STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Hunters West Holdings, LLC,
Petitioner,

v

MTT Docket No. 449149
Assessment No. S421686

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING RESPONDENT'S REQUEST FOR COSTS AND ATTORNEY FEES

FINAL OPINION AND JUDGMENT

INTRODUCTION

On December 19, 2012, Respondent filed a Motion for Summary Disposition. On January 7, 2013, Petitioner filed its Brief in Opposition to Respondent's Motion for Summary Disposition.

Respondent requests Summary Disposition under MCR 2.116(C)(4) because Petitioner failed to (i) appeal the Notice of Final Assessment ("Final Assessment") within 35 days, as required by MCL 205.22(1), and is therefore precluded from directly or collaterally challenging the Final Assessment, under MCL 205.22(4) and MCL 205.22(5), based on an issue that was addressed by the Final

Assessment, and (ii) pay the uncontested tax liability before filing its appeal, as required by MCL 205.22(1). Respondent also requests that it be awarded costs and attorney fees.

Petitioner contends that (i) it did properly invoke the Tribunal's jurisdiction in this case, under MCL 205.22(1), as it filed its appeal within 35 days of the Respondent's decision to deny its 2008 Amended Michigan Business Tax ("MBT") return, along with the issuance of the "Corrected" Final Assessment, on October 24, 2012, and (ii) there is no uncontested portion of tax because Petitioner is appealing Respondent's decision to reject its amended MBT return.

Oral Argument on Respondent's Motion for Summary Disposition was heard on February 11, 2013. Wayne D. Roberts, attorney at Dykema Gossett PLLC, appeared on behalf of Petitioner, and Zachary C. Larsen, Assistant Attorney General, appeared on behalf of Respondent.

The Tribunal finds that although Petitioner did not appeal to the Tribunal within 35 days of when the original Final Assessment was issued on January 13, 2011, Petitioner did appeal to the Tribunal within 35 days from when Respondent issued a letter denying Petitioner's Amended MBT return on October 24, 2012. But, although Petitioner timely filed its appeal, Petitioner failed to pay the uncontested portion of the underlining issue, the Final Assessment, and therefore, has failed to invoke the Tribunal's jurisdiction under MCL 205.22(1). As a result,

the Tribunal grants Respondent's Motion for Summary Disposition and affirms the subject assessment, but finds no basis upon which to award costs and attorney fees to Respondent.

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner failed to invoke the Tribunal's jurisdiction in this case under MCL 205.22(1) because Petitioner failed to (i) appeal the Notice of Final Assessment ("Final Assessment") within 35 days, as required by MCL 205.22(1), and is therefore precluded from directly or collaterally challenging the Final Assessment, under MCL 205.22(4) and MCL 205.22(5), based on an issue that was addressed by the Final Assessment, and (ii) pay the uncontested tax liability before filing its appeal.

First, to provide clarification as to the issue in this case, Respondent states that (i) Petitioner filed its original 2008 MBT return, untimely, on October 30, 2009, and did not pay any of the tax represented on that return (i.e., $134,526); (ii) in processing the return, Respondent (a) denied Petitioner's deduction related to a Single Business Tax ("SBT") business loss carry-forward, which resulted in approximately $4,000 in additional taxes due beyond the amount Petitioner admitted to owing in its original return, and (b) issued a Notice of Additional Tax Due to Petitioner on December 20, 2009; (iii) the December 20, 2009 Notice also separately imposed underpaid penalty and interest for Petitioner's failure to pay the

