Empire Iron Mining Partnership and The Cleveland-Cliffs Iron Company, Petitioners,	MICHIGAN TAX TRIBUNAL
v	MOAHR Docket No. 18-003877 Consolidated with 18-003878, 19-003740, 19-003742
Tilden Township and Richmond Township, Respondent.	Presiding Judge Steven M. Bieda

ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING PETITIONERS' SUMMARY DISPOSITION UNDER MCR 2.116(I)(2)

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment (POJ) on November 14, 2019. 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 December 4, 2019, Respondents filed exceptions to the POJ. In the exceptions, Respondent states that (1) the Administrative Law Judge (ALJ) misapplied the rules of statutory construction in interpreting the Tax on Low Grade Iron Ore Act, (2) the ALJ's finding that the phrase "is mined" must be construed in the present tense is contradictory to the plain language of the statute, and (3) the ALJ's reliance on intrinsic aids to define "mining" and "production" is unsupported, contrary to the plain statutory language, and produces absurd results.

On December 18, 2019, Petitioners filed a response to Respondents' exceptions. In the response, Petitioners state that Respondents' exceptions ignore the fact that the tax is applicable only to "low grade iron ore mining property." The subject property cannot be subject to the tax if it is not low grade iron ore mining property, and according to the definition of low grade iron ore mining property, the subject property cannot be low grade iron ore mining property if it is not mined. Tax statutes are to be strictly construed and ambiguities and doubtful language are construed in favor of the taxpayer and

Respondents' have not explained how taxing the property pursuant to the GPTA is an "absurd result."

The Tribunal has considered the exceptions, response, and the case file and finds that the ALJ propertly considered the testimony and evidence in the rendering of the POJ. The POJ does not render portions of Sections 2 and 3 meaningless or contradict the plain language of those sections or the cited Attorney General opinion as Respondent contends. As noted in the POJ, Sections 2 and 3 only apply to "low grade iron ore mining property," i.e., "mineral bearing land from which low grade iron ore is mined." If the property is not mining property, these sections do not apply, and thus there can be no contradiction. And despite Respondents' assertions to the contrary, a "plain language" reading of this phrase is not as an adjective phrase describing what type of mineral is mined on the property. In that regard, the Tribunal notes that both parties repeatedly cite the "plain language" of the statute in support of their respective arguments, but the language of the statute is neither clear nor unambiguous. The Michigan Supreme Court has held that "when there can be reasonable disagreement over a statute's meaning, or, as others have put it, when a statute is capable of being understood by reasonably well-informed persons in two or more different senses, [a] statute is ambiguous." [1] The Court went on to note that it "has concluded that statutes [are] ambiguous when one word in the statute has an unclear meaning, when a statute's interaction with another statute has rendered its meaning unclear, or when application of the statute to facts has rendered the correct application of the statute uncertain."[2] It reasoned that this standard "gleans the fundamental principles from the 'reasonable minds,' 'doubtful,' and 'susceptible' tests,"[3] and "has been applied, in some variation, by every other state in the country, all the federal circuit courts, and by the United States Supreme Court."[4] The Tribunal finds that the disputed phrase is capable of being understood in two different senses and judicial construction is therefore not only appropriate, but necessary. The fact that no specific finding of ambiguity was contained in the POJ is irrelevant, as it was implicit in the analysis and final determination. The Tribunal finds no merit in Respondent's contention that "mining" and "production" are technical terms such that reliance on a dictionary definition is improper, as there is no evidence establishing or even suggesting that either one of these terms have acquired a peculiar meaning under the law.[5] The Tribunal also finds no absurd results for the reasons set forth above, as well as those cited by Petitioner.

Given the above, Respondent has failed to show good cause to justify the modifying of the POJ or the granting of a rehearing.[6] As such, the Tribunal adopts the POJ as the Tribunal's final decision in this case.[7] The Tribunal also incorporates by reference the

[1] *Petersen v. Magna Corp.*, 484 Mich. 300, 329, 773 N.W.2d 564, 579–80 (2009) (citations omitted).
[2] *Petersen v. Magna Corp.*, 484 Mich. 300, 329, 773 N.W.2d 564, 579–80 (2009) (citations omitted).
[3] *Petersen v. Magna Corp.*, 484 Mich. 300, 329–31, 773 N.W.2d 564, 580 (2009).
[4] *Petersen v. Magna Corp.*, 484 Mich. 300, 329–31, 773 N.W.2d 564, 580 (2009) (citations omitted).
[5] *Brownlow v McCall Enterprises, Inc*, 315 Mich App 103; 888 NW2d 295 (2016).
[6] See MCL 205.762.
[7] See MCL 205.726.

