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

Apex Laboratories International Inc,
Petitioner,

v

MTT Docket No. 16-000724

City of Detroit,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING RESPONDENT'S MOTION FOR COSTS

FINAL OPINION AND JUDGMENT

INTRODUCTION

On January 31, 2017, the parties filed cross-motions for summary disposition. In its Motion, Petitioner contends that it is entitled to a cancellation of Respondent's assessment and a refund of the taxes paid in error. More specifically, Petitioner argues it does not have the requisite nexus with the City because: (i) it conducted no business activity within the City of Detroit, (ii) never employed anyone within the City, (iii) never owned or leased property in the City, (iv) never maintained a place of business in the City, (v) never employed business capital in the City, and (vi) never made sales of goods or services in the City. Further, Petitioner contends that even if it is determined to have nexus, it meets the statutory definition of a financial institution, as defined by MCL 141.606(4); thus, its net profits are exempt from City of Detroit Income Tax ("CDIT"). Finally, if Petitioner is found to have nexus with the City and the financial institution exemption does not apply, Petitioner argues its income is subject to

apportionment and no tax can be imposed because there was no City property, payroll or sales to apportion.

Respondent argues there are no issues of material fact outstanding because it is clear that Petitioner was doing business in and had nexus with the City. Respondent argues that Petitioner's commercial domicile was in the City of Detroit and not in Delaware, as alleged by Petitioner. In support of this argument, Respondent states that: (i) Petitioner had an office in the City of Detroit, (ii) Petitioner's state and federal income tax returns listed the City of Detroit address, and (iii) Petitioner's officers and directors actively managed Petitioner from the City of Detroit. In the alternative, Respondent argues that even if it is determined Petitioner was domiciled in Delaware, Petitioner's activities in the City "far exceeded those required for nexus for out-of-state companies."[1] Respondent, citing RAB 2014-5, argues Petitioner had nexus with the City because it had a "physical presence" in Michigan for more than one day during the tax periods at issue. Specifically, Petitioner's agents "spent months negotiating and closing the Apex Transaction," in the City of Detroit which established "physical presence" as outlined in the previously cited RAB. Finally, Respondent asserts that Petitioner had nexus with the City by virtue of being a part of Huron Capital Partners LLC ("Huron") unitary business.

On February 14, 2017, the parties both filed responses to the Motions for Summary Dispositions. In its response, Petitioner asserts that it was not "doing business" in the City under the language of the statute. Petitioner specifies that use of a mailbox drop, use of professionals, and the presence of statutory officers and directors is not "doing business." Further, Petitioner

[1] Respondent's Brief, p 18.

alleges that Respondent misunderstands the concept of a unitary business because it "is an apportionment concept, not a determination of nexus."[2]

In its response to Petitioner's Motion, Respondent reiterates its previous arguments and alleges Petitioner's nexus argument is frivolous. Respondent also contends that Petitioner does not qualify as a financial institution and argues there is no legal basis for allocating Petitioner's income utilizing the apportionment theory. Respondent argues the three factor formula does not apply because Petitioner engaged in "other business activities;" thus, an alternative method must be used. Lastly, Respondent asserts that because Petitioner's apportionment argument was not raised during the administrative process, it cannot be raised in this litigation.

On March 7, 2017, the Tribunal heard oral arguments to determine whether there are any outstanding issues of material fact in this case. The Tribunal has reviewed the Motions, responses, and the evidence submitted and finds that denying Respondent's Motion for Summary Disposition and granting Petitioner's Motion for Summary Disposition is warranted at this time. The Tribunal further finds the evidence presented supports Petitioner's stance that it did not have nexus with the City of Detroit and was, therefore, not required to pay CDIT for the 2010 and 2012 tax years.[3] Additionally, the Tribunal finds that Respondent has not proven its Motion for Costs is warranted. Therefore, Respondent's Motion for Costs shall be denied.

[2] Petitioner's reply brief at 11.
[3] Petitioner's documentation refers to the 2011 and 2013 fiscal years. The Tribunal will refer to the tax years at issue as the 2010 and 2012 tax years throughout the Final Opinion and Judgment.