amount that Respondent determined to be due on Petitioner's original return, which resulted in tax in the amount of $197,365 owed; (iv) Petitioner did not respond to the December 20, 2009 Notice; (v) it issued a Notice of Intent to Assess to Petitioner's corporate address on November 2, 2010; (vi) Petitioner did not respond to the Notice of Intent to Assess; (vii) it issued the Final Assessment at issue on January 13, 2011, via certified mail; (viii) Petitioner did not respond to or appeal the Final Assessment; (ix) the Final Assessment became conclusive and collectible under MCL 205.25; (x) Petitioner filed an Amended 2008 MBT return on December 28, 2011, which included a deduction for the same SBT business loss carry-forward, which Respondent previously denied, in addition to a reduction in gross receipts attributable to cancellation of indebtedness income; (xi) according to Petitioner's amended return, Petitioner admitted that it owed $19,730 in tax for the 2008 period; (xii) it denied Petitioner's amended MBT return on March 30, 2012; (xiii) Petitioner filed a second amended MBT return on September 6, 2012, which included the same deduction that was claimed in Petitioner's original MBT return, along with the same adjustment to gross receipts for cancellation of indebtedness income that was included in Petitioner's first amended MBT return; (xiv) shortly after filing its second amended MBT return, Petitioner submitted an explanation to Respondent identifying that it also excluded income from a cancellation of indebtedness that it had previously included on its original return, which Petitioner

stated was not included within the definition of gross receipts under the Michigan Business Tax Act ("MBTA");[1] (xv) it denied Petitioner's second amended return and provided an updated copy of the Final Assessment, with a current calculation of interest, "as a courtesy to remind [Petitioner] of the outstanding assessment," on October 24, 2012 (Tr, p 33); and (xvi) "if [Petitioner is] going to continue to preserve [its] ability to amend for a given period, [Petitioner has] to play by the rules" and "pay at a time when they agree that [it] owe[s] a certain amount," referencing an "unclean hands type defense" (Tr, p 8).

To support its Motion for Summary Disposition under MCR 2.116(C)(4), Respondent contends that (i) Petitioner failed to appeal to the Tribunal within 35 days of the issuance of the Final Assessment at issue in this case; (ii) Petitioner's second amended return does not alter the finality of the Final Assessment; (iii) Petitioner failed to pay the uncontested portion of tax in the amount of $19,730, as represented by Petitioner's amended returns; and (iv) the Court of Appeals has held that the pre-payment provision in MCL 205.22(1) does not violate a taxpayer's right to due process, citing *Anderson v Dep't of Treasury*, unpublished

[1] The MBTA, Act 36 of 2007, has been repealed by Act 39 of 2011 effective when conditions applied by enacting Section 1 of Act 39 of 2011 are met. Enacting section 1 of Act 39 of 2011 provides, "Enacting section 1. The Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, is repealed effective on the date that the secretary of state receives a written notice from the department of treasury that the last certificated credit or any carry forward from that certificated credit has been claimed."

opinion per curiam of the Court of Appeals, issued August 9, 2012 (Docket Nos. 303470 & 305074). (R's Motion; Tr, pp 3-14, 31-34)

PETITIONER'S CONTENTIONS

Petitioner contends that (i) it did properly invoke the Tribunal's jurisdiction in this case, under MCL 205.22(1), as it filed its appeal within 35 days of Respondent's decision to deny its amended MBT return, along with the issuance of the Corrected Final Assessment, on October 24, 2012, and (ii) there is no uncontested portion of tax because Petitioner is appealing Respondent's decision to reject its amended MBT return.

In support of its contentions that it did properly invoke the Tribunal's jurisdiction in this case, Petitioner states that (i) upon realizing it improperly included cancellation of indebtedness ("COD") income in its original 2008 MBT return, it filed an amended 2008 MBT return, eliminating amounts that were realized as COD income from the MBT gross receipts tax base; (ii) Respondent's October 24, 2012 denial of its amended 2008 MBT return, which included a Corrected Final Assessment, resulted in an increase in the amount of interest assessed against Petitioner; (iii) the October 24, 2012 correspondence included guidance as to Petitioner's appeal rights; (iv) the Corrected Final Assessment was the first notice of Final Assessment that Petitioner received with respect to MBT for the 2008 tax year, as confirmed by the Affidavit of Daniel E. Karam; (v)

