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

South Lyon Apartment, LLC,
Petitioner,

v

MTT Docket No. 414553
Assessment No. S388055

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING PETITIONER'S REQUEST FOR COSTS AND ATTORNEY FEES

FINAL OPINION AND JUDGMENT

INTRODUCTION

On October 4, 2012, Petitioner filed a Motion for Summary Disposition. On October 18, 2012, Respondent filed its Brief in Opposition to Petitioner's Motion for Summary Disposition.

Petitioner requests Summary Disposition under MCR 2.116(C)(10) because there is no genuine issue of material fact and because Petitioner's sale of its 50% ownership interest in Depsly Apartment Co., a Michigan Limited Partnership ("Depsly") is not subject to Single Business Tax ("SBT"). Petitioner also requests that it be awarded costs and attorney fees.

Respondent contends that Petitioner's sale of its ownership interest in Depsly constitutes business activity under the SBT, and as a result, Respondent requests that the Tribunal find that Respondent is entitled to summary disposition pursuant to MCR 2.116(I)(2).

Oral Argument on Petitioner's Motion for Summary Disposition was heard on November 1, 2012. Pursuant to the Tribunal's Order dated October 24, 2012, prior to oral argument, the Tribunal and the parties conducted an in camera review of evidence Respondent contended was relevant to this case but was subject to protection under MCL 205.28(1)(f). During the in camera review, Respondent indicated that the evidence subject to protection under MCL 205.28(1)(f) related to the current status of DEP'N Investment Co.'s ("DEP'N")[1] account with Respondent and is only relevant with respect to Petitioner's equal protection claim. As a result of the in camera review, the Tribunal entered an Order on November 2, 2012, granting Respondent's request to accept documentation protected by MCL 205.28(1)(f) under seal, in addition to granting Petitioner's Motion to Seal Joint Exhibit 6, and further indicated in that Order that the admissibility of the evidence presented during the in camera review will be decided, if necessary, after the Tribunal renders its decision on the "casual transaction" issue raised in Petitioner's Motion for Summary Disposition and as discussed at Oral Argument.

The Tribunal finds that the capital gains recognized from the sale of Petitioner's ownership interest in Depsly is not subject to SBT. Therefore, the Tribunal grants Petitioner's Motion for Summary Disposition and cancels the subject assessment. Based on the Tribunal's decision, Petitioner's additional claims with respect to equal protection and penalty are moot and, therefore, do not need to be addressed. Similarly, the Tribunal finds it unnecessary to rule on the admissibility of Respondent's evidence relative to the current status of its account relating to DEP'N. Finally, the Tribunal finds no basis upon which to award costs and attorney fees to Petitioner.

## PETITIONER'S CONTENTIONS

Petitioner contends that the sale of its 50% ownership interest in Depsly is a casual transaction, as defined by MCL 208.4(1), and as such, should not be included in its SBT base. Petitioner further asserts that (i) Respondent's disparate treatment of similar transactions by other similarly situated taxpayers is a violation of equal protection, due process, and uniform application of tax laws and (ii) Respondent's 25% penalty for late payment pursuant to MCL 205.24 was improper since Petitioner had reasonable cause for not filing an SBT return in 2005.

In support of its contention that capital gain income recognized from its sale of its ownership interest in Depsly is not subject to SBT, Petitioner asserts that the

[1] DEP'N also held a 50% ownership interest in Depsly prior to selling its ownership interest.

transaction qualifies as a casual transaction and, therefore, is not subject to SBT. In citing *Manske v Dep't of Treasury*, 265 Mich App 455; 695 NW2d 92 (2005), Petitioner argues that Respondent bears the burden to prove that the disposition of Petitioner's only asset should be included in its tax base because casual transactions are not exemptions but are instead exclusions from tax. Petitioner asserts that (i) *Manske* is directly on point and supports its Motion; (ii) its asset disposition was a single transaction; (iii) it was a passive, limited investor in Depsly for the operation of Pontrail Apartments; (iv) it was not in the business of selling assets; (v) the critical inquiry is to determine what Petitioner's purposes were as it actually operated; and (vi) the transaction is not incidental to Petitioner's business purpose, as the sale was not a minor concomitant circumstance, event, item, or expense.

