

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

Veolia ES Arbor Hills Landfill, Inc.,  
Petitioner,

v

Michigan Department of Treasury,  
Respondent.

MTT Docket No. 342011  
Assessment No. O669453

Tribunal Judge Presiding  
Cynthia J Knoll

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION FOR  
SUMMARY DISPOSITION

**SUMMARY**

Petitioner is appealing Final Assessment No. O669453 issued by Respondent on August 23, 2007. The Final Assessment established that Petitioner owes Single Business Tax (SBT) in the amount of \$97,921.00, plus interest. As a result of Respondent's audit of Petitioner's SBT returns for tax years 2001, 2002, 2003 and 2004, Respondent concluded that Petitioner did not qualify for the ITC on its purchase of a landfill because it does not meet the requirements set forth in MCL 208.35a and disallowed an Investment Tax Credit (ITC) carry forward claimed on Petitioner's 2001 SBT return. Respondent also adjusted the depreciation add back reported on Petitioner's 2002, 2003, and 2004 returns. Petitioner maintains that the subject property is a depreciable asset and therefore qualifies for the ITC. The Tribunal disagrees. Rather, the subject property is the landfill's airspace, which the Tribunal concludes is an intangible asset that does not meet the statutory requirements for claiming an ITC. As such, Petitioner is not entitled to the ITC carry forward and Respondent's Final Assessment is affirmed.

**BACKGROUND**

Petitioner is a Michigan corporation engaged in the business of operating a Type II sanitary landfill. Petitioner is a member of a controlled group and was purchased by its parent company, Onyx Waste Services of Milwaukee, Wisconsin in 2000. Although Petitioner is included on its parent company's consolidated federal return, Petitioner filed separate SBT returns for the tax years at issue (i.e., 2001, 2002, 2003 and 2004). Petitioner claimed, under MCL 208.35a, an ITC on its SBT return for the 2000 tax year based on its purchase price of the landfill including \$56,296,190.00 allocated to landfill airspace. In the 2001 tax year, Petitioner carried forward \$249,102, representing the unused portion of the ITC credit originally taken in the 2000 tax year. For the 2002 through 2004 tax years, Petitioner added back to its SBT tax base the amount of depreciation associated with the landfill airspace that was deducted for Federal tax purposes. Petitioner also utilized the gross receipts reduction provided by MCL 208.31(2) for tax years 2002 through 2004.

The assessment was the result of Respondent's audit discovery of the purported deficiency in tax due to Respondent's disallowance of Petitioner's ITC carry forward from its 2000 SBT return. Respondent did not audit Petitioner's 2000 SBT return within the statutory period and therefore was barred from challenging the original ITC claimed. The deficiency consists of \$114,978.00 for the year 2001, and overpayments of \$10,169.00, \$6,384.00, and \$505.00 for the years 2002, 2003, and 2004, respectively.

Following the audit examination, Petitioner requested, and Respondent granted, an informal conference with the Hearings Division, which was held on July 25, 2007, to appeal the assessment. The Hearing Referee concluded that the proposed deficiency shall be assessed as originally determined. On August 15, 2007, Respondent issued its Decision and Order of Determination accepting the recommendation of the Hearing Referee. Respondent issued a Bill for Taxes Due (Final Assessment) for Assessment No. O669453. The SBT deficiency was in the amount of \$97,921, plus interest of \$34,429.40. Statutory interest continues to accrue and penalties were not assessed.

On September 18, 2007, Petitioner filed this appeal with the Tribunal. A Prehearing Conference was held at the Tribunal on June 8, 2010, to schedule the adjudication of this case at which time the parties indicated their intentions to file cross motions for summary disposition. The Tribunal issued a Scheduling Order on June 17, 2010, setting September 13, 2010, as the date for oral arguments on the anticipated Motions for Summary Disposition.