BACKGROUND

Huron is a private equity firm that invests in lower middle-market companies. Huron invests in existing companies by raising funds and using the funds to form limited partnerships. In 2004, Huron raised funds to form The Huron Fund II, LP ("Fund"). The general partner of the Fund is Huron Capital Partners GP II. In 2006, Huron identified a viable investment opportunity and recommended to the Fund that it should invest in Labstat International, ULC ("Labstat"), a Canadian company. Petitioner was created during the acquisition of Labstat to hold the Fund's investment in Labstat.

In 2010, Labstat paid a dividend to Petitioner and Petitioner filed a CDIT return and paid 1% CDIT on the income. The transaction giving rise to the assessment of CDIT in 2012 was the sale of Labstat to Alaris Royalty Corp. On June 6, 2012, Petitioner sold its interest in Labstat which resulted in gain and dividends to Petitioner. Petitioner filed a City of Detroit income tax return and reported the 2012 gains and dividend income from the sale of Labstat. Petitioner remitted $69,140 in CDIT for the fiscal year ending April 30, 2011. In July 2012, an estimated tax voucher was remitted in the amount of $319,000 for CDIT for the fiscal year ending April 30, 2013.

In March 2015, Petitioner received a Proposed Assessment from Respondent concluding that Petitioner had nexus with the City of Detroit and owed an additional 1% CDIT, interest, and penalties for 2010 and 2012 resulting from dividends and capital gains received. On April 1, 2015, Petitioner objected to the Proposed Assessment by letter arguing that it does not conduct business within the City of Detroit. After the parties conducted discovery, on February 12, 2016, Respondent issued a second Notice of Proposed Assessment asserting Petitioner's liability for income tax, assessed interest and penalty. Petitioner requested a refund of CDIT paid through its

2012 income tax return and amended 2010 income tax return and Respondent issued an Audit Letter denying the refund claim on March 17, 2016. As a result, Petitioner filed an appeal with the Tribunal on April 15, 2016.

PETITIONER'S CONTENTIONS

In support of its Motion, Petitioner contends that because it lacks the requisite nexus with the City, it does not owe CDIT for the 2010 and 2012 tax years. Petitioner requests cancellation of all CDIT, interest and penalties imposed by the City of Detroit and further argues it is entitled to a refund of taxes paid because: (i) Petitioner does not have sufficient nexus with the City to subject it to CDIT, (ii) alternatively, if it is determined that Petitioner has nexus, then it is exempt from CDIT tax as it qualifies as a "financial institution," and (iii) in the alternative, if Petitioner is found to have nexus, and does not qualify as a "financial institution," Petitioner argues instead that its income is subject to apportionment resulting in zero income apportioned to the City of Detroit.

Petitioner contends that during the original audit by the City of Detroit, only a perfunctory review of federal and state tax returns and documents from the internet was completed in order to determine Petitioner had nexus with the City. However, Petitioner argues when looking at the totality of the circumstances, Petitioner lacks the necessary nexus with the City because it does not have a physical presence in the City, and its contacts "are de minimis and do not rise to the level necessary to create nexus."[4] In his affidavit, David S. Reynolds, CFO of Huron, testified that Petitioner "made no sale of goods or services within the City . . . [nor were there any] employees in the City." Further, Petitioner did not "maintain an office in the City, nor hold any real or tangible personal property . . . [Petitioner] never conducted business in

[4] Petitioner's Motion at 14.

the City, nor engaged in business activity in the City."[5] Petitioner further contends that its only income for the tax years at issue, the dividend income and gain from the sale of Labstat, was income resulting from the passive holding of Labstat's stock and not the result of any active business activity on Petitioner's part. Additionally, the statutory standard requires a substantial nexus; however, Petitioner did not have a physical presence, nor did its activities solicit sales. Further, Petitioner argues there could be no physical presence in the City of Detroit because it had no employees or an office in the City, sold no goods or services in the City, and its sole purpose was to passively hold Labstat's stock and debt.

