of

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[3] Respondent's Brief in Support of its Motion for Summary Disposition, (RB) p. 6
[4] *Craig v Detroit Public Schools CEO*, 265 Mich App 572, 574; 697 NW2d 529 (2005)
[5] *Nowell v Titan Insurance Co*, 466 Mich 478, 482; 648 NW2d 157 (2002)
[6] *Id.* at n5

> the courts is to reconcile statutes if possible and enforce them. The courts will regard all statutes on the same general subject as part of one system and later statutes should be construed as supplementary to those preceding them. *Valentine v McDonald*, 371 Mich 138, 144; 123 NW2d 277 (1963) (emphasis added by Respondent).

Respondent argues that "[t]o read MCL 208.39e(8) as an implicit repeal of MCL 208.73(5) would be to favor the general statutory provision over the statute more specific as to the subject matter, thereby abrogating well-settled principles of statutory construction that require apparently conflicting statutes to be read together, reconciled, with each being given meaning and effect." (RB p. 8) Respondent asserts that it has provided a reasonable construction of the statutes that avoids repeal of MCL 208.73(5).

APPLICABLE LAW

The parties rely on MCR 2.116(C)(10) in filing their Motions for Summary Disposition and Respondent also cites MCR 2.116(C)(8).

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). The Michigan Supreme Court, in *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), 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.
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> 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.
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> 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. *Id*. at 361-363. (Citations omitted.)

In the event, however, it is determined that 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; 469 NW2d 436 (1991). On the other hand, under MCR 2.116(I)(2), "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

MCR 2.116(C)(8) provides the following ground upon which a summary disposition motion may be based: "The opposing party has failed to state a claim on which relief can be granted." "A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery." *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). "Under MCR 2.116(C)(8), we accept all well-pleaded factual allegations as true and construe them in a light most favorable to the nonmoving party." *Johnson v City of Detroit*, 457 Mich 695, 701; 579 NW2d 895 (1998). Only if no factual development could justify the plaintiff's claim for relief can the motion be granted. *Koenig v City of South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999).

CONCLUSIONS OF LAW

The beginning point of analysis is the statute's plain language. The primary goal of judicial interpretation of statutes is to discern and give effect to the intent of the Legislature; the rules of statutory construction merely serve as guides to assist in determining that intent with a greater degree of certainty. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003); *In re Quintero Estate*, 224 Mich App 682, 692-693; 569 NW2d 889 (1997). It is a fundamental principle that a clear and unambiguous statute leaves no room for judicial construction or interpretation. *Gladych, supra* at 597, 664 NW2d 705; *People v McIntire*, 461 Mich 147, 152-153; 599 NW2d 102 (1999). "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case." *Id.* at 153; 599 NW2d 102, quoting *People v McIntire*, 232 Mich App 71, 119; 591 NW2d 231 (1998). (Young, P.J., concurring in part and dissenting in part) (emphasis in the original). Thus, this Court "may engage in judicial construction only if it determines that statutory language is ambiguous." *Gilbert v Second Injury Fund*, 463 Mich 866, 867; 616 NW2d 161 (2000).

A plain reading is unambiguous when the statute's language has only one meaning. Where the language in a statute is ambiguous, a court may go beyond the statute's words in order to ascertain legislative intent. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "An ambiguity of statutory language does not exist merely because a reviewing court questions whether the Legislature intended the consequences of the language under review. An ambiguity can be found only where the language of a statute as used in its particular context has more than one common and accepted meaning." *Colucci v McMillin*, 256 Mich App 88, 94; 662 NW2d 87 (2003). If reasonable minds can differ with respect to the meaning of a statute, that statute may be considered ambiguous and judicial construction is appropriate. *Ross v Michigan*, 255 Mich App 51, 55; 662 NW2d 36 (2003).

MCL 208.73 reads in relevant part:

> (1) An annual or final return shall be filed with the department in the form and content prescribed by the department by the last day of the fourth month after the end of the taxpayer's tax year. Any final liability shall be remitted with this return. A person who's apportioned or allocated gross receipts plus the adjustments provided in section 23b(a), (b), and (c) are less than the following amount for the appropriate year need not file a return or pay the tax provided under this act:
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> * * * *
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> (e) $250,000.00 for tax years beginning after December 31, 1994.
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> * * * *
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> (5) For tax years that end after July 6, 1994, an affiliated group as defined in this act, a controlled group of corporations as defined in section 1563 of the internal revenue code and further described in 26 C.F.R. 1.414(b)-1 and 1.414(c)-1 to 1.414(c)-5, or an entity under common control as defined in the internal revenue code shall consolidate the gross receipts of the members of the affiliated group, member corporations of the controlled group, or entities under common control that have apportioned or allocated gross receipts, plus the adjustments provided in section 23b(a), (b), and (c), of $100,000.00 or more to determine if the group or entity shall pay a tax or file a return as provided under subsection (1). An individual member of an affiliated group or controlled group of corporations or an entity under common control is not required to file a return or pay the tax under this act if that member or entity has apportioned or allocated gross receipts, plus the adjustments provided in section 23b(a), (b), and (c), of less than $100,000.00.