On August 5 and 6, 2010, the parties filed cross motions for summary disposition pursuant to MCR 2.116(C)(10). The parties each filed a response to the motions on August 20, 2010. On September 13, 2010, the Tribunal was prepared to hear oral arguments to determine whether any genuine issues of material fact exist and to ask clarifying questions of the parties. Petitioner failed to retain a court reporter and failed to appear for the oral argument. Respondent was present at the scheduled time and, as such, the Tribunal went forward allowing Respondent oral argument in regard to its Motion for Summary Disposition.

On September 16, 2010, Petitioner submitted a Motion to Set Aside Oral Argument and Reconvene at a Later Date, arguing that it is inequitable for the Tribunal to have proceeded with oral argument in the absence of Petitioner's representative. On September 28, 2010, Respondent submitted its response and on October 19, 2010, the Tribunal issued an order denying Petitioner's motion.

### **PETITIONER'S CONTENTIONS**

Petitioner contends that it properly claimed an ITC under repealed MCL 208.35a on its 2000 tax year SBT return. Petitioner argues that it qualified for the credit because its landfill operations were eligible for depreciation under Federal Internal Revenue Code (IRC) section 167 and the landfill airspace was a tangible asset. As such, Petitioner carried forward \$249,102, the unused portion of the credit, to its 2001 SBT return. Petitioner further contends that, as a result of an audit examination conducted by Respondent, Petitioner's ITC carry forward was disallowed for tax year 2001 and Petitioner's depreciation add back was decreased in subsequent years to eliminate the depreciation reported on the landfill in each year of the audit period.

Petitioner asserts that the key issue for consideration is “. . . whether landfill expenses incurred in Michigan by Petitioner and reflected on its 2000 SBT tax return for which Petitioner claimed a Michigan ITC were eligible for the credit.”<sup>1</sup> Specifically, Petitioner contends that “. . . its Michigan based landfill costs incurred were for tangible items, and the landfill costs incurred were or would become eligible for depreciation, amortization, or accelerated capital cost recovery.”<sup>2</sup>

Petitioner cites IRC §167(a) which states that taxpayers are afforded a deduction for depreciation on a reasonable basis for the exhaustion, wear and tear, and obsolescence of property that is used in a trade or business or for the production of income. Although land cannot be depreciated, Petitioner argues it may claim a deduction for improvements made to the land. Petitioner cites three United States Tax Court decisions that, it argues, support the application of IRC §167 to landfill operations and allow depreciation for the space in and above the landfill. The three Tax Court cases are: (1) *Sexton v Commissioner*, 42 TC 1094 (1964), (2) *Sanders v Commissioner*, 75 TC 157 (1980), and (3) *Browning-Ferris Industries, Inc v Commissioner*, TC Memo 1987-147. Petitioner contends that the cases support its stance that “. . . the landfill assets claimed by Petitioner were eligible for depreciation for federal tax purposes during the tax years at issue.”<sup>3</sup>

Petitioner argues that the landfill airspace is a tangible asset and therefore it meets the requirements under MCL 208.35a. Petitioner states that because the term “tangible asset” is not defined within the Single Business Tax Act (SBTA), it looks to Federal Regulation §1.167(a)-2 for guidance. This Regulation states that the depreciation allowance applies to tangible property that is subject to exhaustion. Petitioner further cites Michigan’s Sales and Use Tax Act, specifically MCL 205.92(k), which states that tangible personal property is personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses. Petitioner states that the aforementioned passages show that the air contained in and around a landfill should be considered tangible.

Petitioner concludes that it has sufficiently proven that the landfill costs incurred were for tangible items and were eligible for depreciation. As such, Petitioner was entitled to the ITC that was taken on its 2000 SBT return and was carried over to its 2001 SBT return. The adjustments made to Petitioner’s 2001, 2002, 2003, and 2004, SBT returns by Respondent on audit were incorrect and Final Assessment No. O669453 that resulted from the adjustments should be cancelled in its entirety.