Petitioner further argues that the presence of officers or directors is insufficient to create nexus, as it requires more than "mere performance of perfunctorily administrative activities and other ministerial functions perfunctory performed by fiduciaries . . . [and] it has not been established that any such actions . . . were completed in the City."[6] Petitioner also explains it used a Detroit address on its tax returns merely for administrative convenience and not because it actually possessed a business office in the City of Detroit.

Next, Petitioner asserts in the alternative that it is exempt from CDIT because it qualifies as a "financial institution," and, as a result, its net profits are exempt under MCL 141.632(g). Petitioner states for the 2010 tax year, its only asset was Labstat shares, which is intangible property, and its gross income "consisted solely of a dividend it received" as a result of its ownership of Labstat shares. Regarding the 2012 tax year, Petitioner sold its stock to a Canadian purchaser, and Petitioner contends it "held the net proceeds from the sale . . . delivered to a shareholder's . . . account . . . and the balance was treated as capital gain."

[5] Affidavit of David S. Reynolds.
[6] Petitioner's Motion at 16.

Alternatively, if the Tribunal determines that Petitioner has nexus, and does not qualify as a financial institution, Petitioner argues that its income is subject to apportionment. Petitioner contends that it is a holding company created to possess the legal title to the Labstat stock and debt. Petitioner contends that it had "no 'property' in the City, either real or tangible . . . no 'compensation [was] paid to employees' in the City . . . no 'sales made in the city,' [rather the] only 'sale' was Labstat stock in Canada, [as] the Labstat stock was delivered to the purchaser in . . . Canada."[7] Finally, Petitioner argues that "the sales factor is applicable, with the gross revenue from the sale of the Labstat stock included in the denominator, and zero in the numerator."[8] [Emphasis omitted.]

Petitioner filed a reply brief in response to Respondent's Motion for Summary Disposition. In opposition of Respondent's Motion, Petitioner states: (i) it was not "doing business" in the City, and (ii) Respondent misunderstands the concept of a unitary business. Petitioner contends that incidental activities do not constitute "doing business" and "commercial domicile" is a statutorily defined term, and as a passive holding company, Petitioner "is not engaged in an active trade or business that requires a physical location." Petitioner reiterates that use of the City of Detroit address for tax reporting also does not constitute "doing business" in the City of Detroit; rather, it was for administrative convenience. Further, the "statutory officers and directors were employed by Huron, and . . . [their] activities . . . were performed on behalf of, and at the specific direction of Huron." Petitioner maintains that Huron directed their duties, and paid them for their services. Additionally, any activities that the officers and directors performed on behalf of the Petitioner, "such as the execution of ministerial fiduciary functions,

[7] Petitioner's Motion at 26-27.
[8] *Id.* at 27.

were done so at the direction of Huron." Regarding the fiduciary duty, Petitioner argues, "Michigan courts have recognized that the performance of incidental services performed on behalf of a company does not create an in-state physical presence sufficient to impose tax." [Emphasis omitted.] Additionally, Petitioner contends that Respondent's reliance on Louisiana law which has no precedential value here.

Petitioner rebuts Respondent's reliance on the unitary business principle by clarifying that it is an apportionment concept and not a mechanism to establish nexus. Petitioner further contends that there are no economies of scale between Petitioner and Huron and "the CITA [City Income Tax Act] does not contain the unitary concept."

Petitioner also filed a response to the City's supplemental brief arguing that Respondent is "attempting to raise a new argument two years after issuing its first proposed amendment." Petitioner argues the apportionment argument was pled in its Petition, Pre-Hearing Statement, Motion for Summary Disposition, and its reply to Respondent's Motion for Summary Disposition. Petitioner argues that Respondent's "claim for 100% apportionment to the City ignores the delivery of the share certificate to the buyer in Canada, . . . [and] the testimony of multiple deponents that the administrative activities by Petitioner's officers occurred in multiple locations."

RESPONDENT'S CONTENTIONS

Respondent's Motion for Summary Disposition is predicated on its belief that Petitioner was doing business and had nexus to the City of Detroit. First, Respondent argues that Petitioner's commercial domicile was in the City, as this was where Petitioner managed its business and had a business office. Respondent argues that Petitioner's commercial domicile is not Delaware because it has no office in Delaware and paid no Delaware income tax;

Respondent claims it is telling that Petitioner only paid tax in the State of Michigan and neither in Delaware or Canada, where Labstat was located. Respondent claims that Petitioner's officers, directors and other agents actively managed the business in Detroit. Respondent further argues that Petitioner paid Huron $1 million for services occurring in the City and Petitioner and its unitary business affiliates enjoyed City of Detroit services.

