STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

GRETCHEN WHITMER
GOVERNOR

ORLENE HAWKS
DIRECTOR

Edward W Sparrow Hospital Association,
Petitioner,

v

Michigan Department of Treasury,
Respondent.

MICHIGAN TAX TRIBUNAL

MOAHR Docket No. 19-000640

Presiding Judge
Steven M. Bieda

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment (POJ) on June 25, 2020. The POJ states, in pertinent part, "[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal in writing, by mail or by electronic filing, if available, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions)."

On July 15, 2020, both parties filed exceptions to the POJ. In its exceptions, Petitioner states that, although it agrees with the POJ's conclusion that Petitioner's Motion for summary disposition should be granted, the Tribunal should also have granted Petitioner summary disposition under MCR 2.116(C)(7) because collateral estoppel applies to this case. The legal rules *Edward W Sparrow Hosp Ass'n v Dep't of Treasury*[1] also apply to this case. The Tribunal also should have granted Petitioner summary disposition under MCR 2.116(C)(9) because Respondent's defenses are untenable as a matter of law and no factual development could deny Petitioner's claim. Respondent's arguments only argue that *Edward W Sparrow* was wrongly decided, and reuse arguments settled in the prior case.

In its exceptions, Respondent states that, under the Michigan Business Tax Act's (MBTA) plain language, Petitioner is not entitled to claim the credits and deductions at issue. The plain language of the investment tax credit and depreciable asset deduction is limited to assets of a type, under the internal revenue code, that are will become eligible for depreciation. The interpretation of the POJ does not read the MBTA as a whole. The MBTA specified that the assets must either be presently depreciable or will become depreciable. This prohibits a claim for property that theoretically will become depreciable. The POJ fails to give meaning to the words "are" and "will become." If there is ambiguity, the exemption must be strictly construed in favor of the taxing

[1] *Edward W Sparrow Hosp Ass'n v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued February 15, 2011 (Docket No. 294833).

authority under *Tomra of North America, Inc v Dep't of Treasury*.[2] The POJ rewrites the MBTA to provide a credit when the assets are "similar in quality" to those assets eligible for depreciation under the Internal Revenue Code. Petitioner's assets do not qualify under the Internal Revenue Code. A tax-exempt entity is taxed only on its for-profit income, and it follows that deductions and credits must relate to the income derived from the for-profit portion of the entity. The POJ fails to provide any analysis with respect to the compensation credit and materials-and-supplies deduction, and these deductions are limited to Petitioner's for-profit taxable business entity. Limiting compensation to for-profit business activity is supported by the MBTA's cap on the combined compensation credit and investment tax credit, which is a percentage of tax liability. Petitioner may only claim materials and supplies for ordinary and necessary business expenses connected to its for-profit business activity. Respondent does not dispute the determination that summary disposition was not appropriate under MCR 2.116(C)(9) and (C)(7).

On July 29, 2020, both parties filed a response to the exceptions. In its response, Petitioner states that *Tomra* is inapplicable because, as Respondent states, no ambiguity exists. Even if it were applicable, the Supreme Court stated that the canon of construction discussed within cannot overcome the plain text of the statute and is a canon of last resort. This canon is not necessary because the POJ correctly determines the plain meaning of the statutes. Because the statute clearly states that assets *of a type* that are or will become eligible for depreciation are eligible, the assets need not actually be depreciable under the Internal Revenue Code. The POJ correctly determined that Respondent's interpretation effectively reads out "of a type" from the statute. With respect to the compensation credit and materials and supplies deduction, the plain language of the MBT does not provide that Petitioner must allocate these to its taxable activities.

In its response, Respondent states that Petitioner fails to satisfy the elements of collateral estoppel. There was no question of fact essential to the judgment decided in the prior case, and the parties could not have litigated issues arising under the MBT in the prior case, which involved the Single Business Tax (SBT) for different tax years. The Restatement of Judgments states that re-litigation is not precluded when it is an issue of law, the claims are substantially unrelated, or a new determination is warranted to account for a change in legal context. The application of collateral estoppel is limited when different tax years are involved. There are many differences between the SBT and the MBT. The SBT was a value-added tax, and the MBT is a tax on gross receipts. Petitioner did not plead res judicata or collateral estoppel in the Petition, and Respondent cannot be expected to answer claims not raised.

