

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

R & R Ready Mix, Inc.,
Petitioner,

v

MTT Docket No. 16-000079

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Preeti Gadola

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, R & R Ready Mix, Inc., appeals Final Assessment Nos. UK13555 and UK13557, levied by Respondent, Michigan Department of Treasury (“The Department”), on December 29, 2015. The Final Assessments established that Petitioner owes tax in the amount of \$7,368 for 2009 and \$5,535 for 2011, for a total tax due of \$12,903. Petitioner also owes interest in the amount of \$1,279 for 2009 and \$490 for 2011 for total interest due of \$1,769.¹ Edward Kisskorni, CPA, represented Petitioner, and Randi Merchant, Attorney, represented Respondent.

A hearing on this matter was held on November 1, 2017. Petitioner’s witness was Mary Beth Taglauer, Controller, R & R Ready Mix, Inc. Respondent’s witnesses were Elaine Van Buskirk, Audit Supervisor, Michigan Department of Treasury, and Russell Willett, President, R & R Ready Mix, Inc.

Based on the evidence, testimony, and case file, the Tribunal finds that the assessments shall be affirmed.

The subject appeal is related to the Michigan Business Tax (“MBT”). Petitioner is a corporation subject to the tax for the 2009 and 2011 tax years.² The original appeal consisted of several issues, including whether Petitioner was the designated member of a Unitary Business Group (“UBG”) to which additional members need be added, and as such, additional MBT was due. This case was held in abeyance pursuant to *LaBelle Management, Inc. v Department of*

¹ Interest continues to accrue per 1941 PA 122. Also see R-7 at 2.

² There is no longer any contention related to tax year 2010.

Treasury, in which the Court considered the “Control Test” for a UBG.³ After the decision in *LaBelle*, the Department adjusted Petitioner’s tax liability, however, there were still unresolved issues remaining, including the issues presented at the hearing of this matter. Respondent alleges the Petition is insufficient because it only addresses the UBG issue, therefore the Tribunal has no jurisdiction over the remaining issues. The Tribunal finds the Petition is sufficient relating the issues before it here.

The remaining issues are related to the Small Business Alternative Credit (“SBAC”),⁴ specifically, the reduction of credit provisions of the SBAC. The issue at hand relates to reduction of credit as a result of the compensation of Petitioner’s President, Mr. Russell Willett.

PETITIONER’S CONTENTIONS

Petitioner claims there are two requirements pursuant to the SBAC, one that gross receipts do not exceed 20 million dollars, two that adjusted business income not exceed 1.3 million dollars. Petitioner contends the parties agree that the two aforementioned requirements are met. Petitioner contends the parties also agree that R & R Ready Mix qualifies for the SBAC in 2009 and 2011, only the amount of the credit is disputed. Petitioner contends that in 2009, it is entitled to 100% credit and in 2011, 80% credit. Petitioner also contends that its Petition is sufficient to address these allegations and was not limited to the issue resolved in *LaBelle*.

Petitioner contends the SBAC is determined by among other things, the compensation of its President and shareholder, Mr. Russell Willett. Section 107(3) of the MBTA⁵ defines compensation as salaries, wages, bonuses and commissions which were calculated on a cash accounting basis. However, Petitioner chose to calculate its compensation related to employee benefits, under the accrual method, which is

³ *LaBelle Management, Inc v Dep’t of Treasury*, 315 Mich.App. 23, 888 NW2d 260 (2016).

⁴ MCL 208.1417.

⁵ MCL 208.1107(3)

permitted under the Act.⁶ Petitioner contends the employee benefits under contention are 401k contributions to American Funds and contributions to Blue Cross/Blue Shield (“BCBS”), on behalf of Mr. Willett. The statements from American Funds regarding his 401k were on a cash basis and need be converted to an accrual basis.⁷ Further the BCBS statements put forth Petitioner’s contribution for Mr. Willett’s health care to be less than determined by Respondent. As such, Mr. Willett’s compensation does not disqualify Petitioner from receiving the SBAC in the full amount for 2009 and at 80% in 2011.