Findings of Fact and Conclusions of Law contained in the POJ in this Final Opinion and Judgment.

Therefore,

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

IT IS FURTHER ORDERED that Petitioners are GRANTED Summary Disposition under MCR 2.116(I)(2).

IT IS FURTHER ORDERED that the assessments at issue are CANCELLED.

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 Tribunal with the required filing fee within 21 days from the date of entry of the final decision.[8] 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.[9] 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.[10] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[11]

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

[8] See TTR 261 and 257.
[9] See TTR 217 and 267.
[10] See TTR 261 and 225.
[11] See TTR 261 and 257.

decision, it is an "appeal by leave."[12] 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.[13] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[14]

By _____

Entered: January 9, 2020
ejg

[12] See MCL 205.753 and MCR 7.204.
[13] See TTR 213.
[14] See TTR 217 and 267.

Empire Iron Mining Partnership and The Cleveland-Cliffs Iron Company, Petitioners,	MICHIGAN TAX TRIBUNAL
v	MOAHR Docket Nos. 18-003877, 18-003878, 19-003740, & 19-003742
Tilden Township and Richmond Township, Respondents.	Presiding Judge Peter M. Kopke

ORDER DENYING PETITIONERS' MOTION FOR IMMEDIATE CONSIDERATION

ORDER GRANTING PETITIONERS' MOTION TO CONSOLIDATE

PROPOSED ORDER DENYING
RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

PROPOSED ORDER GRANTING
PETITIONERS SUMMARY DISPOSITION UNDER MCR 2.116(I)(2)

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

On August 9, 2019, Respondents filed a Motion in MOAHR Docket Nos. 18-003877 and 18-003878 requesting that the Tribunal enter summary judgment in their favor under MCR 2.116(C)(8) and 2.116(C)(10). On August 30, 2019, Petitioners filed a response to the Motion for Summary Disposition. On August 29, Petitioners filed a Motion to Consolidate MOAHR Docket Nos. 18-003877 and 18-003878 with MOAHR Docket Nos. 19-003740 and 19-003742 and a Motion for Immediate Consideration of their Motion to Consolidate. On September 5, 2019, Respondents filed a response to Petitioners' Motion to Consolidate. On September 6, 2019, Respondents filed a reply to

Petitioners' response to their Motion for Summary Disposition.[1] On September 10, 2019, the Tribunal issued an Order adjourning the hearing scheduled for September 17, 2019 and requiring the parties to provide written responses.[2] The September 10, 2019 Order also provided, in pertinent part, "Petitioners . . . contacted the Tribunal on September 6, 2019, to request that the Tribunal conduct oral argument instead of a status conference to address purported misleading statements made by Respondents in support of its claims." On October 1, 2019, the parties filed responses to the September 10, 2019 Order. Following the respective responses and Respondents' objection to Petitioners' purported, but non-existent *ex parte* communication regarding its "misleading statements,"[3] the Tribunal issued an Order on October 2, 2019 giving Respondents the opportunity to respond to Petitioners' contentions regarding misleading factual statements so to "avoid any future potential argument of prejudice." On October 9, 2019, Respondents responded to the October 2, 2019 Order.

The Tribunal has reviewed the Motions, the Responses, the Replies, and the case file and finds that denying the Motion for Immediate Consideration, granting the

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[1] In its September 10, 2019 Order, the Tribunal explained that Respondents' September 6, 2019 filing was "technically a Reply to a Response that is precluded under TTR 225(6)." Nevertheless, the Tribunal would have required Respondents to file said Reply as part of the written information required herein and, as such, the Reply will be considered in the rendering of the Tribunal's decision on Respondents' Motion for Summary Disposition.

[2] The Order specifically required Petitioners to file a reply to Respondents' Response to Petitioners' Motion to Consolidate, a written statement identifying Respondents' purportedly misleading statements, and "written statements indicating whether the properties at issue in the consolidated cases and the new appeals had parcel numbers for either ad valorem or Specific Ore Tax purposes for the 2018 and 2019 tax years and, if so, a list of the properties at issue with their identifying parcel numbers by case number for each tax year . . . [and] [i]f not, a list identifying the properties at issue by case number for each tax year." The Order also required Respondents to file the same written statements concerning parcel numbers, a written statement indicating the purpose of the parcel numbers on the 2018 delinquent tax bill sent to Petitioners, and copies of the SOT tax rolls for the 2018 and 2019 tax years or an explanation for why the rolls did or did not exist.