The Tribunal has considered the exceptions, response, and the case file and finds that the Administrative Law Judge (ALJ) properly considered the evidence submitted in the rendering of the POJ. More specifically, the ALJ properly concluded that the doctrine of

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[2] *Tomra of North America, Inc v Dep't of Treasury*, ___ Mich ___; ___ NW2d ___ (2020) (Docket Nos. 158333 and 158335).

collateral estoppel does not apply to this case and that, as a result, summary disposition under MCR 2.116(C)(7) was not proper. "Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding."[3] In addition, "courts are reluctant to apply preclusion doctrines when questions of law are involved and the causes of action do not arise from the same subject matter or transaction."[4] In tax cases, collateral estoppel "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged."[5] A principle of statutory interpretation is that a provision must be read in the context of the "entire act."[6] The Tribunal concludes that the ALJ properly denied summary disposition because the statutes at issue in *Edward W Sparrow* and here are placed within different acts. Although much of the language is identical, the context in which they must be read is different because the way the MBT taxes entities, based on gross receipts, is different from the way that the SBT taxed entities, based on value-added. Accordingly, the issue in this case, a matter of law, was not actually litigated in *Edward W Sparrow*. For the same reasons, the ALJ properly denied Petitioner's motion under MCR 2.116(C)(9).

With respect to Respondent's exceptions, the Tribunal finds that Respondent's interpretation selectively reads the words "are" and "will become" without giving meaning to the phrase "of a type." On this issue, the Tribunal finds persuasive the analysis of the Court of Appeals in *Edward W Sparrow*, because the language is identical. Respondent's citation to *Tomra* is unpersuasive, as the Supreme Court's discussion of applicable canons of construction explained that strict construction is a canon of "last resort."[7] It further stated that "courts should employ it only when an act's language, after analysis and subjection to the ordinary rules of interpretation, presents ambiguity."[8] Here, it is unnecessary to resort to such a canon because, as explained by the Court of Appeals, Respondent's construction does not give the entire statute meaning. In other words, that "ordinary rules of interpretation" are sufficient to determine the meaning of the relevant statutes. With respect to the compensation credit and materials-and-supplies deduction, the basis for Respondent's denial was that Petitioner could not claim these credits and deductions for items related to its non-profit business activity. Neither MCL 208.1113(6)(c) (materials) nor MCL 208.1403(2) (compensation) provide that these deductions and credits apply only to materials and compensation related to for-profit activity. Similarly, although Treasury argues that not limiting these deductions and credits to for-profit activity artificially lowers the combined cap for the investment tax and compensation credit,[9] MCL 208.1403(1) also does not

[3] *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006).
[4] *In re Application of Indiana Mich Power Co to Increase Rates*, 329 Mich App 397, 408; 942 NW2d 639 (2019).
[5] *CIR v Sunnen*, 333 US 591, 599-600 (1948).
[6] *Yachcik v Yachcik*, 319 Mich App 24, 32; 900 NW2d 113 (2017).
[7] *Tomra*, slip op at 8.
[8] *Id.* (quotation marks and citation omitted).
[9] See MCL 208.1403(1).

reference a distinction between for-profit and non-profit activity and "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself."[10]

Given the above, both parties have failed to show good cause to justify the modifying of the POJ or the granting of a rehearing.[11] As such, the Tribunal adopts the POJ as the Tribunal's final decision in this case.[12] The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the POJ in this Final Opinion and Judgment.

As a result:

a. The taxes, interest, and penalties, as levied by Respondent, are as follows:

Assessment Number: UN98822

Taxes	Interest	Penalties
$220,588.00	$66,845.53	$35,322.00

b. The final taxes, interest, and penalties are as follows:

Assessment Number: UN98822

Taxes[13]	Penalties
$13.00	$0.00

IT IS SO ORDERED.

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

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Order within 28 days of entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves the last pending claim and closes this case.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

[10] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).
[11] See MCL 205.762.
[12] See MCL 205.726.
[13] Interest to be computed in accordance with 1941 PA 122.