PETITIONER’S ADMITTED EXHIBITS

- P-1: Russell A. Willett 2009 and 2011 Officer Compensation Health Insurance and Pension Contributions
- P-2: 2009 R & R Ready Mix, Inc. - Officer Compensation
- P-3: 2011 R & R Ready Mix, Inc. - Officer Compensation
- P-4: Tape of Monthly 2009 Blue Cross Premium Payments for Russell A. Willett
- P-5: Blue Cross Blue Shield 2009 Monthly Bills
- P-6: Tape of Monthly 2011 Blue Cross Premium Payments for Russell A. Willett
- P-7: Blue Cross Blue Shield 2011 Monthly Bills
- P-8: Tape of Monthly 2009 American Funds Contributions for Russell A. Willett
- P-9: American Funds Statements – 10/1/09-12/31/09
- P-10: December 2008 401k Salary Deferral and Employer Contribution
- P-11: December 2009 401k Salary Deferral and Employer Contribution
- P-12: Tape of Monthly 2011 American Funds Contributions for Russell A. Willett

⁶ “Under an accrual method of accounting, income is includible in gross income when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy.” 26 CFR 1.451-1(a). In comparison, under a cash method of accounting, “such an amount is includible in gross income when actually or constructively received.” 26 CFR 1.451-1(a).

⁷ Tr. at 16.

P-13: Russell A. Willett American Funds Statements - 1/1/11-3/31/11

P-14: Russell A. Willett American Funds Statements - 4/1/11-6/30/11

P-15: Russell A. Willett American Funds Statement - September 30, 2011

P-16: Russell A. Willett American Funds Statement - December 31, 2011

P-17: Russell A. Willett American Funds Statement - March 31, 2012

P-18: December 2011 R & R Ready Mix, Inc. 401k Salary Deferral and Employer Contribution

P-19: December 2011 Triple R Trucking, Inc. 401k Salary Deferral and Employer Contribution

P-20: Michigan Business Tax Audit Determination

P-24: R & R Ready Mix, Inc. 2008 Michigan Business Tax Annual Return File Copy – As
Originally Filed

P-25: R & R Ready Mix, Inc. 2009 Michigan Business Tax Annual Return File Copy – As
Originally Filed

P-26: R & R Ready Mix, Inc. 2010 Michigan Business Tax Annual Return File Copy – As
Originally Filed

P-27: R & R Ready Mix, Inc. 2011 Michigan Business Tax Annual Return File Copy – As
Originally Filed

PETITIONER'S WITNESS

Mary Beth Taglauer

As noted above, Ms. Taglauer is the Petitioner's controller and she was Petitioner's contact person with regard to the Department's audit. As controller, she is responsible for Petitioner's upper end accounting, such as the calculation of employee benefits for tax purposes. In preparation for Petitioner's audit by the Department, Ms. Taglauer provided information regarding Mr. Willett's 2009 and 2011 W-2s and the employer contributions to Petitioner's 401k

and Blue Cross/Blue Shield health insurance, on behalf of Mr. Willett. She testified for the appeal before the Tribunal, however, she recalculated employer contributions for health insurance from statements received in the mail from the insurance company by Mr. Willett. She was able to obtain and provide paper copies of the statements from February 2009 until December 31, 2009, however, the January payment was included in the 2008 documents, which were destroyed due to its seven year records retention policy. She testified, however, that the premium payments were constant, and as such, the January contribution would be the same at the remaining months' contributions, in the amount of \$785.62.⁸ Ms. Taglauer testified that almost the same scenario applied to insurance contributions for the 2011 tax year, which were approximately \$990.45 per month, however, she was missing two statements from the 2011 tax year. Also, for the last two months of the year, there was a \$6 increase in premium to \$996.65.⁹