The statute was amended in 2002 by Public Law 531 to add MCL 208.39e(8), which reads as follows:

> *Notwithstanding any other provision of this act* and for tax years that begin after December 31, 2002, a person whose apportioned or allocated gross receipts are

> less than $350,000.00 for the tax year need not file a return or pay the tax as provided under this act. (Emphasis added]

Petitioners argue that the statute uses the word "person," a term defined in the Single Business Tax Act to include Petitioners both as individual corporate entities and together as a controlled group. MCL 208.6(1) states:

> "Person" means an individual, firm, bank, financial institution, limited partnership, copartnership, partnership, joint venture, association, corporation, receiver, estate, trust, or any other group or combination acting as a unit.

A conflict arises because of the Legislature's use of the phrase "*Notwithstanding any other provision of this act*." Petitioners argue that this must be interpreted to mean that the filing threshold is $350,000 regardless of any other provision in the Single Business Tax Act. The language of MCL 208.39e(8) is unambiguous on its face. It establishes a $350,000.00 filing threshold for all persons. And although the definition of "person" includes "any other group or combination acting as a unit," it does not include the specific terms "affiliated group," "controlled group of corporations" or "entity under common control."

At the outset, the Legislature's amendment in 2002 is problematic. If the Legislature intended to amend section 73 of the Act, then the logical amendment should have been to section 73, not to section 39e, a section that concerns an entirely different subject matter. However, a review of legislative history reveals that MCL 208.39e(8) was added as part of a bill originally intended to create credits associated with the Next Energy Authority. The bill was amended to repeal the Single Business Tax after December 31, 2009, and to increase the filing threshold to $350,000. Under other circumstances, the legislature might have added the increased filing threshold to MCL section 73, in which case there would have been no reason to include the language: "Notwithstanding any other provision of this Act." The Tribunal finds that the phrase was added to place the reader on notice that another section of the Act, section 73, provides for a different general threshold with no stated ending date, but that the $350,000 applies for 2003 and thereafter. There simply is no evidence that the Legislature intended to change the more specific consolidation provisions of section 73(5).

Petitioner argues that Respondent seeks a constructive interpretation of the statute which would render the phrase "notwithstanding any other provision of this act" meaningless. The Tribunal disagrees. The purpose of that phrase is to make clear that the new filing threshold of $350,000 replaces the threshold found in MCL 208.73(1)(a) through (e); general statute effectively repealing another general statute. The threshold found in MCL 208.73(5) is a more specific threshold intended to govern an "affiliated group," a "controlled group of corporations," or an "entity under common control."

The Tribunal reads the language in section 73(5) as effectuating the Legislature's intent to provide specific guidelines for consolidating gross receipts of members of controlled groups for determining if the members of the controlled group are required to pay the tax or file a return. The logic behind this provision is obvious. The Legislature intended to prohibit taxpayers from carving up otherwise commonly controlled businesses such that the gross receipts of individual

persons are below the threshold, hence avoiding tax filing requirements. The consolidation provision of 73(5) would otherwise be unnecessary because all members of the group would, by definition, exceed the $350,000 threshold.

In this case, Petitioners' apportioned and adjusted gross receipts exceeded $100,000 for the tax years at issue. Therefore, the gross receipts of each must be added together to determine if the gross receipts of the controlled group exceeded the $350,000, in which case the members of the group are required to file and pay tax. Only those persons with gross receipts less than $100,000 would be excluded from the calculation and not required to file returns.

Reading 39e(8) as part of a harmonious act does not nullify 73(5). Prior to the enactment of Public Act 531 of 2002, section 73(1) set forth the general filing threshold. Section 73(1) also emphasized its control over those falling under the definition of a "person." Section 73(5) took away from the definition of "person" an affiliated group as defined by MCL 208.31(1), a controlled group of corporations as defined in section 1563 of the internal revenue code, and an entity under common control as defined in the internal revenue code. After the act separates these three from the term "person," the statute directs the group to consolidate the gross receipts of the members that have apportioned or allocated gross receipts, plus adjustments, of $100,000 or more to determine if the individual persons are required to file and pay tax.

In addition, "the legislature is presumed to be aware of all existing statutes when enacting a new statute." *Walen v Dep't of Corrections,* 443 Mich 240, 248; 505 NW2d 519 (1993). The clear and unambiguous language of both MCL 208.73(1) and (5) and MCL 208.39e(8) leaves the Tribunal no cause for interpretation of the language as the statutes are understood as written. MCL 208.39e(8) simply raised the filing threshold to $350,000, effectively repealing 73(1)(e), and left 73(5) to control the specific group for a specific purpose.

And finally, Petitioners place their reliance on two Tribunal Small Claims decisions and a Court of Claims case. While the Tribunal strives for consistency and does not take lightly its authority to review each case de novo, a decision is not a precedent unless so designated by the Tribunal. (MCL 205.765) Neither decision cited by Petitioners have been designated as precedential, nor does the decision by the Court of Claims have any precedential weight.

JUDGMENT

IT IS ORDERED that Petitioners' request for refunds for the tax years at issue is DENIED.

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

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

IT IS FURTHERED ORDERED that the entry of this judgment will resolve any pending Motions regarding the above-captioned matter.

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: November 18, 2010 By: Cynthia J Knoll