A motion for reconsideration must be filed with the Tribunal with the required filing fee within 21 days from the date of entry of the final decision.[14] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[15] You are required to serve a copy of the motion on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[16] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[17]

A claim of appeal must be filed with the Michigan Court of Appeals with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[18] You are required to file a copy of the claim of appeal with filing fee with the Tribunal in order to certify the record on appeal.[19] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[20]

By ______________________________

Entered: August 24, 2020
wmm

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[14] See TTR 261 and 257.
[15] See TTR 217 and 267.
[16] See TTR 261 and 225.
[17] See TTR 261 and 257.
[18] See MCL 205.753 and MCR 7.204.
[19] See TTR 213.
[20] See TTR 217 and 267.

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MICHIGAN TAX TRIBUNAL

MOAHR Docket No. 19-000640

Presiding Judge
Peter M. Kopke

PROPOSED ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

PROPOSED ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

As a result of a telephonic status conference, the Tribunal entered an Order on July 16, 2019 establishing dates for the filing of Cross-Motions for Summary Disposition and Responses to those Motions. In compliance with that Order, the parties filed Cross-Motions on December 13, 2019 and Responses on January 13, 2020.

The Tribunal has reviewed the Motions, the Responses, and the case file and finds that there are no genuine issues of material fact and that the granting of Petitioner's Motion for Summary Disposition under MCR 2.116(C)(10) is warranted.

PETITIONER'S MOTION

In its Motion, Petitioner contends that it is entitled to summary disposition in its favor under MCR 2.116(C)(7), MCR 2.116(C)(9), and MCR 2.116(C)(10), as well as the principles of *res judicata* and *collateral estoppel*. Petitioner also contends that this case only differs from a prior case between the parties, *Edward W Sparrow Hosp Ass'n v Michigan Dep't of Treasury* ("the prior case"),[1] in one key respect: the applicable act at

[1] See the unpublished opinion *per curiam* issued by the Court of Appeals in *Edward W Sparrow Hosp Ass'n v Michigan Dep't of Treasury* issued on February 15, 2011 (Docket No. 294833).

issue is now the Michigan Business Tax Act ("MBT") and not the Single Business Tax ("SBT"). Petitioner further contends that (i) it is entitled to an investment tax credit, a depreciable asset deduction, a materials and supplies deduction, and a compensation credit because those four items are administered in the same manner under the MBT as they were under the SBT, (ii) this case is a mere re-litigation of the prior case, (iii) the compensation credit and materials and supply deduction were admittedly denied by Treasury for the same reasons as the investment tax credit and depreciable asset deduction, (iv) the Tribunal's reasoning in the prior case should apply equally to the credits and deductions in this case, (v) both *res judicata* and *collateral estoppel* are bases for judgment in its favor, (vi) Respondent failed to state a valid defense by merely arguing that the prior case was incorrectly decided, and (vii) it accepts Respondent's $1,598 reduction of its depreciable assets for tax year 2010, resulting in $13.00 tax plus applicable interest even though no genuine issue of material fact exists.

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION

In its response to Petitioner's Motion, Respondent contends that *res judicata* and *collateral estoppel* are inapplicable because this case and the prior case involve a different tax act. Respondent also contends that the cases involve different tax years and that each tax year is a separate cause of action, which violates the third element of *res judicata*. Respondent further contends that (i) no central question of fact was resolved in the prior case, (ii) the MBT tax benefits were not litigated in the prior case, (iii) the credits and deductions were properly disallowed as stated in its Answer and that it has stated a valid defense to Petitioner's claims, (iv) no material facts are in dispute, and (v) it, rather than Petitioner, is entitled to summary disposition.

RESPONDENT'S MOTION

In its Motion, Respondent contends that summary disposition in its favor is appropriate under MCR 2.116(C)(10). Respondent also contends that (i) Petitioner, a non-profit entity with taxable business income, is limited to expenses deriving from for-profit activities in receiving the credits and deductions and (ii) allowing the credits and deductions would allow Petitioner to use its non-profit, non-taxable activities to subsidize its for-profit tax base. Respondent further contends that (i) Petitioner does not

qualify for the SBT tax benefits because the claimed assets themselves do not qualify for the deduction, (ii) Respondent's tax base for purposes of claiming the SBT tax benefits is limited to the tax base connected to its unrelated business activity, (iii) it contends that the assets must be eligible for depreciation under federal law in order to claim the benefits, (iv) the prior case wrongly decided the issues with respect to the SBT tax benefits, and (v) the MBT tax benefits were also correctly denied.