Ms. Taglauer testified that she provided the Department auditor, Ms. Van Buskirk with all documents requested, but could not provide the requested General Ledger which was 6,000 pages long. However, because it was maintained electronically, Ms. Taglauer did admit smaller reports could be pulled from the larger document, but she did not provide any smaller reports.¹⁰ She also testified that the electronic ledger was retained only for three years, however, after the audit, she changed the ledger retention to six years.¹¹ Ms. Taglauer testified she did not have 2009 paper records at the time of the audit, but also admitted that she received the audit letter from the Department on June 26, 2013, which four years after the first audit year in question.¹²

Ms. Taglauer testified that Petitioner provided its employees, officers and shareholders with 401k benefits and Blue Cross/Blue Shield health insurance, which information and/or statements, on behalf of contributions for Mr. Willett, were provided to the Department. However, Petitioner also provided vision benefits through SVS, dental benefits through BCBS, flexible spending through BCBS, and life insurance through Unum.¹³

⁸ Tr. At 26-31.

⁹ Tr. at 35.

¹⁰ Tr. at 70, 78.

¹¹ Tr. at 105

¹² Tr. at 69.

¹³ Tr. at 74-75.

With regard to Mr. Willett's salary for 2009, Ms. Taglauer acknowledged that it was listed at different figures on his W-2 (\$122,061.76) and in her personal calculations (\$126,281.04), but noted the higher number may be attributed to a flexible spending account and car allowance.¹⁴ She also agreed there are discrepancies between the amount shown for employer contributions to Mr. Willett's 401k, between his W-2 and 401k statements, however those numbers are inconsistent because the last payment for each year is paid in January of the following year.¹⁵ Ms. Taglauer testified that converting Mr. Willett's 401k benefits from a cash basis to an accrual basis for the purpose of his compensation calculation, resulted in paid benefits of \$8,839.67 for 2009 and paid benefits of \$9,889.67 for 2011.¹⁶ There were also differences between numbers related to American Funds and her personal calculations, but the differences were attributed to American Funds improperly listing the contributions in "matching," when the company provided no matching funds.¹⁷

RESPONDENT'S CONTENTIONS

Respondent, the Department, contends that the original petition challenging the assessments that were issued following an MBT audit, primarily focused on the auditor's determination that additional members be added to the UBG, which accounted for the vast majority of the amounts assessed. Respondent claims following the decision in the *LaBelle* case, the auditor reviewed the audit determinations to account for the holdings in *LaBelle* and adjusted the audit figures accordingly. Respondent alleges, if the Tribunal finds the Petition sufficient, the only remaining issue is to determine whether R & R Ready Mix is entitled to the full amount of the SBAC.

The Department contends that Petitioner is not entitled to the full credit, but only 80% of the credit for the 2009 tax year and 60% of the credit for the 2011 tax year. The Department claims the reductions apply because Petitioner's President's compensation fell within the phase out ranges under MCL 208.1417. In 2009 the range is \$160,000 to

¹⁴ Tr. at 84-88.

¹⁵ Tr. at 90-91.

¹⁶ Tr. at 37-38, P-8, P-12.

¹⁷ Tr. at 92-95.

\$165,000 which required a 20% reduction. His compensation figure in 2011 fell within the range of \$ 165,000 to \$ 170,000 that would trigger a 40% reduction. The Department's determinations of tax due were obtained from Petitioner's provided records as well as information relayed verbally by Ms. Taglauer. Petitioner's health insurance statements from Blue Cross, Blue Shield were incomplete, other benefit statements were not provided, however, the Department relied on Petitioner's numbers, even without the additional written, benefit statements. Further the Department contends that Petitioner's use of the accrual method does not change the auditor's findings in this matter.