Respondent's denial of Petitioner's amended 2008 MBT return treated COD income as a "gross receipt" subject to the MBT modified gross receipts tax and therefore, constituted a final decision within the meaning of MCL 205.22(1), which Petitioner contends it appealed within 35 days; (vi) it is appealing Respondent's October 24, 2102 decision to reject its amended 2008 MBT return and "there is no uncontested portion of that decision" (Tr, p 20), and (vii) "the Corrected Final Assessment does start new appeal rights under the reasoning and the analysis in *Winget*." [2] (Tr, p 29) (P's Brief in Opposition; Tr, pp 14-31, 34-35)

STATEMENT OF FACTS

Although the parties did not submit a Joint Stipulation of Facts, the Tribunal has reviewed the case file and finds the following facts:

1. Petitioner is a Delaware Limited Liability Company with its corporate address located at 265 W. Portage Trl, Ste 100, Cuyahoga Falls, OH 44223.

2. Petitioner conducted business in Michigan in 2008.

3. Respondent is a department of the State of Michigan and is statutorily charged with responsibility for the collection of taxes, including MBT.

4. Petitioner filed its original 2008 MBT return on October 30, 2009, and did not pay any of the tax represented on that return (i.e., $134,526).

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[2] *Winget v Dep't of Treasury*, 16 MTTR 76 (Docket No. 319852, April 4, 2007)

5. Respondent denied Petitioner's deduction related to a SBT business loss carry-forward on Petitioner's 2008 MBT return, which resulted in approximately $4,000 in additional taxes due beyond the amount Petitioner admitted to owing in its original return.

6. Respondent issued a Notice of Additional Tax Due to Petitioner on December 20, 2009, which separately imposed underpaid penalty and interest for Petitioner's failure to pay the amount that Respondent determined to be due on Petitioner's original return resulting in tax in the amount of $197,365 being owed.

7. Petitioner did not respond to Respondent's December 20, 2009 Notice of Additional Tax Due.

8. Respondent issued a Notice of Intent to Assess to Petitioner's corporate address on November 2, 2010.

9. Petitioner did not respond to the Notice of Intent to Assess.

10. Respondent issued Final Assessment No. S421686 to Petitioner for the 12/08 tax period, via certified mail, on January 13, 2011, in the amount of $138,512.00, penalty of $49,762.00, and statutory interest in the amount of $14,816.49 for a total assessment of $203,090.49 for Petitioner's failure to file or pay MBT.

11. Petitioner did not respond or appeal the Final Assessment.

12. Petitioner filed an Amended 2008 MBT return on December 28, 2011, which included a deduction for the same SBT business loss carry-forward that Respondent previously denied, as well as a reduction to gross receipts attributable to cancellation of indebtedness income.

13. Petitioner admitted that it owed $19,730 in tax for the 2008 period according to its amended 2008 MBT return.

14. Respondent denied Petitioner's amended MBT return on March 30, 2012.

15. Petitioner filed a second amended MBT return on September 6, 2012, which included the same deduction and adjustment to gross receipts that was claimed in Petitioner's first amended MBT return.

16. Shortly after filing its second amended MBT return, Petitioner submitted an explanation to Respondent identifying that it also excluded COD income that it had previously included in its MBT gross receipts tax base on its original MBT return.

17. Respondent denied Petitioner's second amended return.

18. Respondent issued an updated Final Assessment No. S421686 to Petitioner for the 12/08 tax period on October 24, 2012, in the amount of $138,512.00, penalty of $49,762.00, and statutory interest in the amount of $25,610.25 for a total assessment of $213,884.25 for Petitioner's failure to file or pay MBT.