In the alternative, Respondent states that even if Petitioner was domiciled out of state, Petitioner's activities in the City of Detroit exceed those required for nexus. Respondent cites RAB 2014-5 which defines physical presence. Under this definition, Respondent argues that Petitioner had agents in the City of Detroit conducting activities (the negotiation and closing of the sale of Labstat) on its behalf. Thus, Respondent states that its "agents acting in a representative capacity," physical presence created nexus with the City of Detroit.

Respondent states that Petitioner's argument that taxation is prohibited under the Due Process and the Commerce Clause of the United States Constitution is inapplicable because "those provisions are designed to protect interstate commerce, avoid double taxation and protect entities from taxation,"[9] without minimum contacts. Respondent claims these issues do not exist in this case and nexus is not precluded where Petitioner's commercial domicile and physical presence was within the taxing jurisdiction.

Finally, Respondent argues that nexus is also established because Petitioner was part of Huron's Detroit unitary business; thus, 100% of Petitioner's income would be attributable to the City of Detroit.

Respondent also contends based on email correspondences, Petitioner "made exactly the same nexus argument for avoidance of state tax that [Petitioner] now makes for avoidance of

[9] Respondent's Brief at 19.

[C]ity tax . . . [Petitioner] paid its full state tax liability and has never requested a refund."[10] In support of its contention, Respondent references Petitioner's 2012 State of Michigan tax return where Petitioner indicated "that 100% of its business is in the [S]tate of Michigan." Respondent argues that when it questioned Petitioner after the "alleged discovery of the 'nexus mistake,' [that] it never requested a state tax refund . . . [Petitioner stated] that it 'relied on the advice of its accounting firm.'"

Respondent filed a reply brief in response to Petitioner's Motion for Summary Disposition. In opposition of Petitioner's Motion, Respondent reaffirms its position and adds that Petitioner never made the apportionment request, nor the exemption claim as a "financial institution," prior to the litigation. Further, both arguments are unsound. Regarding nexus, Respondent asserts that Petitioner did not maintain an office in Delaware and there is no evidence its officers or directors were ever located in or managed the business from Delaware. Additionally, Petitioner's Delaware filings even use the City of Detroit address as Petitioner's business address.

Respondent further contends that Petitioner does not qualify as a "financial institution" because it fails the 90% income test for the 2012 CDIT because only 55% of Petitioner's income arose from dividends or interest. Respondent argues that Petitioner's capital gains do not constitute "other charges resulting from the use of money;" thus, it does not contribute to meet the 90% threshold. Further, Petitioner does not qualify as a "financial institution" for the 2010 CDIT this year cannot be "viewed in isolation . . . [and] an entity must consistently meet the 90/90 test to be considered a 'financial institution'."[11]

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[10] On April 10, 2017, Petitioner submitted documentation indicating that the State of Michigan had issued a refund of Petitioner's state tax. Petitioner maintains that the State "has concurred in the lack of nexus and has issued refunds in full."

[11] Respondent's reply brief at 10.

Respondent also contests Petitioner's apportionment claim arguing there is no evidence that business activity was conducted outside the City of Detroit. Thus, because there was no activity conducted within and outside the City, apportionment does not apply and all income is entirely attributable to the City of Detroit. Respondent states that *if* apportionment applies, the activity at issue, the sale of Labstat, was "other business activity" and the capital gains and dividends were generated by Petitioner's management which was conducted in the City of Detroit. Therefore, Respondent argues, that the apportionment factor is 100% and Petitioner's income should be wholly attributable to the City of Detroit.

Respondent also filed a Motion for Sanctions, Costs and Attorney Fees along with its Motion for Summary Disposition. Respondent contends that although it initially assessed a 10% negligence penalty, it believes a 100% fraud penalty is warranted based on the evidence presented. Additionally, Respondent asserts Petitioner's frivolous nexus argument warrants costs, attorney fees and sanctions. In support of its contention, Respondent asserts that Petitioner's nexus argument is not "well grounded in fact" in light of the fact that every document identified by Petitioner shows its principal place of business was in the City of Detroit.