### **RESPONDENT’S CONTENTIONS**

Respondent contends that Petitioner is not entitled to include the cost of its asset in the calculation of the ITC set forth in the SBTA. Respondent argues that neither Petitioner’s land nor landfill airspace are eligible for the ITC. Respondent maintains that although it stipulated that Petitioner was entitled to deduct landfill costs pursuant to IRC §167, it does not agree that

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<sup>1</sup> Petitioner’s Motion for Summary Disposition, page 4.

<sup>2</sup> Petitioner’s Motion for Summary Disposition, page 5.

<sup>3</sup> Petitioner’s Motion for Summary Disposition, page 7.

Petitioner is entitled to the ITC credit. Respondent argues that airspace, although depreciable for federal tax purposes, is not a tangible asset under MCL 208.35a. Therefore, because the language used in MCL 208.35a clearly states that to qualify for the ITC the asset must be tangible, landfill airspace does not qualify.

Respondent cites Black's Law Dictionary's definition of "tangible" which states that it is something "which may be felt or touched, and is necessarily corporeal, although it may be either real or personal." Black's Law Dictionary (5th ed). Airspace does not fit within this meaning of tangible asset and therefore, Respondent argues, Petitioner improperly claimed the ITC.

Respondent also contends that land is not subject to depreciation, amortization, or accelerated capital cost recovery. As such, the subject property, if land, is not eligible for the ITC as it fails the requirements set forth in MCL 208.35a. Respondent cites Treas. Reg. §1.167(a)(2) (2009), which interprets IRC §§ 167 and 168. The regulation states that a depreciation allowance does not apply to land apart from the improvements or physical developments made and is not applicable to natural resources which are subject to depletion. Further, Respondent cites Treas. Reg. 1.168(a)-1 (2009) because it allows for depreciation of improvements to land but not the land itself.

At oral argument, Respondent spoke to the land depreciation issue and stated that Petitioner argues it did not allocate any money to land because upon completion of the landfill, the land would have no residual value. However, Respondent noted that Petitioner allocated money to land on the balance sheet filed with its Federal Tax Return. Further, Petitioner's tax returns show that \$56 million was allocated to land and a deduction for depletion was reported.

Further, as to the U.S. Tax Court cases Petitioner cited in its Motion, Respondent concedes that the Tax Court decisions make sense for federal law purposes. However, here, we are dealing with Michigan's SBTA. Respondent contends that airspace is not subject to depreciation or amortization.

As to whether airspace is tangible, Respondent argued that common sense must be used. The legislative intent and plain meaning of a tangible asset is that air is not corporeal. Respondent argued that the intent of the legislature was not to define tangible at the molecular level. Respondent stated that to consider airspace a tangible asset is beyond common reasoning or sense of what the legislature had in mind when it wrote the statute.

#### **APPLICABLE LAW**

Both Petitioner and Respondent move for summary disposition pursuant to MCR 2.116(C)(10). In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004), the Tribunal stated "[a] motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact." Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). 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)

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* 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. *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 properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992)

### **FINDINGS OF FACT**

The parties filed a joint Stipulation of Facts and the Tribunal adopts the stipulated facts as follows:

1. Veolia ES Arbor Hills Landfill, Inc. (hereinafter “Petitioner”) is a Michigan corporation, identified by Account Number F364349391. Petitioner’s headquarters and principal office are located at 10599 West 5 Mile Road, Northville, Michigan 48168.
2. The Michigan Department of Treasury (hereinafter “Respondent”) is the opposing party in this matter and is located at 430 West Allegan, Lansing, Michigan 48922.
3. Petitioner is located in Northville, Michigan and operates a Type II sanitary landfill.
4. For the periods at issue, Petitioner operated a landfill that accepted municipal solid waste, contaminated soils, wastewater treatment sludge, industrial process waste, construction demolition waste and other non-hazardous industrial and special wastes.
5. Petitioner is a member of a controlled group and was purchased by the parent, Onyx Waste Services of Milwaukee, Wisconsin in 2000 in an asset sale. Petitioner is included on the parent company’s consolidated federal return.
6. For federal tax purposes, during the applicable tax years, Petitioner deducted the landfill costs pursuant to the rule of IRC Section 167 and federal income tax cases including *Sexton v Commissioner*, 42 TC 1094 (1964), *Sanders v Commissioner*, 75 TC 157 (1980), and *Browning Ferris Industries v Commissioner*, TC Memo 1987-147 (1987). However, primarily because the landfill industry refers to these costs as

“landfill depletion,” Petitioner reported the tax deduction on Line 22 Depletion on the face of the federal Form 1120.