19. Petitioner filed its appeal with the Tribunal on December 11, 2012.

20. Petitioner has not paid any tax with respect to MBT for the 2008 tax period.

APPLICABLE LAW

Respondent moves for summary disposition under MCR 2.116(C)(4). MCR 2.116(C)(4) states that a Motion for Summary Disposition is appropriate where "[t]he court lacks jurisdiction of the subject matter." See also *Ashley Ann Arbor, LLC v Pittsfield Twp*, ___ Mich App ___, ___ NW2d ___ (2012). When presented with a Motion for Summary Disposition under MCR 2.116(C)(4), the Tribunal must consider "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties . . . ." MCR 2.116(G)(5). In addition, under MCR 2.116(G)(6), "Affidavits, depositions, admissions, and documentary evidence offered in support of or in

opposition to a motion based on [MCR 2.116(C)(4)] shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." Further:

> A motion under MCR 2.116(C)(4), alleging that the court lacks subject matter jurisdiction, raises an issue of law. The issue of subject matter jurisdiction may be raised at any time, even for the first time on appeal. When a court lacks jurisdiction over the subject matter, any action it takes, other than to dismiss the case, is absolutely void. The trial court's determination will be reviewed de novo by the appellate court to determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether affidavits and other proofs show that there was no genuine issue of material fact. 1 Longhofer, Michigan Court Rules Practice (5th ed), §2116.12, p 398 [Footnotes omitted.]

CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion for Summary Disposition under MCR 2.116(C)(4). The Tribunal finds that Respondent's Motion for Summary Disposition under MCR 2.116(C)(4) should be granted because Respondent's Motion is supported by the facts of this case and applicable statutes and case law.

I. Timeliness of Appeal

MCL 205.22(1) provides that "[a] taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision or order to the tax tribunal within 35 days . . . ." Further, MCL 205.735a(6) similarly provides that "[i]n all other matters, the jurisdiction of

the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 35 days after the final decision, ruling, or determination."

Respondent contends that it properly notified Petitioner of the assessment at issue when it issued its original Final Assessment and further contends that because Petitioner did not appeal the original Final Assessment within 35 days, Petitioner is precluded from directly or collaterally challenging the Final Assessment under MCL 205.22(4) and MCL 205.22(5) based on an issue that was addressed by the Final Assessment.

Petitioner acknowledges that it did not file an appeal to the Tribunal within 35 days of the original Final Assessment issued on January 13, 2011, but contends that it did not receive the original notice of Final Assessment and filed its appeal within 35 days of Respondent's decision to reject its 2008 amended MBT return, along with the corrected Final Assessment, issued on October 24, 2012.

This raises two separate sub-issues: (1) Notice regarding the original Final Assessment and (2) the October 24, 2012 correspondence.

a. Original Final Assessment

As indicated above, the original Final Assessment was issued on January 13, 2011. The Final Assessment states that it was mailed to Petitioner at Petitioner's corporate address. Further, Respondent provided a copy of its certified mail log showing that the Final Assessment was mailed to Petitioner at Petitioner's

corporate address on January 6, 2011, and also provided confirmation of delivery to Petitioner at 11:24 am on January 10, 2011. As a result, the Tribunal finds that Petitioner was properly served notice of the Final Assessment by certified mail at Petitioner's last known address. See *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 410; 809 NW2d 669 (2011). Since Petitioner did not file its appeal until December 11, 2012, Petitioner did not comply with MCL 205.22(1), or MCL 205.735a(6), with regard to the original Final Assessment issued on January 13, 2011, and therefore did not invoke the Tribunal's jurisdiction over the original Final Assessment.

b. October 24, 2012 Correspondence

Although the Tribunal finds that Respondent properly served the original Final Assessment on Petitioner on January 13, 2011, and further finds that Petitioner failed to invoke the Tribunal's jurisdiction over the original Final Assessment, under MCL 205.22(1) and MCL 205.735a(6), the Tribunal must determine what effect, if any, the letter denying Petitioner's 2008 amended MBT return, along with the Corrected Final Assessment, issued on October 24, 2012, has in this case.