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION

In its response to Respondent's Motion, Petitioner contends that Respondent's Motion misrepresents the correct interpretation of the controlling statute by ignoring key language replied upon in the prior case. Petitioner also contends that (i) Respondent mischaracterizes the legal standard set forth in *Total Armored Car v Treasury*,[2] (ii) the prior case is, despite Respondent's assertions, persuasive and controlling, and (iii) *collateral estoppel* also bars re-litigation of that action.

STANDARD OF REVIEW

As for the Tribunal's review of the instant Motions, there are no specific Tribunal rules governing motions for summary disposition. Thus, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[3]

With respect to the instant Motions, Petitioner moves for summary disposition under MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10), and Respondent moves for summary disposition under MCR 2.116(C)(10).

A. *Motions for Summary Disposition under MCR 2.116(C)(7).*

Summary disposition under MCR 2.116(C)(7) is appropriate when claims are barred because of "release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of action." The standard for reviewing such motions was addressed by the Court of Appeals in *RDM Holdings, LTD v Continental Plastics*

[2] See *Total Armored Car Service Inc v Dep't of Treasury*, 325 Mich App 403; 926 NW2d 276 (2018).
[3] See TTR 215.

Co, which was a case involving the barring of a claim under the doctrine of *res judicata*.[4] In that case, the Court of Appeals stated:

> . . . this Court must consider **not only** the pleadings, **but also** any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. *Horace v City of Pontiac,* 456 Mich 744, 749; 575 NW2d 762 (1998). The contents of the complaint **must be accepted as true unless contradicted** by the documentary evidence. *Patterson v Kleiman,* 447 Mich 429, 432; 526 NW2d 879 (1994). This Court must consider the documentary evidence **in a light most favorable to the nonmoving party**. *Herman v Detroit,* 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is **no** factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. *Huron Tool & Engineering Co v Precision Consulting Services, Inc,* 209 Mich App 365, 377; 532 NW2d 541 (1995). If a factual dispute exists, however, summary disposition is **not** appropriate. *Id.*
>
> [Emphasis added.]

B. *Motions for Summary Disposition under MCR 2.116(C)(9)*.

Summary disposition under MCR 2.116(C)(9) is appropriate when "[t]he opposing party has failed to state a valid defense to the claim asserted." As indicated in Petitioner's Motion, the Court of Appeals addressed the consideration of such motions in *Nicita v City of Detroit*, which provides, in pertinent part:[5]

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[4] See *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). As for Petitioner, Petitioner cites Beyer v Verizon North Inc, 270 Mich App 424, 435; 715 NW2d 328 (2006) in support of the granting of its Motion under MCR 2.116(C)(7) based on the doctrine of res judicata. That case does not address the standards for reviewing such motions. Nevertheless, Petitioner also cites *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 440; 505 NW2d 275 (1993) for the proposition that "[t]he standard of review under MCR 2.116(C)(7) requires use to accept all plaintiff's well-pleaded allegations as true and to construe them most favorably to the plaintiff," which is **inconsistent** with the holding in *RDM Holdings*. Said inconsistency is, however, explained by the fact that the defendant in that case filed the motion and not the plaintiff. Nevertheless, the holding *Marrero* was modified by Michigan Supreme Court and said modification was **not** disclosed by Petitioner. In that regard, see *Patterson v Kleiman*, 447 Mich 429,433-434; 526 NW2d 879 (1994), which provides, in pertinent part:

> MCR 2.116(G)(5) provides that the court must consider the affidavits and other supplementary papers filed by the parties. *Neibarger v. Universal Cooperatives, Inc.,* 439 Mich. 512, 532, fn. 29, 486 N.W.2d 612 (1992). Thus, all these materials were properly considered by the courts below.