RESPONDENT'S ADMITTED EXHIBITS

R-1: Audit Confirmation Letter dated 6/26/13

R-2: Audit Diary

R-3: Audit Report of Findings

R-4: Final Assessment UK13555 dated 12/29/15

R-5: Final Assessment UK13556 dated 12/29/15

R-6: Final Assessment UK13557 dated 12/29/15

R-7: Updated Audit Schedules/Workpapers

R-8: MBT Schedule of Shareholders and Officers (2009)

R-9: MBT Schedule of Shareholders and Officers (2011)

R-10: American Funds Statements

R-11: R. Willett compensation figure support documents provided to auditor by taxpayer

R-12: R & R Ready Mix Financial Statements for 2009 and 2010 tax years

R-13 R & R Ready Mix Reviewed Financial Statements for 2011 tax year

R-14: Taglauer email to Nietzke dated 2/25/10

R-15 Taglauer/VanBuskirk January 2014 Email Chain

R-16: Petitioner's Federal Returns for 2009

R-17: Petitioner's Federal Returns for 2010

R-18: Petitioner's Federal Returns for 2011

RESPONDENT'S WITNESSES:

Elaine Van Buskirk

Ms. Van Buskirk is an Audit Supervisor for the Department and prepared the audit at issue. Ms. Van Buskirk is also a Certified Public Accountant. In determining the amount of the SBAC relative to Petitioner for the 2009 tax year, Ms. Van Buskirk retrieved salary, allocated business income and benefits for Mr. Willett from Petitioner's records and Ms. Taglauer's assertions.¹⁸ Ms. Van Buskirk noted that she calculated a different number for these items than Petitioner, yet accepted Petitioner's numbers, knowing there were some compensation benefit pieces missing from her own calculations, such as vision, disability, dental and life insurance, for which statements, or general ledger entries, were not provided.¹⁹ Ms. Van Buskirk calculated 2009 salary for Mr. Willett of \$126,281 and \$23,619 in pension and benefits for a total of \$149,900 in compensation. This number was added to Mr. Willett's taxable allocated business income for the 2009 tax year of \$11,830, for a total compensation of \$161,730, which results in an 80% credit. For the 2011 tax year, total compensation was calculated to be \$168,718, resulting in a 60% credit.²⁰

Ms. Van Buskirk testified with regard to the discrepancy in numbers for BCBS employee benefits, that she received the benefit amount for Mr. Willett from Ms. Taglauer, of \$14,779 for 2009, Petitioner's tax return put forth a benefit amount of \$11,000 and for this appeal, a benefit amount of \$9,427 was alleged.²¹ Ms. Van Buskirk was unable to reconcile the three numbers, and specifically noted that Mr. Willett's compensation cannot be accurately redetermined because

¹⁸ Tr. at 159, 162, 173, R-11.

¹⁹ Tr. at 163-164, 188.

²⁰ Tr. at 155-156, 158-162.

²¹ See R-11, Tr. at 182, 187-188.

statements for all types of benefits were not provided. Ms. Van Buskirk indicated on a scale of 1-10, Petitioner scored about a 3 for cooperation.²²

With regard to the cash versus accrual accounting method allegation, Ms. VanBuskirk testified, “in the long run you’re not going to have a large difference generally.”²³ She also testified that if she used Petitioner’s new numbers for BCBS benefits, it would still be in the same reduction bracket for the SBAC.²⁴

Russell Willett

Mr. Willet is the President of R & R Ready Mix. He testified that the contested issue in this matter is the BCBS benefits paid on his behalf. He testified that the Department is overstating them, and as such, Petitioner is not receiving the amount of SBAC it is due. Mr. Willett acknowledged that he received benefits such as vision, disability and life insurance that were not provided to the Department, but testified those benefits were “very minute in costs.”²⁵ He also admitted that Petitioner paid his membership fees to the Michigan Concrete Association and paid some of his personal expenses. The personal expenses paid for Petitioner were paid back by Petitioner to R & R Ready Mix, Inc.²⁶

FINDINGS OF FACT

1. Petitioner is a corporation subject to the Michigan Business Tax
2. In 2009 and 2011, Petitioner qualified for a Small Business Alternative Credit pursuant to MCL 208.1417.
3. Mr. Russell A. Willett is President and a shareholder of Petitioner
4. Petitioner made health insurance, employer contributions to Blue Cross/Blue Shield for the benefit of Mr. Willett.
5. Petitioner made 401k employer contributions to American Funds on behalf of Mr. Willett.