To support its contention that Respondent's treatment of similar transactions by other similarly situated taxpayers is a violation of equal protection, due process, and uniform application of tax laws, Petitioner states, for example, that its business partner, DEP'N, also held a 50% ownership interest in Depsly and also sold its ownership interest in the same transaction which is the subject transaction of this case; however, although Respondent issued an assessment against DEP'N for DEP'N's sale of its ownership interest in Depsly, Respondent later voided such assessment. Petitioner relies on *Armco Steel Corp v Dep't of Treasury*, 419 Mich 582; 358 NW2d 839 (1984), and *MCL Telecom Corp v Dep't of Treasury*, 136 Mich App 28; 355 NW2d 627 (1984), contending that Respondent's disparate treatment as to casual transactions is unconstitutional and is a violation of equal protection and uniformity. Furthermore, although Petitioner acknowledges that Respondent's Informal Conference Recommendations are not binding, Petitioner utilizes such decisions as persuasive authority to support its contentions regarding Respondent's disparate treatment of casual transactions.

With regard to its contention that Respondent's imposition of a 25% penalty was improper, Petitioner contends that it (i) acted with ordinary business care and prudence, (ii) had no intent to avoid SBT, (iii) maintained a good compliance history with Respondent, and (iv) relied on its accountant's advice. In referencing *Michigan Bell Tel Co v Dep't of Treasury*, 229 Mich App 200; 581 NW2d 770 (1998), Petitioner asserts that there must be an element of intent or fault before penalties may be imposed for its failure to remit a 2005 SBT return, which Respondent has failed to prove. Based on these factors, Petitioner contends that it should be entitled to a waiver of the penalty imposed pursuant to Treasury Rule

205.1013. (Petitioner's Brief in Support of its Motion for Summary Disposition; Transcript, pp 4-21, 35-39)

## RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner's sale of its ownership interest in Depsly is subject to SBT because the sale constituted business activity. To support its contentions, Respondent states that Petitioner had two expressed business activities: (1) yield current income and (2) holding and operating the property as an investment vehicle. Respondent asserts that it was Petitioner's intent from the beginning to profit from its investment and the sale of its ownership interest matched such purpose, albeit incidentally. Respondent relies on *Insilco Corp v United States*, 53 F3rd 95 (1995), asserting that "substance over form is . . . a tool for the commissioner to use to attack things but it is not a tool typically for the taxpayer to use to disavow the form that it has freely chosen for its own transactions. . . . [T]o apply substance over form to [a] partnership agreement and what it states doesn't apply, . . . would recast the partnership agreement, which would be problematic from several standpoints." (Transcript, p 24) While Respondent agrees that *Manske, supra*, is applicable to this case, Respondent states that the facts in this case are distinguishable from those in *Manske*. Furthermore, Respondent claims that the Court of Appeals was "handcuffed" into rendering the decision that it did in *Manske* due to a stipulation. In conceding to its applicability, however, Respondent states that *Manske* is the only binding precedent applicable to this case and that contrary to Petitioner's assertions, Respondent's Informal Conference Recommendations are not.

Additionally, Respondent contends that there was no equal protection violation in its treatment of Petitioner. To support this contention, Respondent contends that the affidavit of Michael N. Rice, which states that DEP'N was assessed for the same transaction and that Treasury voided the assessment, omits important facts, raising questions as to what Mr. Rice knew and when he knew it. Respondent contends that it cancelled the assessment against DEP'N based on Mr. Rice's representations, which did not reflect the disposition of any assets in 2005. Furthermore, Respondent states that "there is no evidence that [Petitioner] has been singled out for treatment disparate to that generally accorded other taxpayers, there is no evidence of any intentional discrimination, and there is no evidence that any 'unequal' treatment was motivated by anything constitutionally impermissible." (Respondent's Brief in Opposition to Petitioner's Motion for Summary Disposition, p 18)

Finally, Respondent indicated during the in camera review that it may be willing to remove penalties assessed to Petitioner based on what Mr. Rice told Petitioner, to be determined at an evidentiary hearing with Mr. Rice, if necessary. (Respondent's Brief in Opposition to Petitioner's Motion for Summary Disposition; Transcript, pp 21-35, 40-41)

## STATEMENT OF FACTS

The parties offered a Joint Stipulation of Facts on September 6, 2012. Based on the Joint Stipulation of Facts, the Tribunal finds the following:

1. Petitioner is a Michigan Limited Liability Company whose address during the relevant year was 187 S. Old Woodward Avenue, Birmingham, Michigan 48009.

2. Respondent is an administrative department of the State of Michigan and is statutorily designated to administer and collect SBT on behalf of the State of Michigan.