[5] See *Nicita v City of Detroit*, 216 Mich App 746, 750; 550 NW2d 269 (1996).

> A motion brought under MCR 2.116(C)(9) seeks a determination whether the opposing party has failed to state a valid defense to the claim asserted against it. **Only the pleadings may be considered** when the motion is brought under MCR 2.116(C)(9). MCR 2.116(G)(5). **The well-pleaded allegations are accepted as true**, and **the test is whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery**. *Lepp v Cheboygan Area Schools,* 190 Mich App 726, 730, 476 NW2d 506 (1991).
>
> [Emphasis added.]

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

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.[6] Further, it has also been held that (i) 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,[7] (ii) the moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider,[8] (iii) the burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists,[9] (iv) where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving 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,[10] and (v) if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[11]

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[6] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).
[7] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[8] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[9] *Id.*
[10] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[11] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

CONCLUSIONS OF LAW

The Tribunal has carefully considered Petitioner's Motion under MCR 2.116(C)(7) and 2.116(C)(9) and finds that neither support the granting of the Motion. More specifically, the Tribunal finds that neither the doctrine of *res judicata* nor the doctrine of *collateral estoppel* applies in this case despite the many obvious similarities between this case and the prior case. In that regard, the Michigan Supreme Court has stated:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first . . . . it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.[12]

Although the prior case "was decided on the merits" and the cases "involve the same parties or their privies," the issue presented in the instant case "could [not] have been [] resolved in the first," as the issues arose under different tax acts. Further, Petitioner's November 8, 2005 Petition and the Tribunal's October 7, 2009 decision were filed and issued, respectively, in the prior case well before the tax years at issue in this case. As a result, different tax years are also involved. Unfortunately, Petitioner's brief fails to address these fatal flaws in support of its *res judicata* claim. Petitioner instead describes the change in taxing acts as "irrelevant."[13] However, the Tribunal finds that this argument supports Petitioner's claim under *collateral estoppel*, not *res judicata*. As the issue in this case could not have been "resolved" in the prior case due to the change in taxing acts and different tax years and, as such, res judicata is not at issue in this case.

For collateral estoppel to apply:[14]

> . . . three elements must be satisfied: (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment;" (2) "the same parties must have had a full [and fair] opportunity to litigate the issue;" and (3) "there must be mutuality of

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[12] See *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007).
[13] See Petitioner's Motion at p 14.
[14] See *Monat v State Farm Ins Co*, 469 Mich 679, 683-685; 677 NW2d 843 (2004).

> estoppel." *Storey v Meijer, Inc, 431 Mich 368, 373* . . . (1988). "[M]utuality of estoppel requires that in order for a party to estop an adversary form relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, '[t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.'" *Lichon v American Universal Ins Co,* 435 Mich 408 . . . (1990).

In considering the applicability of collateral estoppel in tax cases, the United States Supreme Court has held that:

> where two cases involve . . . taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and **applicable legal rules remain unchanged**.[15]
>
> [Emphasis added.]

Petitioner contends that the controlling statutory scheme and language in the MBT is identical to the SBT "for all relevant purposes."[16] However, this contention cannot square with the fact that different tax acts are under consideration. The SBT and MBT are identical in certain portions, including many of those relating to credits and deductions, as addressed in Petitioner's Motion.[17] However, as Respondent's response points out, there are notable differences in the acts. Notably, the SBT is a modified value-added tax, whereas the MBT taxes modified gross receipts.[18] The Tribunal finds that applicable legal rules changed substantially enough between these acts to negate Petitioner's collateral estoppel argument. Therefore, summary disposition under MCR 2.116(C)(7) is not appropriate.

Petitioner's Motion under MCR 2.116(C)(9), like its Motion under subsection (C)(7), primarily focuses upon Respondent's arguments that the prior case was wrongly

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[15] See *CIR v Sunnen*, 333 US 591, 599-600 (1948). This case was superseded by statute on other grounds, but the Court's determination upon collateral estoppel requiring unchanged legal rules remains applicable.
[16] See Petitioner's Motion at 12.
[17] *Id.*
[18] See Respondent's Response at 10.

decided. While this argument does appear in Respondent's Answer, the Tribunal finds that the Answer addresses the pertinent portions of the Petition by disputing Petitioner's statutory interpretations and other arguments. Specifically, Respondent argues in its Answer that Petitioner is not entitled to claim the credits and deductions in dispute when the underlying compensation for that basis is tax-exempt business activity.[19] Because the issues presented in this case were specifically addressed and refuted by Respondent in its Answer and other filings, the Tribunal finds that Respondent's Motion under MCR 2.116(C)(9) must also be denied.