²² Tr. at 140.

²³ Tr. at 185.

²⁴ Tr. at 188.

²⁵ Tr. at 190.

²⁶ Tr. at 192.

6. Petitioner provided Mr. Willett with vision benefits through SVS, life insurance through Unum, dental benefits, flexible spending, and disability benefits.
7. Petitioner paid Mr. Willett's membership fees to the American Concrete Association.
8. Petitioner contends it is entitled to a 100% SBAC for 2009 and an 80% credit for 2011, and Respondent contends Petitioner is entitled to an 80% SBAC in 2009 and 60% credit in 2011.
9. Mr. Willett's salary for 2009 was \$126,281 and his pension and benefits were \$23,619, for compensation of \$149,900. Mr. Willett's taxable allocated business income for 2009 was \$11,830, for a total compensation of \$161,730.
10. Mr. Willett's salary for 2011 was \$141,281, and his pension and benefits were \$27,437 for total compensation of \$168,718.

CONCLUSIONS OF LAW

Sufficiency of the Petition

Respondent alleges there is no remaining issue before the Tribunal because the UBG matter has been resolved. Respondent contends the Petition makes no mention of the SBAC issue and as such, the Tribunal has no jurisdiction over it. Upon review of the Petition, the Tribunal finds it does have jurisdiction pursuant to paragraph 49, which states, "R & R Ready Mix appeals and objects to the adjustment in MBT nonrefundable credits. The audit adjusted the MBT nonrefundable credits in each of the three years of the audit period. [Exhibit P-9.3-5: MBT Audit Determination by Year]." Further, Respondent's Prehearing Statement acknowledges:

The auditor had also determined that Petitioner would not have been entitled to the full benefit of the SBAC for the 2009 and 2011 tax years because the amount of compensation reported for Petitioner's president should have been increased. Thus, even absent the determination that additional members should have been added to Petitioner's UBG, Petitioner still owes additional MBT for the tax years at issue.

During the prehearing conference of this matter, both parties, and the Tribunal Judge, agreed that the SBAC issue was the remaining issue for hearing. As such, in addition to the

Petition language quoted above, the Tribunal finds all parties, and the Tribunal, had sufficient notice of the issues before it and as such, it has jurisdiction over the matter at hand.

Small Business Alternative Credit

Pursuant to MCL 208.1417, taxpayers with gross receipt of less than \$20,000,000 may be entitled to the SBAC. “If a taxpayer qualifies for the SBAC, the credit ‘is the amount by which the tax imposed under this act exceeds 1.8% of adjusted business income.’”²⁷ However, to claim the SBAC, there are several requirements, including ceilings on gross receipts, as noted above,²⁸ and, “relevant to this case, limitations on the amount of compensation paid to a corporate shareholder and officer.”²⁹ MCL 208.1417 states, in pertinent part:

1) The credit provided in this section shall be taken after the credits under sections 403 and 405 and before any other credit under this act and is available to any taxpayer with gross receipts that do not exceed \$20,000,000.00 and with adjusted business income minus the loss adjustment that does not exceed \$1,300,000.00 as adjusted annually for inflation using the Detroit consumer price index and subject to the following:

(a) An individual, a partnership, a limited liability company, or a subchapter S corporation is disqualified if the individual, any 1 partner of the partnership, any 1 member of the limited liability company, or any 1 shareholder of the subchapter S corporation receives more than \$180,000.00 as a distributive share of the adjusted business income minus the loss adjustment of the individual, the partnership, the limited liability company, or the subchapter S corporation.

(b) A corporation other than a subchapter S corporation is disqualified if either of the following occur for the respective tax year:

(i) Compensation and directors' fees of a shareholder or officer exceed \$180,000.00.

²⁷ MCL 208.1417(4); See also *Four Zero One Associates LLC v Dep't of Treasury*, 320 Mich.App. 587 (2017), related to SBAC compensation for bonuses.