7. On Petitioner’s originally filed federal tax return for the 2000 tax year it did not claim an investment tax credit as the federal investment tax credit was repealed.
8. On Petitioner’s originally filed Michigan Single Business Tax return for the 2000 tax year, Petitioner claimed an Investment Tax Credit (ITC) provided for by MCL 208.35a, based on Petitioner’s belief that the eligibility of the landfill expenses qualified for depreciation under IRC Section 167.
9. The ITC is set forth in the SBTA at MCL 208.35a, and particularly applicable for this case, MCL 208.35a(1)(a), which reads as follows:

Calculate the cost, including fabrication and installation, paid or accrued in the taxable year of tangible assets of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes, provided that the assets are physically located in this state for use in a business activity in this state and are not mobile tangible assets.

10. In the 2001 tax year, Petitioner carried forward \$249,102, which represented the unused portion of the ITC credit generated in the 2000 tax year. On its 2000 SBT return, Petitioner reported \$63,776,368 of capital investments on its Michigan Form C-8000ITC, of which \$56,296,190 related to landfill expenses. Based on its investment of \$63,776,368 in 2000, Petitioner claimed a total ITC credit of \$494,968 and utilized \$245,866 of the credit on its 2000 SBT return. Petitioner carried forward \$249,102 to its 2001 SBT return.
11. In the 2001 tax year, Petitioner did not utilize either the gross receipts reduction provided by MCL 208.31(2) or the compensation reduction provided by MCL 208.31(4).
12. In the 2002 through 2004 tax years, Petitioner utilized the gross receipts reduction provided by MCL 208.31(2).
13. Pursuant to MCL 208.35a(6), the ITC is not available when a person reduces its adjusted tax base under MCL 208.31(2).
14. Respondent audited Petitioner’s Single Business Tax returns for the period January 1, 2001 through December 31, 2004. The 2000 tax year was not under examination during the audit and is not at issue in this proceeding.

15. On audit, Respondent disallowed the ITC carry forward of \$249,039 claimed on Petitioner's 2001 SBT return.
16. On August 1, 2006, Petitioner filed documents with the Michigan Department of Treasury pursuant to MCL 207.1001 *et seq.*, claiming that the ITC Credit of \$249,102 claimed is correct as filed, and the landfill depreciation is a valid addition for Michigan Single Business Tax purposes for the period extending from January 1, 2001 through December 31, 2004.
17. Petitioner requested an informal conference, which was held July 25, 2007.
18. The Michigan Department of Treasury Hearings Division issued its Decision and Order of Determination in favor of Respondent on August 15, 2007. In its Decision and Order, Respondent determined that the proposed deficiency shall be assessed as originally determined for tax in the amount of \$97,921 and interest to be computed in accordance with sections 23 and 24 of 1941 PA 122, as amended.
19. Respondent's audit adjustments resulted in issuance of its Final Assessment No. O669453 on August 23, 2007.
20. Respondent's Final Assessment No. O669453 provided the tax, tax years and amount in controversy as follows:

| Tax                 | Tax Year | Tax Assessed         |
|---------------------|----------|----------------------|
| Single Business Tax | 2001     | \$114,978 deficiency |
| Single Business Tax | 2002     | \$10,169 overpayment |
| Single Business Tax | 2003     | \$6,384 overpayment  |
| Single Business Tax | 2004     | \$505 overpayment    |
| TOTAL               |          | \$97,921 deficiency  |

No portion of Final Assessment No. O669453 has been paid by Petitioner.