3. The tax in controversy is SBT assessed upon Petitioner for tax year ending December 31, 2005.

4. Petitioner acquired a 50% ownership interest in Depsly, a Michigan Limited Partnership, on or about November 3, 1994.

5. Petitioner owned a 50% partnership interest in Depsly from November 1994 to December 2005, when Petitioner sold its 50% interest in Depsly.

6. Petitioner ceased all business activity as of December 2006.

7. On March 6, 2009, Respondent's Discovery Division sent a letter to Petitioner requesting a statement of the basis for the partnership's failure to file an SBT return for 2005.

8. On April 1, 2009, Petitioner filed a Certification of No SBT Filing Responsibility on the form provided by Respondent.

9. Respondent issued a Final Bill for Taxes Due No. S388055 (the "Final Assessment"), dated March 25, 2011, to Petitioner, assessing SBT for the 12/05 tax period, in the amount of $23,227.02, penalty in the amount of $5,806.75, and interest in the amount of $7,744.06, for a total assessment of $36,777.83.

10. Respondent's assessment against Petitioner included a 25% penalty for late payment of tax, pursuant to MCL 205.24.

In addition to the facts stipulated by the parties, the Tribunal finds the following:

1. Article II of Petitioner's Articles of Organization and Certificate of Conversion, filed on August 11, 2004, provides, "The purpose or purposes for which the limited liability company is formed is to engage in any activity within the purposes for which a limited liability may be formed under the Limited Liability Company Act of Michigan."

2. Prior to August 2004, Petitioner was a Limited Partnership named South Lyon Apartment Co.

3. South Lyon Apartment Co.'s Certificate of Limited Partnership provides, "The purpose and character of the business is to operate the Pontrail apartment development as an investment and for the production of income, and to carry on any and all activities related thereto."

4. Petitioner's sale of its interest in Depsly was its only sale of a business interest during its existence as a limited partnership or an LLC.

5. Petitioner has not acquired an interest in any business other than Depsly during its existence as a limited partnership or an LLC.

## APPLICABLE LAW

Petitioner moves 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. See *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. See *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 nonmoving party. See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider. See *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. See *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. See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Alternatively, Respondent requests that the Tribunal find that Respondent is entitled to summary disposition pursuant to MCR 2.116(I)(2). Pursuant to MCR 2.116(I)(2), if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party. See also *Mascia v IDS Property Casualty Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2012 (Docket No. 304607), citing *Jaguar Trading Ltd Partnership v Presler*, 289 Mich App 319; 808 NW2d 495 (2010).

## CONCLUSIONS OF LAW

MCL 208.31[2] provides, in pertinent part ". . . (3) The tax levied under this section and imposed is upon the privilege of doing business and not upon income."

For purposes of SBT, MCL 208.9(1) defines "tax base" to mean "business income."

For persons other than corporations, MCL 208.3(3) defines "business income" to mean "that part of federal taxable income derived from business activity."

MCL 208.3(2) defines "business activity," in part, as a transfer of legal or equitable title to property, whether real, personal, or mixed, tangible or intangible, 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 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.

MCL 208.4(1) classifies a "casual transaction" as a transaction made or engaged in other than in the ordinary course of repeated and successive transactions of a like character, except that a transaction made or engaged in by a person that is incidental to that person's regular business activity is a business activity within the meaning of this act.

Here, the Tribunal must determine whether Petitioner's one-time sale of its interest in Depsly constitutes business activity under the SBT. Tax statutes, and exceptions thereto, are generally construed against the government, see *Manske, supra*, citing *DeKoning v Dept of Treasury*, 211 Mich App 359; 536 NW2d 231 (1995), whereas statutory exemptions are strictly construed against the taxpayer, see *ANR Pipeline Co v Dept of Treasury*, 266 Mich App 190; 699 NW2d 707 (2005). In this regard, the Tribunal finds it is Respondent's burden to establish applicability of the SBT to this transaction because the SBT is a tax statute and a casual transaction is an exception thereto. See *Manske, supra*.

[2] The SBT was repealed by Public Act 325 of 2006, effective for tax years that begin after December 31, 2007.

Petitioner contends that its sale of ownership interest in Depsly is a casual transaction. To support its contentions, Petitioner asserts that the facts in this case directly correlate to those presented in *Manske*. As in *Manske*, Petitioner argues that the sale of its ownership interest in Depsly was a single transaction; it was not in the business of selling assets; and the transaction is not incidental to Petitioner's business purpose, as the sale was not a minor concomitant circumstance, event, item, or expense.