[3] The purported *ex parte* communication was, as indicated in the October 2, 2019 Order providing Respondents with an opportunity to address its "misleading statements," a voice mail message left on the telephone of the legal secretary for the Presiding Judge that was not reviewed by the Judge.

Motion to Consolidate, denying Respondents' Motion for Summary Disposition, and granting summary disposition in favor of Petitioners under MCR 2.116(I)(2) is warranted at this time.

RESPONDENTS' CONTENTIONS

The cases involve the interpretation of the same act and the sole issue is a legal issue. Nevertheless, the 2019 cases could involve different assessment documents and, at the time of the filing of the Motion to Consolidate, answers to the petitions in filed in MOAHR Docket Nos. 19-003740 and 19-003742 were not due.

The Specific Ore Tax ("SOT") tax base is either that calculated under MCL 211.622 ("Section 2") or MCL 211.623 ("Section 3") and Section 3 continues to apply as long as there is a five-year average annual production. Merchantable low-grade iron ore exists at the mine and a facility in Toledo, Ohio, has been constructed to utilize that ore. As long as the mine is capable of producing ore it is taxable under MCL 211.624 ("Section 4"). The SOT is an "in-lieu-of" tax that is an exemption, which is strictly construed against the taxpayer. The phrase "is mined" is an adjective, which embraces both present and future actions. Michigan's Natural Resources Environmental Protection Act also uses the word "mined" as an adjective. That Act specifically refers to "active mining," land that "is being mined," deposits "currently being mined," and areas "presently being mined." Omitting a provision in one statute that is included in another statute is intentional on the part of the Legislature. Michigan's Supreme Court has declined to adopt a strict present tense interpretation of "is" where a party gave "extraordinary and undue weight to the fact that the Legislature used the present tense of verbs." The Legislature has explicitly clarified that words used in the present tense

include the future in MCL 141.602, 125.402, and 206.2. Petitioners' interpretation renders Section 2 of the Act nugatory because the SOT applies before ore has been produced, before construction of beneficiation facilities, or before experimental operation of the plant. Petitioners' interpretation is also absurd because they could cease operation on tax day and later resume operations, a situation where the SOT would not apply.

Petitioners seem to contend that Respondents' statements are misleading because Petitioners have not planned to "upgrade" the mine. However, the Empire Mine Restart Study lists a "Major Project Component" as "Empire Mill upgrades and equipment replacement." Mentions of "upgrades" are littered throughout Petitioners' statements to the Michigan Department of Environment, Great Lakes, and Energy ("EGLE") and the Michigan Economic Development Corporation ("MEDC"). Petitioners' statements indicate that they have proposed plans to upgrade the property, and thus Respondents have not made misleading statements because they have simply reiterated what Petitioners presented to the State of Michigan. Although Petitioners state that the iron ore produced by the Empire Mine is not compatible with the Toledo plant, Petitioners have informed the MEDC that the Toledo plant demands may require the pellets produced by the Empire Mine. Pellets from the Empire Mine, despite being high in silica, could be processed into a product usable at the Toledo plant. Petitioners admit that they did seek and receive incentive offers from the state, as well as an environmental permit. Petitioners have not identified a misleading statement concerning a necessary power plant.

Finally, Petitioners have failed to state a claim upon which relief may be granted because they appealed reference-only parcel numbers, not the parcel numbers on the specific tax roll. Respondents provided both the ad valorem and SOT rolls. The tax roll is titled “Ad Valorem + Special Acts.” The ad valorem roll references and is followed by the specific tax roll, which is the SOT and commercial forest and industrial facilities taxes. The Empire Mine spans four taxing jurisdictions, including both Respondents. What constitutes the Empire Mine is best set forth in legal descriptions. Marquette County uses BS&A software to generate and mail tax bills, as well as to collect delinquent property taxes. The SOT is not included in this software and it cannot create a tax bill for the Empire Mine. Thus, the local units issue tax bills without respect to any parcel. Because of this, the Country Treasurer selected a specific tax parcel to issue the delinquent notices.