Respondent contends that it issued an updated copy of the Final Assessment, with a current calculation of interest, after it denied Petitioner's second amended MBT, "as a courtesy to remind [Petitioner] of the outstanding assessment," on

October 24, 2012. (Tr, p 33) Respondent further contends that Petitioner is precluded from directly or collaterally challenging the Final Assessment, under to MCL 205.22(4) and MCL 205.22(5), based on an issue that was addressed by the Final Assessment, since Petitioner failed to appeal the original Final Assessment issued on January 13, 2011, within the applicable statutory period.

Petitioner contends that the first notice of Final Assessment that it received was the Corrected Final Assessment and that it invoked the Tribunal's jurisdiction since it appealed within 35 days from the date Respondent issued a decision denying its 2008 amended MBT return, along with the notice of the Corrected Final Assessment.[3]

MCL 205.22(4) states, "The assessment, decision, or order of the department, if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack."

MCL 205.22(5) states:

> An assessment is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment, decision, or order of the department, and a person is not entitled to a refund of any tax, interest, or penalty paid pursuant to an assessment unless the

[3] The Tribunal finds it very difficult to believe that, by its count, thirteen separate notices, assessments, or correspondence were mailed to Petitioner at the same address, but Petitioner only received the October 24, 2012 correspondence. However, given no evidence to the contrary, the Tribunal accepts the Affidavit of Mr. Karam that Petitioner did not receive the original Final Assessment mailed by Respondent by certified mail and the argument of Mr. Roberts, on behalf of Petitioner, that Petitioner did not receive any other notice or correspondence from Respondent. (Tr, p 26)

> aggrieved person has appealed the assessment in the manner provided by this section.

Although the Tribunal agrees that Petitioner failed to invoke the Tribunal's jurisdiction over the original Final Assessment, that the original Final Assessment is final, and that Petitioner is precluded from any further review of the original Final Assessment, the Tribunal must determine whether the October 24, 2012 correspondence constitutes a new "assessment, decision, or order" for purposes of MCL 205.22(1) and MCL 205.735a(6), sufficient to commence a new statutory appeal period.

In *Chrysler Financial Services Americas, LLC v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2012 (Docket No. 302299), pp 2-3, the Court of Appeals provided some guidance regarding the meaning of "assessment, decision, or order" under MCL 205.22(1):

> MCL 205.22 does not define the terms "assessment," "decision," or "order." . . . Because those terms are not legal terms of art, consulting a lay dictionary is appropriate. The *Random House Webster's College Dictionary* (1997) offers several definitions of "decision," the more pertinent being: (1) "the act or process of deciding," (2) "the act of making up one's mind," and (3) "something that is decided; resolution." In accordance with these definitions, the notices constituted "decisions" of defendant within the meaning of MCL 205.22(1). [Footnotes omitted.]
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> * * *
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> Even if we were to consult Black's Law Dictionary, . . . the definition of "decision" contained therein would not require a different result.

> Black's Law Dictionary (9th ed) defines "decision," in part, as "[an] agency determination after consideration of the facts and the law [.]"
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> * * *
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> The *Random House Webster's College Dictionary* (1992) provides three definitions for the word "assessment." It may mean (1) "the act of assessing; appraisal; evaluation," (2) "an official valuation of property, used as a basis for levying a tax," or (3) "an amount assessed as payable." [Citation and footnote omitted.]
>
> The definitions of the term "assess" include "to impose a tax or other charge on[.]" *Random House Webster's College Dictionary* (1997).
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> * * *
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> Further, the definitions of the term "assessment" in Black's Law Dictionary (9th ed) include, "[i]mposition of something, such as a tax or fine, according to an established rate; the tax or fine so imposed[.]" . . . Moreover, . . . it [is] not necessary for the title to include the word "decision" or "assessment" in order for the notices to fall within the dictionary definitions of those terms.