Respondent contends that Petitioner had two expressed business activities, both of which sought income based on investment, and Petitioner's sale of its ownership interest solidified such purpose. Although Petitioner did not sell any other businesses during its existence, Respondent insists that it is not appropriate to apply a substance-over-form application to the situation. Specifically, Respondent contends that Petitioner was formed to yield income from its investment and, as a result, the income recognized from its sale of Depsly constitutes business activity, though incidentally. While Respondent agrees that *Manske* is the only binding precedent to provide the Tribunal direction in rendering its decision, Respondent contends that *Manske* is distinguishable from the present case since the Court of Appeals was "handcuffed" into rendering the decision that it did based on a stipulation.

In *Manske*, *supra*, p 460, the Court of Appeals held that "[t]he trial court erred by not focusing on the characteristics of this specific transaction," being the granting of a deed in lieu of foreclosure. In that regard, "[t]he [trial] court identified 'the securing of real estate' as being '[a] fundamental cornerstone' of plaintiff's business." *Manske, supra*. The Court of Appeals further went on to state:

> whatever dictionary one might use to define the word "incidental," the granting of a deed in lieu of a foreclosure-relinquishing plaintiff's property rights-cannot be considered "minor" or a "minor concomitant circumstance, event, item, or expense" or "subordinate to something of greater importance; having a minor role." Transferring plaintiff's ownership interest was a major event, a significant act in a financial sense that extinguished plaintiff's business interest in the development in question. *Manske, supra,* p 461.

In this case, Petitioner's sole asset was its 50% ownership interest in Depsly. At no time during Petitioner's existence did Petitioner have any other assets, nor

did Petitioner sell any other assets. Petitioner was formed exclusively to be a passive, limited investor in Depsly for the operation of Pontrail Apartments. Although the sale of Petitioner's ownership interest in Depsly was a transfer of legal title engaged in Michigan with the object of gain, albeit indirectly, the Tribunal finds that Respondent failed to substantiate its contention that this sale was incidental to Petitioner's business activity and as such, was not a casual transaction. Respondent provided no evidence to convince the Tribunal that Petitioner was in the business of selling assets. The characteristics of this transaction were not similar to the activity Petitioner engaged in prior to the sale of its ownership interest. More importantly, Petitioner's sale of its ownership interest "was a major event, a significant act in a financial sense that extinguished [Petitioner's] business interest" in Depsly. *Manske, supra*. As a result, Petitioner's sale of its ownership interest constituted a casual transaction under MCL 208.4(1), since the sale was not in Petitioner's ordinary course of repeated and successive transactions of a like character and was not incidental, as defined in *Manske*. Consequently, the recognized gain from the sale should not be included in Petitioner's SBT base for the 2005 tax year.

Having reviewed applicable statutes and case law, as well as the exhibits, affidavits, and arguments presented by the parties, the Tribunal concludes that granting Petitioner's Motion for Summary Disposition is appropriate. The Tribunal, therefore, cancels the subject assessment. As a result, Petitioner's additional claims with respect to equal protection and penalty are moot and therefore, do not need to be addressed.

The Tribunal further finds that, in consideration of the above, awarding costs and attorney's fees to Petitioner is not appropriate. With respect to Petitioner's request for costs associated with this tax 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 City of Brighton*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2012 (Docket No. 301826), 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." *Id*. at 5. 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. Also applicable is MCL 24.323(1), which states that "[t]he presiding officer that conducts a contested case shall award to a prevailing party, other than an agency, the fees incurred by the party in connection with that contested case, if the presiding officer finds that the position of the agency to the proceeding was frivolous."

The Administrative Procedures act defines "agency" as a ". . . state

department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action." MCL 204.303(2).

MCL 24.323 states that:

> To find that an agency's position was frivolous, the presiding officer shall determine that at least 1 of the following conditions has been met: (a) The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party, (b) The agency had no reasonable basis to believe that the facts underlying its legal position were in fact true, (c) The agency's legal position was devoid of arguable legal merit.

Although Petitioner is the prevailing party in this case, the record does not support a finding that Respondent had no reasonable basis to believe that the facts underlying its legal position were true and its legal position was not devoid of arguable legal merit. Respondent believed its assessment was grounded in fact and law and was not established nor defended by Respondent to harass, embarrass, or injure Petitioner. Therefore,

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

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

IT IS FURTHER ORDERED that Assessment No. S388055 is CANCELLED.

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

MICHIGAN TAX TRIBUNAL

By: Steven H. Lasher

Entered: November 30, 2012