PETITIONERS’ CONTENTIONS

The four cases involve common issues of law and fact and the representatives are the same in each case. Respondents’ own Motion requests summary disposition for the 2018 and 2019 tax years. The issue in the cases is whether the subject property is subject to the SOT. Respondents agree that the cases involve interpretation of the same act. The cases also involve whether the property “is mined.” No decision to restart the mine had been made as of December 31, 2017 or December 31, 2018 and Respondents’ claim is based mostly on facts at least through July 26, 2019.

The SOT only applies to “low grade iron ore mining property.” The Act’s definition of “low grade iron ore mining property” is “land from which low-grade iron ore is mined.” During the tax years at issue, the subject property was not mined. Because of this, the

SOT does not apply. A tax may only be imposed if expressly authorized by law and Respondents have not identified authority that authorizes assessing the SOT.

Respondents' statement that "Petitioners have planned an upgrade of the mine" is misleading because the representative of the owner of the subject property has investigated whether it is feasible to restart the mine but have determined not to pursue a restart. Respondents' exhibits reference "rehabilitation," not an upgrade and Respondents' claim that the purpose of the non-existent upgrade is to supply a plant in Toledo is false because pellets produced from ore mined at the subject property cannot be used at that plant. Respondents' statement that Petitioners sought and/or received incentives and environmental permits required to restart the mine is false. Petitioners asked the state what incentives would be available and received offers that have expired. Petitioners sought a wetland permit at the State's request, but many other permits are required before Petitioners could restart operations. Respondents also fail to recognize that permits for power plants would be necessary before restarting the mine.

Finally, Petitioners have stated a claim for relief because they have identified the subject property at issue as the Empire Mine. TTR 227(3)(c) and MCR 2.111(B)(1) only require Petitioners to reasonably inform Respondents of the property at issue. Petitioners were not required to identify parcel numbers in the petitions, only descriptions. Petitioners requested the tax roll for the subject property and were informed that there was no tax roll for 2019 or prior years. The County, however, provided tax parcels and descriptions, which Petitioners identified to the State Geologist. The Geologist accepted Petitioners descriptions and the letter was sent to

Respondents. The notices of the assessment provided to Petitioners did not contain parcel numbers, and Respondents provided parcel numbers on the tax delinquency notices, but never provided these numbers previously. Even if the pleadings were defective, Petitioners could amend the pleadings.

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[4] In this case, Respondents move for summary disposition under MCR 2.116(C)(8) and (C)(10). Motions under MCR 2.116(C)(8) are appropriate when "[t]he opposing party has failed to state a claim on which relief can be granted." Dismissal should be granted when the claim, based solely on the pleadings, is so clearly unenforceable that no factual development could possibly justify a right to recovery.[5] In reviewing a motion under this subsection, the court must accept as true all factual allegations in support of a claim, as well as all inferences which can fairly be drawn from the facts.[6]

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

[4] See TTR 215.
[5] See *Transamerica Ins Group v Mich Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993).
[6] See *Meyerhoff v Turner Constr Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[7]

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party.[8] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[9] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[10] 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.[11] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[12] Summary disposition under MCR 2.116(I)(2) is appropriate "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment . . . ," and as such, the court may render judgment in favor of the opposing party.[13]

CONCLUSIONS OF LAW

The Tribunal has carefully considered Petitioners' Motion for Immediate Consideration of its Motion to Consolidate and finds that denying the Motion is

[7] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).
[8] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[9] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[10] *Id.*
[11] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[12] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[13] See also *Washburn v Michailoff*, 240 Mich App 669; 613 NW2d 405 (2000).

warranted. More than 21 days has elapsed since the filing of the Motion for Immediate Consideration, a Response to the Motion to Consolidate was filed, and the scheduled hearing was adjourned, thus rendering the Motion for Immediate Consideration moot.[14]

As for consolidation, the Tribunal may order a consolidation of cases upon a finding of substantial and controlling common questions of fact or law.[15] In that regard, the parties agree that the noted dockets present the same dispositive question of law and that the parties in each of the cases are the same. Although Respondents argued that no Answers had been filed in MOAHR Docket Nos. 19-003740 and 19-003742, Answers were filed in both cases on September 16, 2019. Further, the parties have provided documentation pertaining to the 2019 tax year (i.e., tax rolls, etc.) and Respondents have asserted that Petitioners are planning on restarting the mine. Accordingly, the Tribunal concludes that consolidating the 2019 cases with the 2018 cases is appropriate.