²⁸ MCL 208.1417(1)

²⁹ MCL 208.1417(1)(b); *Four Zero One Associates*, 320 Mich.App 587.

(ii) The sum of the following amounts exceeds \$180,000.00:

(A) Compensation and directors' fees of a shareholder.

(B) The product of the percentage of outstanding ownership or of outstanding stock owned by that shareholder multiplied by the difference between the sum of business income and, to the extent deducted in determining federal taxable income, a carryback or a carryover of a net operating loss or capital loss, minus the loss adjustment.

As noted above, the issue in this matter is Mr. Willet's compensation, which Respondent alleges is in an amount subject to a greater percentage credit reduction than is alleged by Petitioner, pursuant to MCL 208.1417(c), which states:

c) Subject to the reduction percentage determined under subsection (3), the credit determined under this subsection shall be reduced by the following percentages in the following circumstances:

(i) If an individual, any 1 partner of the partnership, any 1 member of the limited liability company, or any 1 shareholder of the subchapter S corporation receives as a distributive share of adjusted business income minus the loss adjustment of the individual, partnership, limited liability company, or subchapter S corporation; if compensation and directors' fees of a shareholder or officer of a corporation other than a subchapter S corporation are; or if the sum of the amounts in subdivision (b)(ii)(A) and (B) is more than \$160,000.00 but less than \$165,000.00, the credit is reduced by 20%.

(ii) If an individual, any 1 partner of the partnership, any 1 member of the limited liability company, or any 1 shareholder of the subchapter S corporation receives as a distributive share of adjusted business income minus the loss adjustment of the individual, partnership, limited liability company, or subchapter S corporation; if compensation and directors' fees of a shareholder or officer of a corporation other than a subchapter S corporation are; or if the sum of the amounts in subdivision (b)(ii)(A) and (B) is \$165,000.00 or more but less than \$170,000.00, the credit is reduced by 40%.

(iii) If an individual, any 1 partner of the partnership, any 1 member of the limited liability company, or any 1 shareholder of the subchapter S corporation receives as a distributive share of adjusted business income minus the loss adjustment of the individual, partnership, limited liability company, or subchapter S corporation; if compensation and directors' fees of a shareholder or officer of a corporation other than a subchapter S corporation are; or if the sum of the amounts in

subdivision (b)(ii)(A) and (B) is \$170,000.00 or more but less than \$175,000.00, the credit is reduced by 60%.

(iv) If an individual, any 1 partner of the partnership, any 1 member of the limited liability company, or any 1 shareholder of the subchapter S corporation receives as a distributive share of adjusted business income minus the loss adjustment of the individual, partnership, limited liability company, or subchapter S corporation; if compensation and directors' fees of a shareholder or officer of a corporation other than a subchapter S corporation are; or if the sum of the amounts in subdivision (b)(ii)(A) and (B) is \$175,000.00 or more but not in excess of \$180,000.00, the credit is reduced by 80%.

The definition of compensation pursuant to the MBTA, is found in MCL 208.1107(3), which states:

(3) "Compensation" means all wages, salaries, fees, bonuses, commissions, other payments made in the tax year on behalf of or for the benefit of employees, officers, or directors of the taxpayers, and any earnings that are net earnings from self-employment as defined under section 1402 of the internal revenue code of the taxpayer or a partner or limited liability company member of the taxpayer. Compensation includes, but is not limited to, payments that are subject to or specifically exempt or excepted from withholding under sections 3401 to 3406 of the internal revenue code. Compensation also includes, on a cash or accrual basis consistent with the taxpayer's method of accounting for federal income tax purposes, payments to a pension, retirement, or profit sharing plan other than those payments attributable to unfunded accrued actuarial liabilities, and payments for insurance for which employees are the beneficiaries, including payments under health and welfare and noninsured benefit plans and payment of fees for the administration of health and welfare and noninsured benefit plans. Compensation for a taxpayer licensed under article 25 or 26 of the occupational code, 1980 PA 299, MCL 339.2501 to 339.2518 and 339.2601 to 339.2637, includes payments to an independent contractor licensed under article 25 or 26 of the occupational code, 1980 PA 299, MCL 339.2501 to 339.2518 and 339.2601 to 339.2637.