Lastly, Respondent asserts that Petitioner's conduct "has been designed to 'harass or to cause unnecessary delay or needless increase in the cost of litigation.' [including when Petitioner] filed a motion for more definite statement[s]."[12] Respondent asserts that Petitioner, "at all times had all relevant documents and direct access to all witnesses with knowledge of Apex's Detroit activities."[13] [Emphasis omitted.] Further, Petitioner's Motion to Compel Deposition was "a complete waste of time. [Petitioner's] counsel had all [the] facts and simply

[12] Respondent's brief at 28.
[13] *Id.*

wanted to argue legal definitions of nexus with these non-attorney witnesses."[14] Additionally, Petitioner's "wrongful conduct carried over to the City's deposition of [Nicholas] Barker and [Brian] Demkowicz."[15]

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.[16] In this case, both Petitioner and Respondent move for summary disposition under MCR 2.116(C)(10).

Summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[17] In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under (C)(10) will be denied.[18]

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.[19] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[20] The

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[14] *Id.*
[15] *Id.*
[16] See TTR 215.
[17] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).
[18] See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).
[19] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[20] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[21] 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.[22] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[23]

CONCLUSIONS OF LAW

The assessment at issue was imposed under Detroit City Code, Part III, Chapter 18, Article X, Ordinance Section 18-10-5(c), which incorporates the City Income Tax Act, MCL 141.501 *et seq*. The CDIT applies to "the taxable net profits of a corporation doing business in the city, being levied on such part of the taxable net profits as is earned by the corporation as a result of work done, services rendered and other business activities conducted in the city."[24]

MCL 141.605 provides that "'doing business' means the conduct of any activity with the object of gain or benefit, except that it does not include:

(a) The solicitation of orders by a person or his representative in the city for sales of tangible personal property, which orders are sent outside the city for approval or rejected, and if approved, are filled by shipment or delivery from a point outside the city.

(b) The solicitation of orders by a person or his representative in the city, in the name of or for the benefit of a prospective customer of a person, if orders by the customer to such person to enable the customer to fill orders resulting from the solicitation are orders described in paragraph (a).

(c) The mere storage of personal property in the city in a warehouse neither owned nor leased by the taxpayer.

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[21] *Id.*
[22] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[23] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[24] See MCL 141.614.

First, the Tribunal must determine whether Petitioner was "doing business" as defined by MCL 141.605. The primary goal of statutory interpretation is to give effect to the Legislature's intent.[25] "When the plain and ordinary language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted."[26] Further, the CITA specifies that, "the words, terms and phrases set forth in [section 5] and their derivations *have the meaning given therein*."[27] (Emphasis added.)

The Tribunal finds that Petitioner was created to hold Labstat's stock and debt and this activity, even though passive, is "any activity" under MCL 141.605. Next, the Tribunal must determine whether Petitioner's activity was conducted with the objective of gain or benefit. Prior to the formation of Petitioner, Huron "identified an investment opportunity in Labstat . . . [and] recommended to the Fund to acquire . . . shares of Labstat."[28] Petitioner was then formed to "maximize its investment."[29] These statements show Petitioner was formed with the objective of gain or benefit. Ultimately, Petitioner "received a dividend due to its stock holding in Labstat."[30] Further, "[t]he sale of [Petitioner's] interest in Labstat resulted in gain and return of capital to [Petitioner]."[31] As such, the Tribunal finds that Petitioner was "doing business" under MCL 141.605 and that the exceptions enumerated in sections a through c are not applicable to the facts of this case.