Finally, each party claims that there is no genuine issue of material fact to be determined in this case; however, each party claims that the undisputed facts entitle it to summary judgment under law.

Petitioner contends it is entitled to denied credits and deductions, specifically: (1) the investment tax credit, (2) depreciable assets deduction; (3) materials and supplies deduction; and (4) compensation credit.

The MBT allows for deduction against ". . . . 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 . . . ."[20] 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. Respondent argues that this language is identical to a subsection of the SBT, which also states that ". . . 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."[21] The SBT statute went on to state that, for tax years beginning after December 31, 1999, there was also a credit for those type of assets if the assets were "physically located in this state for use in a business activity in this state and are not mobile tangible assets."[22]

[19] See Respondent's Answer at paragraph 25.
[20] See MCL 208.1403(3)(a).
[21] See MCL 208.23(c).
[22] See MCL 208.35a(1)(a).

The MBT also allows for a deduction for "assets, including the costs of fabrication and installation, acquired during the tax year 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. . . ."[23] Additionally, the MBT allows for a deduction for "purchases from other firms," including "to the extent not included in inventory or depreciable property, materials and supplies. . . ."[24] The MBT finally allows credits for a taxpayer's "compensation,"[25] which was claimed against capital acquisitions including both Petitioner's non-profit and unrelated business activity assets.

The Tribunal agrees with Respondent's narrow contention that much of this language, including the cited 43-word portion of the investment tax credit and the supplement language regarding business activity, is identical to similar language in the SBT. To one extent, the identical nature of these passages is entirely irrelevant. As previously discussed, this issue is not subject to *res judicata* or *collateral estoppel*, and the different tax bases of the two statutes make the taxes incomparable in many ways. Those realities do not change the facts that the intent of these phrases within each of the respective taxing acts is to describe the types of assets eligible for a credit or deduction under the respective statutes and, further, that the functions of tax redactors such as credits and deductions remain unchanged between the taxing acts.

Therefore, it is appropriate for the Tribunal, in the context of considering the best interpretation of this precise statutory phrasing, to look to the Michigan Court of Appeals, which held in the prior case:

> . . . MCL 208.23(c) and MCL 208.35a(1)(a) only reference federal tax law in order to determine the type of assets that are subject to the CAD or the ITC. MCL 208.23(c) directs the taxpayer to "deduct the cost . . . 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." (emphasis added). MCL 208.35a(1)(a) contains the same language. Respondent's interpretation of the statutes – that the statutes permit a CAD or an ITC only to the extent allowed by federal tax law –

[23] See MCL 208.1113(6)(b).
[24] See MCL 208.1113(6)(c).
[25] See MCL 208.1403(2).

> reads out of the statutes the phrase “of a type.” Indeed, respondent provides no explanation how its interpretation of the two statutes gives any effect to the phrase “of a type.” Because a statute must be construed to give effect to every clause . . . respondent’s interpretation of the statutes is contrary to the statutes’ plain language.
>
> . . . MCL 208.35a(1)(a) contains a requirement that is not included in MCL 208.23(c). Assets, to be eligible for the ITC, must not only be “of a type” that are “eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes,” the assets must be “physically located in this state for use in a business activity in this state” and not be “mobile tangible assets.” We find no merit to respondent’s argument that because “non-profit activities are not engaged in ‘with the object of gain, benefit, or advantage,’ . . . the Tax Tribunal erred in concluding that the phrase “business activity” . . . does not require allocation of assets between tax-exempt and nonexempt activities. The Legislature, in addition to defining “business activity,” . . . also provided a definition for “unrelated business activity” . . . . “Unrelated business activity” was defined as “any business activity that gives rise to unrelated taxable income as defined in the internal revenue code.” . . . We agree with the petitioner that if the Legislature had intended to require a tax-exempt entity to calculate the ITC solely on its nonexempt activities, it would have used the phrase “unrelated business activity,” rather than “business activity.” . . . [26]