21. In the 2001, 2002, 2003, and 2004 tax years, Respondent decreased Petitioner's reported depreciation add back to eliminate the amortization and depletion reported on the landfill in each year of the audit period (the landfill depreciation expense.)
  - a. 2001, decrease of \$6,831,610

- b. 2002, decrease of \$5,436,694
- c. 2003, decrease of \$3,566,696
- d. 2004, decrease of \$3,508,157.

22. On September 19, 2007, Veolia timely filed a Petition for Review with the Michigan Tax Tribunal, in accordance with the provisions of MCL 205.22, seeking an order from the Tribunal granting the ITC credit claimed and the landfill depreciation add-back for Michigan SBT, which the Department of Treasury has denied by letter dated August 15, 2007, in the amount of \$97,921 for the period from January 1, 2001 through December 31, 2004, plus interest and costs.

The Tribunal further finds that the subject property is the landfill airspace which is the volume of space on the subject landfill site which is permitted for the disposal of municipal solid waste. Moreover, the subject airspace is considered intangible property pursuant to the Black's Law Dictionary definition.

### CONCLUSIONS OF LAW

The Tribunal has carefully considered the parties' Motions for Summary Disposition under the criteria for MCR 2.116(C)(10), and based on the pleadings, affidavits and other documentary evidence filed with the Tribunal, determines that granting Respondent's Motion and denying Petitioner's Motion is appropriate. The Tribunal concludes that the pleadings, affidavits and documentary evidence prove there is no genuine issue with respect to any material fact.

The issue in this appeal is whether Petitioner is allowed to carry forward the unused portion of the ITC, claimed in the 2000 tax year, to the 2001 tax year. However, the Tribunal is first charged with determining whether Petitioner was entitled to claim the ITC in the 2000 tax year, pursuant to MCL 208.35a. This determination will then enable the Tribunal to decide whether Respondent properly issued a Final Assessment for SBT deficiency totaling \$97,921.00 and \$132,350.40 of interest.

The relevant statute is repealed MCL 208.35a, which stated that a taxpayer could claim a credit against the tax imposed by the SBTA provided the taxpayer:

[c]alculate the cost, including fabrication and installation, paid or accrued in the taxable year of **tangible assets** of a type **that are**, or under the internal revenue code **will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes**, provided that the assets are physically located in the state for use in a business activity in this state and are not mobile tangible assets. (Emphasis added)

The Tribunal finds that the landfill airspace is an asset that is eligible for depreciation for federal income tax purposes. Petitioner cites three relevant United States Tax Court decisions that support its contention that the landfill airspace is depreciable. The lead case cited is *Sexton*, *supra*. In this case, the petitioner operated refuse dumps and attempted to take deductions for

depreciation for the investment in the space contained in the excavation which was purchased for use in the dump business, based upon the quantity of space exhausted by filling each year. The Court cited Treas. Reg. 1.167(a)-3 which provides that, “[i]f an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance.” The Court ultimately determined that, pursuant to IRC 167, the landfill airspace is properly subject to transfer separately from the related land and therefore can be depreciated as wasting assets in the business of the petitioner. The Tax Court subsequently upheld the *Sexton* decision in *Sanders* and *Browning-Ferris Industries, supra*.

The Tribunal concludes that there is neither relevant Michigan-specific statutory law nor precedential case law that may guide the Tribunal in its determination of whether landfill airspace is depreciable. As such, the Tribunal finds that reliance on the three aforementioned U.S. Tax Court decisions is appropriate. The U.S. Tax Court has consistently held that landfill airspace is a depreciable asset and has even gone so far as to determine that the proper method of depreciation is the unit of production method. Moreover, the Tribunal finds that Petitioner properly depreciated the subject airspace. Further, it was not a fatal flaw that Petitioner erroneously listed the depreciation expenditure as depletion on its tax returns, as the ITC statute merely mandates the subject property be eligible for depreciation to qualify for the ITC.

The second issue the Tribunal must address is whether the subject airspace is a tangible asset. If so, Petitioner properly claimed the ITC on its 2000 tax return and is thus entitled to the ITC carry forward for the 2001 tax year, at issue in this appeal. If the subject airspace is an intangible asset, the requirements set forth in the ITC statute are not met and Petitioner’s ITC carry forward shall not be allowed.