The remaining issue to be resolved is whether Petitioner was doing business *in the City of Detroit*. Respondent must establish a connection, or nexus, between Petitioner and the City of

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[25] *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).
[26] *Moshier v Whitewater Twp*, 277 Mich App 403, 407; 745 NW2d 523 (2007).
[27] MCL 141.602.
[28] Affidavit of David S. Reynolds.
[29] *Id.*
[30] *Id.*
[31] *Id.*

Detroit to justify the imposition of CDIT. The United States Supreme Court in *Quill Corp v North Dakota*,[32] held that "[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'"[33] Plainly, there must be some physical presence established in order for Petitioner to be subjected to tax. It is undisputed that in Michigan substantial nexus is required before one is subjected to taxation in this State.[34] Substantial nexus will be found if "the activities performed in [the] state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in [the] state."[35] Here, Respondent must show "some minimum connection" or physical presence between the City of Detroit and the transaction it seeks to tax, the sale of the Labstat shares. Respondent claims that nexus is established because: (i) Petitioner's commercial domicile was in the City, (ii) Petitioner had a physical presence in the City, and (iii) Petitioner was part of a unitary business with Huron.

First, Respondent contends that nexus is established because Petitioner's commercial domicile was in the City of Detroit. Respondent cites to MCL 206.6(1) contending that "[t]he universally accepted definition of 'commercial domicile' is 'the principal place from which the trade or business of the taxpayer is directed or managed."[36] Petitioner counters that Respondent fails to mention that the definition of commercial domicile "is a statutorily defined term, and not 'a universally accepted definition,' . . . [nor is] this defined term . . . contained in the Act at issue, the [CITA]."[37] While it is true that "commercial domicile" is not defined in the CITA, the parties

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[32] *Quill Corp v North Dakota*, 504 US 298, 306; 112 SCt 1904 (1992).
[33] *Quill* at 306.
[34] Though the CITA does not reference or define "nexus" or "substantial nexus" the parties refer to the prior Michigan Business Tax and Corporate Income Tax statutes as guides. See MCL 208.1200, MCL 206.621(1), RAB 2014-5.
[35] *Tyler Pike Industries Inc v Wash State Dept. of Rev*, 483 US 232, 250; 107 SCt 2810 (1987).
[36] Respondent's Brief in Support of its Motion for Summary Disposition at 16.
[37] Petitioner's Reply Brief to Respondent's Motion for Summary Disposition at 4-5.

have utilized definitions for other relevant terms (e.g. nexus) from other tax statutes which are relatable to city income taxes. Further, even though Respondent refers to the definition of "commercial domicile" as a "universally accepted definition," Respondent was referring to the definition contained in the Michigan Income Tax Act which, the Tribunal finds, is an applicable definition. Nevertheless, the Tribunal does not find the phrase "commercial domicile" relevant to the determination of whether Petitioner has nexus with the City of Detroit. This term refers to the principal place a business is directed or managed. The Tribunal agrees with Petitioner that as a passive holding company, Petitioner does not engage in an active trade or business that requires either a physical location or express direction or management.

Additionally, Petitioner contends that Respondent failed to cite any relevant Michigan case law to support its contention. Respondent did, however, cite *Kevin Associates LLC v Crawford*[38] in support of its argument. In *Kevin Associates*, a Delaware corporation, K & B, Inc. had three subsidiaries, including Yendis Properties ("Yendis"), which was also incorporated in Delaware.[39] Yendis was a holding company formed to hold stock of the subsidiaries and to provide loans.[40] The Louisiana Department of Revenue assessed corporate income and franchise tax against Yendis. Yendis maintained it was not subject to tax in Louisiana because its only sources of income were dividends paid to it by its subsidiaries and it did not conduct business within Louisiana. The Department countered that Yendis' commercial domicile was in Louisiana because corporate records and managerial decisions were made in Louisiana, the office in Delaware was merely a mailing address, and board and director activity was carried out in Louisiana.[41] The Louisiana Supreme Court stated "under Louisiana income and franchise tax

[38] *Kevin Associates LLC v Crawford*, 865 So 2d 34 (2004).
[39] *Id*. at 2.
[40] *Id*.
[41] *Id*. at 7.

statutes . . . the income and capital at issue in this case is allocable to the commercial domicile of the taxpayer."[42]

Respondent contends that Petitioner maintained significantly more activity with the City than the taxpayer in *Kevin Associates*. However, the Tribunal finds that *Kevin Associates* is not applicable to the instant case and Respondent's reliance on *Kevin Associates* is unsubstantiated. Importantly, Louisiana case law has no precedential value in Michigan, and although it may be considered persuasive, the Louisiana Supreme Court specifically stated that application of the commercial domicile concept was an exception to the general rule and the decision was made "under Louisiana income and franchise tax statutes."[43] Thus, this case is distinguishable to the facts at hand as *Kevin Associates* relates to Louisiana-specific laws that have not been proven to be relevant to Michigan law. In conclusion, Respondent has not proven that Petitioner's "commercial domicile" is located in the City of Detroit to justify the imposition of CDIT under this rationale.