In our case, Respondent issued a letter, which stated, "Your Amended return received based on pending legislation SB 1037 is denied," along with a Corrected Final Assessment, with a current calculation of interest under 1941 PA 122. Although Petitioner contends that "the Corrected Final Assessment does start new appeal rights under the reasoning and the analysis in *Winget*" (Tr, p 29), the Tribunal does not believe that the Corrected Final Assessment constitutes a new "assessment, decision, or order" since the Corrected Final Assessment merely provided an updated calculation of interest under 1941 PA 122.

In *Winget v Dep't of Treasury*, 16 MTTR 76 (Docket No. 319852, April 4, 2007), the Tribunal entered an Order denying respondent's motion for summary disposition under MCR 2.116(C)(4). Similar to the issue before us, petitioners in *Winget* asserted that a corrected final assessment is appealable under MCL 205.22. The Tribunal agreed and stated, "Section 22's phrase 'an assessment, decision or order' includes both a 'final assessment' and a 'corrected final assessment.' Both are subject to appeal." *Winget, supra* at 82.

While *Winget* appears to stand for the proposition that all corrected final assessments are subject to appeal, the Tribunal finds that the facts in *Winget* support a narrow interpretation of the Tribunal's decision in that case. More specifically, the penalties were modified in the corrected final assessment in *Winget*, whereas only the interest was modified in the Corrected Final Assessment in this case, as *authorized by* 1941 PA 122. As a result, the Tribunal reads *Winget* in connection with *Chrysler Financial Services Americas, LLC* and finds that a corrected final assessment that merely updates the statutory interest accrued does not amount to an "assessment, decision, or order" to begin a new statutory appeal period under MCL 205.22(1) or MCL 205.735a(6).

Although the Tribunal does not find that the Corrected Final Assessment in this case amounts to an "assessment, decision, or order," the Tribunal finds that, consistent with the analysis above, the letter that was attached to the Corrected

Final Assessment, rejecting Petitioner's 2008 amended MBT return, constitutes a "decision" for purposes of MCL 205.22(1) and MCL 205.735a(6) because the letter suggests that Respondent made a "determination after consideration of the facts and the law," albeit pending legislation at the time the letter was issued.[4] Accordingly, since Petitioner filed its appeal within 35 days of this decision, the Tribunal finds that Petitioner's appeal of Respondent's October 24, 2012 decision was timely.

II. Uncontested Amount

Respondent contends that Petitioner failed to pay the uncontested tax liability before filing its appeal, as required by MCL 205.22(1), and thus failed to invoke the Tribunal's jurisdiction. More specifically, Respondent states that according to Petitioner's amended return, Petitioner admitted that it owed $19,730 in tax for the 2008 period, and as such, Petitioner should have paid $19,730 before filing its appeal with the Tribunal. Respondent further references an "unclean hands type defense" and states "that if [Petitioner is] going to continue to preserve [its] ability to amend for a given period, [Petitioner has] to play by the rules" and "pay at a time when they agree that [it] owe[s] a certain amount." (Tr, p 8)

Petitioner contends that there is no uncontested portion of tax; therefore, it was not required to pay any tax relative to MBT for the 2008 tax period before

[4] Senate Bill 1037 (2012) became law, via 2012 PA 605, after the letter was issued to Petitioner, on January 9, 2013, and was given immediate effect.

filing its appeal with the Tribunal. More specifically, Petitioner contends that there is no uncontested portion of tax because Petitioner is appealing Respondent's decision to reject its amended MBT return.

MCL 205.22(1) states, in pertinent part, "The uncontested portion of an assessment, order, or decision *shall* be paid as a prerequisite to appeal." [Emphasis added.]