With respect to the Motion for Summary Disposition, the parties dispute the interpretation of the James Goulette Iron Ore Recovery Act of 1987, MCL 211.621 *et seq*., ("the Act"). Respondents point to Sections 2 and 3 of the Act as the sections that provide the calculation for the SOT. In that regard, Section 2 states:

> **Before the first calendar year in which production of merchantable ore from a low grade iron ore mining property has been established on a commercial basis, or before the period of construction of the plants for the beneficiation or treatment of low grade iron ore and the period of experimental operation of the plants**, the low grade iron ore mining property shall be subject to a specific tax equal to the rated annual capacity of the plant in gross tons multiplied by .55% of the mine value per gross ton, based upon the projected natural iron analysis of the iron ore pellets or of the concentrated and/or agglomerated products, multiplied by

[14] See TTR 225(4).
[15] See R 792.10118.

> the percent of construction completion of the low grade iron ore mining property.[16] [Emphasis added.]

While Section 3 states:

> **Beginning with the first calendar year after production of merchantable ore from a low grade iron ore mining property has been established on a commercial basis**, the low grade iron ore mining property shall be subject to a specific tax equal to the average annual production in gross tons during the preceding 5-year period, multiplied by 1.1% or beginning December 31, 2001 through December 31, 2006 0.75% of the mine value per gross ton, based on the average natural iron analysis of shipments for that year of the iron ore pellets or of the concentrated or agglomerated products. A year in which production did not take place shall be excluded in computing the average production but only until the property has a 5-year record of commercial production. Mine value is determined by subtracting from the published lower lake price of Lake Superior iron ore pellets, or the particular concentrated or agglomerated products as of December 31, for the subsequent calendar year, all the transportation and handling costs, including any tax charged for transporting or handling the iron ore pellets or products, from the mining property to Lake Erie ports.[17] [Emphasis added.]

The Act also provides that, "[i]f the specific tax determined under section 3 is less than the specific tax determined under section 2, then section 2 shall govern." Both Sections 2 and 3, however, specifically provide that "low grade iron ore mining property shall be subject to a specific tax. . . ."[18] **Accordingly, the statute authorizes a specific tax against** "**low grade iron ore mining property**." [Emphasis added.] Low grade iron ore mining property is defined, in relevant part, as "mineral bearing land from which low grade iron ore **is mined**. . . ."[19] [Emphasis added.]

The Tribunal concludes that the phrase "is mined" must be interpreted in the present tense. When interpreting statutes, courts must "discern and give effect to the

[16] See MCL 211.622.
[17] See MCL 211.623(1).
[18] See MCL 211.622. The identical language also appears in MCL 211.623(1).
[19] See MCL 211.621(b).

Legislature's intent as expressed in the words of the statute."[20] Courts "accord to every word or phrase of a statute its plain and ordinary meaning, unless a term has a special, technical meaning or is defined in the statute."[21] "Is" is the present tense of the verb "to be."[22] **Because the Legislature used the present tense of the verb, rules of grammar dictate that the statute be construed in the present tense**.[23] [Emphasis added.] Even if, as Respondents urge, "is mined" is a form of adjective that "describes the state or condition of the subject,"[24] Respondents present no authority that the use of a phrase as an adjective means that it encompasses the past, present, and future tenses. Respondents' citation to *Estate of Shinholster v Annapolis Hosp*,[25] arguing that the Legislature's use of the present tense does not apply only to current use, is also unpersuasive. In *Estate of Shinholster*, the Court stated that the defendants and the