The Tribunal must next determine whether Petitioner had a physical presence in the City of Detroit sufficient enough to establish nexus. Both parties agree that physical presence is a key component in establishing nexus; however, physical presence is not defined in the CITA. Both parties rely upon the statutory definition of "physical presence" found in the Michigan Income Tax Act and the Tribunal finds this definition relevant to this case. MCL 206.621(2)(b) defines "physical presence" as:

> any activity conducted by the taxpayer or on behalf of the taxpayer by the taxpayer's employee, agent, or independent contractor acting in a representative capacity. Physical presence does not include the activities of professionals providing services in a professional capacity or other service providers if the activity is not significantly associated with the taxpayer's ability to establish and maintain a market in this state.

[42] *Id.* at 39-40.
[43] *Id.*

Respondent focuses on the definition's mention of activities conducted on behalf of the taxpayer by the taxpayer's agent. Respondent claims the activities of Petitioner's officers and directors, which were purportedly conducted in Petitioner's Detroit office, and the contracted consulting services utilized during the sale of Labstat is sufficient physical presence under the above-referenced definition. Petitioner asserted that the mere presence of officers and directors does not create nexus, rather the activities of those officers and directors establishes whether substantial nexus has been created. The evidence shows that the referenced activities were performed at the direction of and on behalf of Huron or Labstat, rather than Petitioner. Mr. Brian Demkowicz testified during deposition that the officers and directors were employed by Huron and their conduct was directed by Huron.[44] Mr. Nicholas Barker, a partner at Huron, testified at deposition "[a]ll of my direction, and the reason I was doing what I was doing, was based on direction from . . . Huron."[45] Mr. Reynold's further testified that Petitioner "did not direct or control, or cause to be directed or control, the activities of Labstat."[46] Michael Beauregard, a partner at Huron, testified at deposition that, "[w]e did not meet on behalf of [Petitioner]. We met on behalf of Labstat."[47] During the deposition of Nicholas Barker, he testified that "I would review [the documents] as an employee of Huron Capital. I didn't think of myself . . . acting in a role for [Petitioner.]"[48]

Petitioner's use of professional consultants does not establish physical presence in the City. MCL 206.621(2)(b) expressly excludes the activities of professionals providing services if those services are not significantly associated with the taxpayer's ability to establish and

[44] Deposition of Brian Demkowicz 32: 1-3.
[45] Deposition of Nicholas Barker 13:19-21.
[46] *Id.*
[47] Deposition of Michael Beauregard 15: 9-10.
[48] Deposition of Nicholas Barker 10: 14-17.

maintain a market in this state. Additionally, the presence of Petitioner's officers and directors does not create Petitioner's physical presence in the City as it was proven that the activities completed by the board and directors in the City of Detroit were at the direction and control of Huron and not Petitioner. Again, Petitioner's primary activity was holding the shares and debt of Labstat and the conduct of the officers and directors, as directed by Huron, were incidental to Petitioner's primary activity.

Further, as supported by the evidence, Petitioner was not engaged in the sale of goods or services in the City, nor was it engaged in an active trade or business as a passive holding company. As Petitioner's representative stated at oral argument, "[t]here was [also] no connection between the activities that gave rise to the income, [the sale of Labstat share] and anything with the City of Detroit." Rather, Petitioner's income came from the activities of Labstat which is not attributable to Petitioner and does not constitute a physical presence in the City of Detroit. Finally, the Tribunal does not find Petitioner's use of a City of Detroit address as its mailing address on its federal income tax returns, a physical presence to establish nexus with the City. The Tribunal finds that Petitioner's reasoning that the City of Detroit was listed for administrative convenience convincing.