The SBTA does not provide a definition of what constitutes a tangible asset. Pursuant to repealed MCL 208.2(2), one must examine the “. . . laws of the United States relating to federal income taxes.” Upon review of the Internal Revenue Code, the Tribunal finds that it does not specifically define what a tangible asset is. Petitioner cites Treas. Reg. §1.167(a)-2 for guidance on tangible property. This regulation states that:

The depreciation allowance in the case of tangible property applies only to that part of the property which is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence. The allowance does not apply to inventories or stock in trade, or to land apart from the improvements or physical development added to it. The allowance does not apply to natural resources which are subject to the allowance for depletion provided in section 611. No deduction for depreciation shall be allowed on automobiles or other vehicles used solely for pleasure, on a building used by the taxpayer solely as his residence, or on furniture or furnishings therein, personal effects, or clothing; but properties and costumes used exclusively in a business, such as a theatrical business, may be depreciated.

Specifically, Petitioner relies on the portion of the regulation that states that in the case of tangible property the depreciation allowance applies to that part of the property which is subject

to exhaustion. However, Petitioner's reliance on this Regulation is flawed. It does not define the term tangible property; it merely states that tangible property subject to exhaustion is depreciable. Petitioner is attempting to convince the Tribunal that the Regulation proves that landfill airspace is tangible simply because it is subject to exhaustion. The Tribunal finds this argument unpersuasive and further finds that Treas. Reg. §1.167(a)-2 is irrelevant.

The Tribunal finds that there is no authority to support Petitioner's contention that the subject airspace is a tangible asset. Although the word "tangible" is not defined, undefined statutory words and phrases are construed according to their common and approved usage, unless such a construction would be inconsistent with the Legislature's manifest intent. *ADVO-Systems, Inc v Dep't of Treasury*, 186 Mich App 419, 424; 465 NW2d 349 (1990). The Tribunal looks to *The American Heritage College Dictionary* definition of "tangible," which defines "tangible" as, "1a. discernable by the touch; palpable. b. Possible to touch. c. Possible to be treated as fact; real or concrete." *The American Heritage College Dictionary* (2002), at 1408. Further, upon examination of the legal definition of "tangible," Black's Law Dictionary defines "tangible" as "[h]aving or possessing physical form; CORPOREAL. 2. Capable of being touched and seen; perceptible to the touch; capable of being possessed or realized." (Emphasis in original) Black's Law Dictionary (8th ed).

The Tribunal finds that reliance on these dictionary definitions to ascertain the plain meaning of the term tangible asset is appropriate. As such, the Tribunal finds that landfill airspace is an intangible asset as it is not corporeal in nature. Moreover, Respondent has proven that a genuine issue of disputed fact does not exist and Petitioner has failed to rebut that presumption. Respondent properly determined that Petitioner's subject property does not meet the requirements for an ITC.

The statute of limitations has run regarding whether Petitioner's 2000 Single Business Tax Return is deficient due to an improper ITC application. As such, the Tribunal has no jurisdiction over this issue. However, the Tribunal has proper jurisdiction over whether the ITC carry forward was properly applied to Petitioner's 2001 tax return and concludes that the 2001 carry forward is invalid. Further, the Tribunal finds that any Federal depreciation deduction taken should not be added back to Petitioner's SBT base in tax years 2002 through 2004, as explained herein. Respondent's Final Assessment is affirmed.

## JUDGMENT

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

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

IT IS FURTHER ORDERED that Respondent's August 23, 2007 Final Assessment No. O669453 is AFFIRMED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes and interest as finally shown in this Order within 20 days of the entry of this Order.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes, interest, and penalties shall collect the taxes, interest, and penalties or issue a refund as required by this Order within 28 days of the entry of this Order.

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

MICHIGAN TAX TRIBUNAL

Entered: October 21, 2010

By: Cynthia J. Knoll