[20] See *Guardian Environmental Servs, Inc v Bureau of Constr Codes & Fire Safety, Dep't of Labor & Economic Growth*, 279 Mich App 1, 6; 755 NW2d 556 (2008), quoting *Pohutski v City of Allen Park*, 465 Mich 675, 683, 641 NW2d 219 (2002).
[21] See *Guardian Environmental Servs, Inc*, 279 Mich App at 6; MCL 8.3a.
[22] See *Merriam-Webster's Collegiate Dictionary* (11th ed).
[23] See *Rock v Crocker*, 499 Mich 247, 262; 884 NW2d 227 (2016).
[24] Respondents also argue that using "mined" as an adjective is supported by other statutes applying to mines. Specifically, Respondents point to the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.101 *et seq*. NREPA references "active mining," MCL 324.9115, land that "is being mined," MCL 324.9115, deposits "currently being mined," MCL 324.63202, and land "presently being mined" MCL 324.63707. Respondents cite *Donkers v Kovach*, 277 Mich App 366; 745 NW2d 154 (2007) for the proposition that "[t]he omission of a provision in one statute that is included in another statute should be construed as intentional, and provisions not included by the Legislature may not be included by the courts." *Id*. at 371. The Tribunal does not conclude that reading "is mined" as present tense reads anything into the Act because, as explained above, "is mined" is present tense. Further, the Court in *Donkers* concluded that the two statutes at issue related to the same subject matter and shared a common purpose, and thus concluded that they were *in pari materia* before applying the rule cited by Respondents. **That is not the case here**. [Emphasis added.] Even if NREPA and the Act generally relate to the same subject matter, natural resources, they do not share a common purpose. Although both NREPA and the Act both affect mines, NREPA's purpose is "to protect the environment and natural resources of the state. . . ," 1994 PA 451, preamble, and the Act's purpose is to "encourage commercial development of and uniform production from low grade mineral resources in the state of Michigan." MCL 211.625.Thus, the two statutes do **not** share a common purpose and the canon of *in pari materia* is inapplicable.[Emphasis added.] Accordingly, the Tribunal declines to interpret the provisions of NREPA alongside the Act to conclude that "is mined" means something other than present tense.
[25] See *Estate of Shinholster v Annapolis Hosp*, 471 Mich 540; 685 NW2d 275 (2004).

dissent gave "extraordinary and undue weight to the fact that the Legislature has used the present tense of the verbs."[26] The Court explained that, in another subsection of the same statute, the Legislature used the past tense.[27] It also reasoned that the Legislature, if it wished to only have the present tense apply, knew how to make its intent known because it did so in another part of the statute.[28] In other words, in *Estate of Shinholster*, there were other textual clues within the same act that indicated that the Legislature's intent was not to have the applicable section apply only in the present tense. Here, the Act only uses the present tense "is mined." There are also no other textual clues indicating that the Legislature intended that the section be applied in the past or future tense.[29] The Tribunal concludes, because the Legislature chose to use the present tense, that its intent was that only property presently being mined qualifies as low grade iron ore mining property.[30] Accordingly, the SOT only applies to a property that "is mined," and not property that "was mined" or "will be mined."[31]

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[26] *Id*. at 565.
[27] *Id*.
[28] *Id*. at 566.
[29] Unlike the Motor Vehicle Code, which specifically provides that present tense includes the past tense, MCL 257.80, **the Act contains no similar provision**. [Emphasis added.]
[30] See *Michalski v Reuven Bar Levav*, 463 Mich 723, 733; 625 NW2d 754 (2001) (interpreting statutory language in the present tense based on "Legislature's choice of present tense language").
[31] **To the extent that the phrase "is mined" is ambiguous**, **any ambiguity must be resolved in favor of the general rule of taxation**. [Emphasis added.] In *Sandy Pines Wilderness Trails, Inc v Salem Twp*, 232 Mich App 1, 14; 591 NW2d 658 (1998), the Court of Appeals considered an in-lieu-of tax and stated "[a]ssuming the statutory language in this case constitutes a tax 'exemption,' we agree with respondents that tax exemptions are to be strictly construed against the taxpayer." *Id*. at 13. It then quoted the Michigan Supreme Court's opinion in *Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737 (1948), which in turn cited 2 Cooley on Taxation:

> An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, *when a specific privilege or exemption is claimed* under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is *on a claimant* to establish

Reading the statute as a whole, as the Tribunal must,[32] supports the construction that the SOT only applies to property while it is being mined, and not before mining occurs or after mining ceases. The Act separately uses the terms "production" and "mining," and thus those terms must be given different meanings.[33] Although "production" is not specifically defined, the Act, in defining "low grade iron ore," explains that such ore is not merchantable and that "a merchantable product can be produced only by beneficiation or treatment involving fine grinding."[34] "Production" is thus the process of transforming low grade iron ore into a merchantable product. Section 2 of the Act applies "[b]efore the first calendar year in which production or merchantable ore from a **low grade iron ore mining property** has been established on a commercial basis, or before the period of construction of the plants for the benefication or treatment of low grade iron ore. . . ."[35] Section 3 applies "[b]eginning with the first calendar year after production of merchantable ore from a **low grade iron ore mining property** has been established on a commercial basis."[36] These sections thus contemplate the

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> clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him *who claims it*. [2 Cooley on Taxation (4th ed), § 672, p 1403 (emphasis added).]