Finally, Respondent contends that Petitioner had nexus with the City because Petitioner was part of Huron's unitary business group that was based in the City of Detroit. Respondent cites RAB 2014-5 arguing that "[s]o long as one member of a unitary business group has nexus with Michigan, all members of the unitary business group must be included when calculating the taxpayer's corporate income tax base and apportionment formula."[49] Respondent's reliance on RAB 2014-5 is flawed; the above quoted language indicates that only one member of a unitary

[49] Revenue Admin Bull 2014-5.

business group must have nexus with Michigan to include all members when calculating the group's tax base and apportionment formula. This bulletin in no way specifies that when one member of a unitary business group has nexus with Michigan, then nexus is imputed to all members of the group.

The unitary business principle is an apportionment concept and not a method to determine nexus. The Tribunal finds Respondent's reliance on the unitary business concept misplaced as the CITA does not address that concept, nor does it provide language that allows the unitary business concept to create a nexus link to a corporation. Accordingly, the Tribunal rejects Respondent's argument that nexus can be established if Petitioner is part of Huron's unitary business.

Finally, since the Tribunal has determined that Petitioner did not have nexus with the City, and therefore is not subject to CDIT, the Tribunal need not address Petitioner's alternative arguments: (i) if the Tribunal determines Petitioner does have nexus, it would be exempt as it qualifies as a "financial institution," or (ii) in the alternative, if Petitioner has nexus and does not qualify as a "financial institution," the taxable income should be apportioned. Lastly, the Tribunal finds that Petitioner properly raised the alternative apportionment argument in its Petition, as required by TTR 227. Further, Respondent provided no authority requiring waiver of the claim if Petitioner did not raise it during the administrative process. Therefore, Petitioner's claim was not waived.

In Respondent's Motion for Costs, it asserted that while it initially assessed a 10% negligence penalty against Petitioner, based on the evidence, Respondent requests the Tribunal assert a 100% fraud penalty. The Tribunal finds as a result of the cancellation of the assessment at issue, neither a negligence nor fraud penalty is warranted. Finally, Respondent asserts that

Petitioner's objection to the nexus argument was frivolous and not "well grounded in fact," as such Respondent requests costs, sanctions and attorney fees. Based on the determination that Petitioner did not have nexus with the City of Detroit, the Tribunal finds that Petitioner's nexus argument was "well grounded in fact;" thus, Respondent has not shown good cause for an imposition of costs, sanctions and attorney fees.

For the reasons set forth above, the Tribunal concludes that the parties have proven that no genuine issues of material fact remain regarding whether Petitioner is responsible for CDIT for the tax periods at issue. The Tribunal finds that granting Petitioner's Motion for Summary Disposition and denying Respondent's Motion for Summary Disposition is appropriate as Petitioner has proven it had no nexus with the City of Detroit to justify the assessment of CDIT on the dividends and gains at issue in this appeal. Though Petitioner was "doing business," under the broad definition contained in MCL 141.605, Petitioner had no physical presence or minimum connection to the City of Detroit. Therefore, the Tribunal finds the assessment is cancelled and a refund of the taxes, interest and penalties is warranted. As a result, Respondent's Motion for Costs shall be denied.

JUDGMENT

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

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

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

IT IS FURTHER ORDERED that the CDIT Assessment is CANCELLED.

IT IS FURTHER ORDERED that Respondent shall issue a refund of the taxes paid by Petitioner within 35 days of entry of this Final Opinion and Judgment.[50]

[50] See MCL 141.693(3).

This Final Opinion and Judgment resolves the last pending claim and closes the 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.[51] 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.[52] 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.[53] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[54]

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."[55] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on

[51] See TTR 261 and 257.
[52] See TTR 217 and 267.
[53] See TTR 261 and 225.
[54] See TTR 261 and 257.
[55] See MCL 205.753 and MCR 7.204.

appeal.[56] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[57]

By _____Steven H. Lasher_____

Entered: May 2, 2017
pr/sms

[56] See TTR 213.
[57] See TTR 217 and 267.