In *Toaz v Dep't of Treasury*, 280 Mich App 457; 760 NW2d 325 (2008), the Court of Appeals affirmed the Tribunal's decision to grant summary disposition in favor of the Department of Treasury for the taxpayer's failure to pay the uncontested portion of the assessment in that case. The Court of Appeals stated:

> The statutory language in this case is not ambiguous. MCL 205.22(1) clearly requires that "[t]he uncontested portion of an assessment ... shall be paid as a prerequisite to appeal." Although the words "shall," "prerequisite," and "paid" are 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. The word "prerequisite" is defined as "required beforehand" and "something prerequisite; precondition." Among the definitions of the word "pay" is "to discharge or settle (a debt, obligation, etc.), as by transferring money or goods, or by doing something" and "to discharge a debt or obligation." The word "shall" generally indicates mandatory conduct. *Toaz, supra* at 461-462 [Citations omitted.]

In *Toaz*, the petitioner had acknowledged that there was unreported income which in turn affected the petitioner's income tax liability. Based on this "admitted figure for gambling income, the respondent determined the undisputed portion of

tax that petitioner was required to pay was $1,515.36." *Toaz, supra* at 458. Because petitioner failed to pay $1,515.36 before she filed her appeal with the Tribunal, the Court of Appeals affirmed the Tribunal's decision to dismiss petitioner's appeal for lack of jurisdiction under MCL 205.22(1).

In our case, Petitioner admitted that it owed $19,730 in tax for the 2008 period according to its amended 2008 MBT return. Consequently, as was the case in *Toaz*, Petitioner was required to pay the uncontested portion of tax before it filed its appeal with the Tribunal, as required under MCL 205.22(1). Because Petitioner failed to pay $19,730 before it filed its appeal with the Tribunal on December 11, 2012, the Tribunal finds that it has been divested of jurisdiction in this case. The Tribunal further finds that, consistent with *Anderson*, *supra*, this prerequisite to appeal under MCL 205.22(1) does not violate Petitioner's due process rights.

The Tribunal further finds that although Respondent is the prevailing party, in consideration of the above, awarding costs and attorney's fees to Respondent is not appropriate. With respect to Respondent's request for costs associated with this appeal, TTR 145(1) allows the Tribunal to order costs be remunerated to a prevailing party of a decision or order. The rule itself, however, provides no guidelines or criteria by which the Tribunal is to measure whether costs should be awarded. In *Aberdeen of Brighton, LLC v Brighton*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2012 (Docket No. 301826), p

4, the respondent contended that the Tribunal "may only award costs under TTR 145 if the requesting party shows good cause or the action or defense was frivolous." The Court held that the language of TTR 145 is unambiguous and its plain language indicates that a prevailing party may request costs and does not indicate that a showing of good cause or a frivolous defense is necessary.

With regard to the awarding of attorney fees, TTR 111 states that "[i]f an applicable entire tribunal rule does not exist, the . . . Michigan Rules of Court . . . and the provisions of chapter 4 of Act No. 306 of the Public Acts of 1969, as amended, being §§24.271 to 24.287 of the Michigan Compiled Laws, shall govern." While the Michigan Court Rules and the Administrative Procedures Act provide the Tribunal with some criteria in determining whether an award of fees is appropriate, the decision to award fees is solely within the discretion of the Tribunal judge.

MCR 2.114 provides that a signature on "pleadings, motions, affidavits, and other papers" by a party:

> constitutes a certification by the signer that (1) he or she has read the document; (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

MCR 2.114(E) provides that if:

> a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees.

An award of fees is supported by MCR 2.114 if it is found that pleadings, motions, affidavits, or other papers are not grounded in fact and law or are interposed for an improper purpose.

Again, as indicated above, although Respondent is the prevailing party in this case, the record does not support a finding that Petitioner had no reasonable basis to believe that the facts underlying its legal position were true, and Petitioner's legal position was not devoid of arguable legal merit. Petitioner believed its appeal was grounded in fact and law and was not interposed for an improper purpose. Therefore,

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

IT IS FURTHER ORDERED that Respondent's Request for Costs and Attorney Fees is DENIED.

IT IS FURTHER ORDERED that Assessment No. S421686 is AFFIRMED.

This Opinion resolves any pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

By: Steven H. Lasher

Entered: March 18, 2013