Pursuant to MCL 208.1107(3), compensation includes “all wages, salaries, fees, bonuses, commissions, other payments made in the tax year on behalf of or for the benefit of employees, officers, or directors,” “payments to a pension or retirement or profit sharing plan” and “payments for insurance for which employees are the beneficiaries, including payments under health and welfare and noninsured benefit plans” As noted above, the issue in this matter relates to Mr. Willett’s 401k and BCBS benefits. Additionally, the Tribunal finds there are

issues relating to Mr. Willett's vision, disability, dental, flexible spending, and life insurance benefits and the membership dues to the Michigan Concrete Association paid on behalf of Mr. Willett by Petitioner.

Petitioner put forth a detailed analysis of Mr. Willett's salary, 401k and BCBS benefits in order to determine his compensation for tax years 2009 and 2011, and while the Tribunal can appreciate Petitioner's Herculean efforts to substantiate Mr. Willett's employee benefits, there are pieces missing from the puzzle in order for it to accurately determine his compensation pursuant to the SBAC. Ms. Taglauer testified, Petitioner provided vision benefits through SVS, dental benefits through BCBS, flexible spending through BCBS, and life insurance through Unum.³⁰ Ms. Van Buskirk testified that she accepted Petitioner's compensation numbers, knowing there were some compensation benefit pieces missing from her own calculations, such as vision, disability, dental and life insurance, for which statements, or general ledger entries, were not provided.³¹ Mr. Willett acknowledged that he received benefits such as vision, disability and life insurance that were not "not showing up here."³² He also admitted that Petitioner paid his membership fees to the Michigan Concrete Association. Without accurate and complete records of all Mr. Willett's employee benefits, the Tribunal is unable to modify the Department's assessments.

The Court in *Auto-Owners Ins. Co. v. Dep't of Treasury*³³ found, "[a]s the party asserting the right to the credit, plaintiff bears the burden of proving its entitlement." Further, MCL 205.28(3) states, "[a] person liable for any tax administered under this act shall keep accurate and complete records necessary for the proper determination of tax liability as required by law or rule of the department."³⁴ Petitioner has not provided accurate and complete records relating to

³⁰ Tr. at 74-75.

³¹ Tr. at 163-164.

³² Tr. at 190.

³³ *Auto-Owners Ins. Co. v. Dep't of Treasury*, 226 Mich. App. 618, 621, 575 N.W.2d 770, 772 (1997).

³⁴ R 205.4103(1), states, "Pursuant to section 28(3) of the revenue act, MCL 205.28(3), a taxpayer shall maintain all records that are necessary for the proper determination of the taxpayer's tax liability. In addition, a taxpayer shall maintain the records required by each of the tax statutes that are administered by the department in accordance with the revenue act. All required records shall be made available to the commissioner at the request of the commissioner or the commissioner's authorized representatives as provided for in section 3(a) of the revenue act, MCL 205.3(a)."

employee benefits. As a result, the Tribunal finds Petitioner is entitled to an 80% SBAC in 2009 and a 60% SBAC in 2011, as determined by Respondent's adjusted audit.

JUDGMENT

IT IS ORDERED that Final Assessments UK13555 and UK13557 are AFFIRMED as set forth in the Introduction section of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as finally shown in the Proposed 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.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.³⁵ 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.³⁶ A copy of the motion must be served 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.³⁷ Responses to motions for

³⁵ See TTR 261 and 257.

³⁶ See TTR 217 and 267.

³⁷ See TTR 261 and 225.

reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.³⁸

A claim of appeal must be filed 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.”³⁹ A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.⁴⁰ The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.⁴¹

By Preeti Gadola

Entered: February 7, 2018

³⁸ See TTR 261 and 257.

³⁹ See MCL 205.753 and MCR 7.204.

⁴⁰ See TTR 213.

⁴¹ See TTR 217 and 267.