Thus, the long line of cases stating that exemptions are strictly construed against the taxpayer are predicated on the notion that the taxpayer is claiming the exemption. This case presents the unusual situation where the taxpayer argues that the exemption does not apply. In other words, Petitioners do claim an exemption. **The Tribunal concludes that, because the SOT is an "in-lieu-of" tax, i.e. an exemption, from the general rule of ad valorem taxation, see MCL 211.1, the language must be clear and any ambiguity is resolved in the favor of the general rule of ad valorem taxation**. [Emphasis added.] In other words, **the statute must be strictly construed in favor of ad valorem taxation**. [Emphasis added.]

[32] See *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 472; 838 NW2d 736 (2013).
[33] See *Lickfeldt v Dep't of Corrections*, 247 Mich App 299, 306; 636 NW2d 272 (2001).
[34] See MCL 211.621(1).
[35] See MCL 211.622.
[36] See MCL 211.623(1).

application of the SOT before and after production begins, but while mining occurs. The statute is silent as to how a property that previously was mined, or will be mined in the future, is to be treated under the Act. However, "[w]hen the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose."[37] Interpreting the Act to impose the SOT on property that does not qualify as "low grade iron ore mining property" during the tax years at issue would address something not specifically provided for in the statute, the situation where no mining occurred but mining is planned for in the future. This conclusion is consistent with the Tribunal's prior decision in *Cleveland-Cliffs Iron co v Republic Twp*.[38] There, the mine at issue had been idle for approximately ten years.[39] The Tribunal explained that

> . . . the language of the Act does not address idled mines. Instead, the Act clearly and specifically only provides methods of taxation for mines either prior to production of low grade iron ore, or mines engaged in the production of low grade iron ore. The Act does not address the taxation of idled mines which previously produced low grade iron ore. Even if the legislature intended the Act to apply to an idled mine for a length of time reasonably necessary to allow for retooling or upgrading, that time has passed. Therefore, this Act does not apply to the subject property.[40]

Given the conclusion that the SOT only applies to property that "is mined," the Tribunal must determine whether mining occurred such that the SOT applies. The Act does not define "mined," and thus the Tribunal consults a lay dictionary. "Mined" is defined as "to get (as ore) from the earth." The parties do not dispute that the mine was

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[37] See *Menard*, 302 Mich App at 472 (2013).
[38] See *Cleveland-Cliffs Iron Co v Republic Twp*, 7 MTT 561 (Docket Nos. 130044 & 150264), issued January 29, 1993.
[39] *Id*. at 562.
[40] *Id*.

idled in 2016.[41] There is no evidence on the record that any ore was retrieved from the earth in 2018 or 2019 and neither party asserts that mining occurred during those years.[42] Respondents cite public statements from Petitioners that indicate Petitioners may be planning on operating the mine in the future.[43] Even accepting these statements as true, the plain language of the Act does not provide that the SOT is applicable to property that **will** be mined, only property that **is** mined. [Emphasis added.] As such, the Tribunal concludes that there is no issue of material fact concerning whether the property was mined during the tax years at issue. Thus**, the Tribunal concludes that the SOT does not apply**.[44] [Emphasis added.]

Respondents argue that mine operators could cease operations on December 31 and avoid paying SOT for the following year. Although the General Property Tax Act, under which the Act is located, states that "[t]he taxable status of persons and real and personal property for a tax year shall be determined as of each December 31 of the immediately preceding year,"[45] it is not necessarily the case that mining must occur on December 31. Given the fact pattern presented, where a mine temporarily shuts down for several weeks near the end of a calendar year, it is plausible to conclude that the property "is mined" on tax day because mining would occur before and after tax day. In

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[41] See DEQ Summary of Empire Mine Restart E-Mails, attached at Exhibit I to Motion for Summary Disposition, August 9, 2019; Response to Motion, August 30, 2019, p 2.
[42] The parties dispute whether Respondents made misleading factual statements regarding whether Petitioners planned to restart the mine. In light of the Tribunal's conclusion that the statute only applies in the present tense, whether those statements were true or false is irrelevant. Even if Petitioners intended to restart the mine, the SOT would not apply.
[43] See Exhibit F to Motion for Summary Disposition.
[44] The Tribunal reiterates that the SOT is a tax in lieu of ad valorem tax. MCL 211.624(3). In *Cleveland-Cliffs Iron Co*, the Tribunal explained that "in the present instance where the Act does not apply, the property at issue may be subject to ad valorem property tax." *Cleveland-Cliffs Iron Co*, 7MTT at 563. The Tribunal cited MCL 211.154 and stated that "the date of discovery for purposes of applying MCL 211.154 is the date Petitioners filed the present action." *Id*.
[45] See MCL 211.2(2).

the context of other exemptions, it is not clear that a taxpayer would be denied a Principal Residence Exemption simply because they did not occupy the property only on December 31 of the year prior,[46] or that land was not used for agricultural use on December 31 of the year prior.[47] Thus, the Tribunal concludes that its construction of the statute does not lead to an absurd result because a mine could plausibly qualify for the SOT even if no mining activity occurred on December 31 of the year prior.