Given that the language under interpretation in that case is from a different taxing act, the Tribunal must determine whether the comparison is apt. Like MCL 208.35a(1)(a) before it, MCL 208.1403(3)(a) contemplates use “in a business activity.” Under the SBT, “business activity” was:

> a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an employee to his employer, services as a director of a corporation, or a casual transaction. Although an activity of a taxpayer may be incidental to another or other of his business activities, each activity shall be considered to be business engaged in within the meaning of this act.[27]

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[26] See *Sparrow*, supra at 5.
[27] See MCL 208.3(2).

Turning to the MBT, the definition of "business activity" only differs from the SBT in two minor ways.[28] First, the twice-used word "his" is replaced by the phrase "his or her," which the Tribunal finds to cause no change to the definition for purposes of this analysis. Second, the phrase "or a casual transaction" is removed. Again, the Tribunal finds that this distinction has no effect upon the transaction at hand and, for purposes of the facts in this case, "business activity" is identical under the SBT and MBT.

The Tribunal next looks at "unrelated business activity," which was defined under the SBT to be "any business activity that gives rise to unrelated taxable income as defined in the internal revenue code."[29] This definition does differ somewhat from the MBT, which defines it as, "for a tax-exempt person, business activity directly connected with an unrelated trade or business" under the Internal Revenue Code.[30] Here, the parties agree that Petitioner is a tax-exempt entity and that the assets in dispute are directly connected with a for-profit business unrelated to Petitioner's nonprofit mission. Despite the differences in phrasing, the Tribunal finds that the meanings of unrelated business activities under the acts are identical in all key aspects for analyzing the facts present in this case.

The Tribunal now returns to the relevant credit language in dispute. Based upon the foregoing analysis of the relevant statutory language, including the various controlling statutory provisions, the Tribunal is persuaded by the Court of Appeals' analysis, as well as its own review, that Respondent's interpretation of MCL 208.1403(3)(a) reads out a key provision in the statute and is therefore not supported by the plain language of the statute. Although unpublished, the Court of Appeals analysis is highly persuasive in this instance, and the Tribunal finds no error in relying upon it.

Respondent's Motion, overall, fails to persuade the Tribunal that the prior statutory analysis of the identical phrasing must be abandoned. Importantly, Respondent fails to identify any changes or supplements in the MBT, not in place in the SBT, related to the phrase "business activity." As identified by the Court of Appeals, the

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[28] See MCL 208.1105(1).
[29] See MCL 208.10(2).
[30] See MCL 208.1117(8).

Legislature also chose not to differentiate the "business activity" in MCL 208.1403(3)(a) from the term "unrelated business activity" or to make any special provisions for tangible assets used in an unrelated business. Respondent's Motion also focuses upon the parsing of the phrase "of a type," and while the Tribunal found that its analysis of that phrase in MTT Docket No. 320442 was curt, it is not convinced with Respondent's present analysis that there is any certainty that the prior case was wrongly decided. Even to the extent that Respondent's Motion correctly identifies any ambiguity in the prior reading, that ambiguity must yet be resolved in favor of the taxpayer.[31]

Respondent's interpretation of the statute, over-emphasizing the meaning of the phrase "for federal income tax purposes," as previously discussed, reads out a key phrase of the statute – "of a type," as Petitioner contends. The portion of Respondent's Motion addressing the underlying basis for its interpretation is based almost entirely upon the Internal Revenue Code and the Code of Federal Regulations, even though the federal tax status of the property at issue has never been in dispute. However, it does make two arguments which the Tribunal must address.