Respondents also argue that Petitioners have failed to state a claim for relief because they have not appealed the correct parcel numbers. They state that Petitioners have appealed "reference only" parcel numbers assigned to the real property, rather than the parcels on the specific tax roll. Tribunal rules require "[a] description of the matter in controversy. . . ."[48] In addition, Michigan is a notice pleading state.[49] Both parties have consistently referred to the property at issue as the "Empire Mine."[50] The notices sent to Petitioners concerning the tax due bear no parcel numbers and instead refer to an assessment on the "Empire Mine."[51] Even if the real property parcel numbers appealed are not those being taxed, it is clear that Respondents have levied the SOT against the Empire Mine. The Tribunal thus concludes that Petitioners have sufficiently described the matter in controversy and notified Respondents of the nature of the action, i.e., the applicability of the SOT to the Empire Mine.

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[46] See MCL 211.7cc.
[47] See MCL 211.7ee.
[48] See TTR 227(3)(c).
[49] See *Johnson v QFD, Inc*, 292 Mich App 359, 368; 807 NW2d 719 (2011).
[50] See, e.g. Respondents' Response to Order, October 1, 2019; Petition, September 4, 2018, ¶ 1, p 1.
[51] See Letter from Lori Kulju to Gabriel Johnson, August 20, 2018, attached to Petition in Docket No. 18-003877.

However, because this case involves an in-lieu-of tax, the parcel numbers listed on the petition are not at issue. The parcel numbers on the petition are for the purposes of ad valorem taxation. With respect to the SOT, Respondents maintain a specific tax roll, and they provide the "placeholder" parcel numbers for the Empire Mine's SOT. As Respondents explain, no values are placed on these "placeholder" parcel numbers because the SOT is not an ad valorem tax.[52] Moreover, "tax bills are generated outside of the normal processing without parcel numbers. . . ."[53] When Respondents were faced with the problem of generating a delinquency, they had to assign a "parcel number" in the software in order to do so.[54] This explains why the delinquency letters sent to Petitioners have one "placeholder" parcel number from each Respondent. According to Respondents, the best description of the property at issue are the legal descriptions as compiled on the specific tax roll, which come from the State Geologist.[55] As such, the Tribunal concludes that the Empire Mine, as represented by the legal descriptions in Respondents' Specific Tax Rolls, is at issue and, as explained above, is not subject to the SOT.[56]

PROPOSED JUDGMENT

IT IS ORDERED that Petitioners' Motion for Immediate Consideration is DENIED.

IT IS FURTHER ORDERED that the Petitioners' Motion to Consolidate is GRANTED.

IT IS FURTHER ORDERED that all future pleadings and documents filed in these files shall refer to MOAHR Docket No. 18-003877 only.

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[52] See Affidavit of Jackie Lykins, September 19, 2019, ¶ 18, p 3, attached as attachment D to Respondents' Response to Order.
[53] See Affidavit of Jackie Lykins, ¶ 18, p 3.
[54] See Affidavit of Anne Giroux, ¶ 15, p 3, attached as attachment E to Respondents' Response to Order.
[55] See Respondents' Response to Order, p 5-6; Affidavit of Jackie Lykins, ¶ 22, p 3.
[56] **The Tribunal notes that, because the SOT does not apply, the real and personal property was not assessed during the tax years at issue, as indicated on the property tax rolls where the real property parcels are listed with zero value**. [Emphasis added.]

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

IT IS FURTHER ORDERED that Petitioners are GRANTED summary disposition under MCR 2.116(I)(2).

IT IS FURTHER ORDERED that the SOT assessments at issue are CANCELLED.

EXCEPTIONS

This is a **proposed** decision ("POJ") prepared by the Michigan Administrative Hearings System and **not** a final decision.[57] [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.[58]

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: November 14, 2019 By Peter M. Koglar

PMK/wmm

[57] See MCL 205.726.
[58] See MCL 205.762(2) and TTR 289(1) and (2).