First, Respondent contends that, if assets never had to become eligible for depreciation to qualify under this subsection, the Legislature would have excluded the words "are" and "will become." Despite the lengthy battle between the parties regarding this language, Respondent again fails to address how the phrase "of a type" is properly addressed by this reading. Assuming that Respondent correctly contends that use of the terms "are" and "will become" create a sub-section of potentially depreciable property not eligible for the credits and deductions at issue, Respondent's analysis under this line of reasoning fails to persuasively articulate how the phrase "of a type" is not rendered useless by its interpretation. Further and to the extent that both parties may have identified a nugatory interpretation through the other's analysis of the statute, such ambiguities must be decided in favor of the taxpayer.[32]

Second, Respondent contends that its interpretation gives effect to the phrase "of a type" in its identification of depreciable property under the federal tax code. This point

[31] See *Michigan Bell Telephone Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994).
[32] *Ashley Capital LLC v Dep't of Treasury*, 314 Mich App 1, 7; 884 NW2d 848 (2015).

does address the underlying concerns of the Court of Appeals and the Tribunal in the prior case. Despite those concerns, the Tribunal disagrees. Simply removing the phrase "of a type" from the statutory subsections would result in language stating that the assets would be limited to those assets "that are, or under the internal revenue code will become, eligible for depreciable cost recovery for federal income tax purposes." Although taxpayers acting in due prudence can recognize such language plainly refers to 26 USC 167 and similar federal provisions, Respondent's reading of the phrase "of a type" in this interpretation clearly renders it superfluous. As a result, its Motion under MCR 2.116(C)(10) must be denied.

Instead, the Tribunal finds that the plain meaning of the statute supports Petitioner's interpretation. The phrase "of a type" signifies that the assets do not necessarily need to be eligible for depreciation, amortization, or accelerated capital cost recovery for federal tax purposes. Instead, the assets must be similar in qualities or uses to those assets which are. Further, the subsections also indicate that the assets must be used "for a business purpose." The definition of "business activity" under the Act is sufficiently broad as to convince the Tribunal that Petitioner's non-profit activities come under that definition.[33] Having discussed the reasons why Respondent's interpretation of the phrase "of a type" fails, the Tribunal finds that the analysis supports Petitioner's interpretation of the statute. As a result, granting Petitioner's Motion under MCR 2.116(C)(10) is appropriate.

PROPOSED JUDGMENT

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

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

IT IS FURTHER ORDERED that Assessment UN98822 shall be CANCELLED for 2008, 2009, and 2011 and REVISED for 2010 consistent with Petitioner's "acceptance" of Respondent's $1,598 reduction of its depreciable assets for 2010, resulting in an assessment for 2010 of $13.00 tax plus applicable interest.

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[33] See MCL 208.1105(1).

EXCEPTIONS

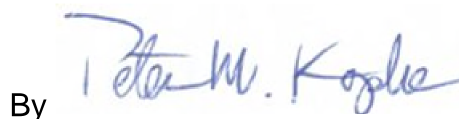
This is a **proposed** decision ("POJ") prepared by the Michigan Administrative Hearings System and **not** a final decision.[34] [Emphasis added.] As such, **no** action should be taken based on this decision, as the parties have 20 days from date of entry of this POJ to **notify** the Tribunal **in writing if they do not agree with the POJ and** to **state in writing** why they do not agree with the POJ (i.e., exceptions). [Emphasis added.]

Exceptions are **limited** to the evidence submitted and any matter addressed in the POJ. [Emphasis added.] There is no fee for filing exceptions and the opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions.[35]

Exceptions and responses filed by **e-mail or facsimile** will **not** be considered in the rendering of the Final Opinion and Judgment. [Emphasis added.] A copy of a party's written exceptions or response **must** be sent to the opposing party **by mail or email, if** email service is agreed upon by the parties**,** and proof must be submitted to the Tribunal demonstrating that the exceptions or response were served on the opposing party. [Emphasis added.]

After the expiration of the time period for the opposing party to file a response to the exceptions, the Tribunal will review the case file, including the POJ and all exceptions and responses, if any, and:

1. Issue a Final Opinion and Judgment (FOJ) adopting the POJ as the final decision.
2. Issue an FOJ modifying the POJ and adopting the Modified POJ as the final decision.
3. Issue an Order vacating the POJ and ordering such other action as is necessary and appropriate.



Entered: June 25, 2020 By ______________________
PMK/bw

[34] See MCL 205.726.
[35] See MCL 205.762(2) and TTR 289(1) and (2).