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

JMS Packaging Inc,
Petitioner,

v

MTT Docket No. 14-005001

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H Lasher

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner filed this appeal disputing Final Assessment No. TK68840 on May 23, 2014. The assessment was issued on April 28, 2014, following Respondent's denial of the small business credit claimed on Petitioner's 2007 Single Business Tax return.

Following the filing of a Joint Stipulation of Facts and Exhibits, the parties filed cross-motions for summary disposition on September 15, 2015. In the motions, which were filed pursuant to MCR 2.116(C)(10), each party contends that they are entitled to judgment as a matter of law because there are no genuine issues of material fact with respect to the validity of the assessment or Petitioner's eligibility for the claimed credit. Responses to the motions were filed on October 10, 2015 and October 12, 2015, respectively.

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner's small business credit was properly denied, as a corporation is not eligible to claim the credit if compensation paid to an officer exceeds $115,000. Petitioner is a professional employer organization that paid as compensation, $178,914.55 to Kristopher Moulds, and $160,614.55 to Michael Jones, as officers of JM Industries, its sole client. Petitioner is the employer of Moulds and Jones and all compensation paid to them was correctly attributed to Petitioner, as any allocation or separation of control in the Client Service Agreement is ineffective and illusory. Petitioner and JM Industries are under common control in that Moulds and Jones are incorporators, officers, and controlling shareholders of each.

PETITIONER'S CONTENTIONS

Petitioner contends that Respondent's disallowance of the small business credit was improper, as it is inconsistent with the plain language of the Client Services Agreement and the federal income and single business tax returns filed, as well as applicable case law. Petitioner and JM Industries are not under common control within the meaning of the Single Business Tax Act, as no one person owns or controls more than 50% of the total combined voting power of all classes of stock. Moulds and Jones, though compensated by Petitioner, are employees of JM Industries, and all compensation paid to them is properly attributed to the same.

STIPULATED FACTS

1. Petitioner is a Michigan Domestic Profit Corporation incorporated on January 5, 2005, by Kristopher Moulds, its Resident Agent, and Michael Jones. The Registered Office Address is: 26300 Bunert, Warren, MI 48089.

2. Petitioner filed Articles of Incorporation on December 17, 2004.

3. Shareholders of Petitioner corporation are Steven Summers (420 shares-21.0%), Michael Jones (790 shares-39.5%), and Kristopher Moulds (790 shares-39.5%).

4. Petitioner filed a Federal Form 1120S 2007 U.S. Income Tax Return for an S corporation with the United States Internal Revenue Service.

5. Petitioner filed a Michigan Form C-8000 2007 Michigan Single Business Tax Annual Return with the Michigan Department of Treasury.

6. Petitioner maintains its books and records on the accrual basis utilizing a double entry system where business transactions are recorded as they occur.

7. Petitioner's federal and state tax returns were prepared based upon its books and records and accounting systems.

8. Petitioner is a "professional employer organization" as that term is defined in the Single Business Tax Act, Act 228 of 1975, as amended at MCL 208.4(4).

9. Petitioner is a "captive employee leasing company" in that employees are leased to a single entity, JM Industries, Inc.

10. Petitioner pays wages and employment taxes of its employees out of its own accounts and reports, collects, and deposits state and federal taxes for its employees.

11. JM Industries, Inc. is a Michigan Domestic Profit Corporation incorporated on April 19, 1990 by Kristopher Moulds, its Resident Agent, and Michael Jones. The Registered Office Address is: 26300 Bunert, Warren, MI 48089.

12. JM Industries filed Articles of Incorporation on April 11, 1990.

13. The shareholders of JM Industries adopted the By-Laws of JM Industries, Inc. on March 30, 1990.

14. Officers and shareholders of JM Industries are President-Treasurer, Kristopher Moulds (50%) and Vice President-Secretary, Michael Jones (50%).

15. JM Industries filed a Federal Form 1120S 2007 U.S. Income Tax Return for an S Corporation with the United States Internal Revenue Service.

16. JM Industries filed a Michigan Form C-8000 2007 Michigan Single Business Tax Annual Return with the Michigan Department of Treasury.

17. JM Industries maintains its books and records on the accrual basis utilizing a double entry system where business transactions are recorded as they occur.

18. JM Industries' federal and state tax returns were prepared based upon its books and records and accounting systems.

19. JM Industries leases employees from Petitioner pursuant to a Client Service Agreement executed in February of 2005.

20. Pursuant to Section VI of the JMS Packaging, Inc. Client Service Agreement, JM Industries paid to Petitioner, $3,445,072.43 in 2007.

21. JM Industries accounted for the service fees paid to Petitioner in its books and records as follows:

Account Number	515	$60,038.20	Labor-Production
Account Number	520	$839,367.24	Labor-Shipping
Account Number	525	$201,152.71	Labor-Drivers
Account Number	530	$108,853.61	Taxes-Payroll
Account Number	580	$105,178.93	Insurance-Health
Account Number	615	$353,940.00	Wages-Officer
Account Number	620	$738,802.63	Wages-Sales
Account Number	625	$765,570.58	Wages-Office
Account Number	630	$158,652.93	Taxes-Payroll
Account Number	680	$95,413.62	Insurance-Health
Account Number	640	$2,740.00	Auto Expense
Account Number	646	$4,989.85	ADP Processing Fee
Account Number	646	$10,372.13	Administration Fee
TOTAL		$3,445,072.43	

22. Kristopher Moulds was paid wages by Petitioner in the amount of $186,120 in 2007. Such wages were reported on Federal Form W-2 along with the required federal and

Michigan income tax withholding, social security, medicare and retirement plan withholding.

23. Michael Jones was paid wages by Petitioner in the amount of $167,820 in 2007. Such wages were reported on Federal Form W-2 along with the required federal and Michigan income tax withholding, social security, medicare and retirement plan withholding.

24. Petitioner received by USPS a Single Business Tax Annual Return Notice of Adjustment dated December 20, 2011. The notice computed additional Single Business Tax due in the amount of $28,287.00 plus interest of $5,470.13 for a total amount due of $33,757.13.

25. Petitioner requested and was granted an Informal Conference. The Informal Conference was heard in Dimondale, Michigan on November 14, 2012 before Sherry Hilpert, Hearing Referee.

26. Sherry Hilpert, Hearing Referee, issued her Informal Conference Recommendation recommending "the department maintain Intent to Assess TK68840 for tax in the amount of $28,287.00 and interest which is determined in accordance with 1941 PA 122.

27. Respondent issued a Decision and Order of Determination dated March 26, 2014 ordering "the proposed deficiency covering the period appearing on the respective notice of Intent to Assess TK68840 shall be assessed as originally determined for tax in the amount of $28,287.00 and interest to be computed in accordance with 1941 PA 122."

28. Respondent issued a Final Bill for Taxes Due (Final Assessment) Number TK68840, dated April 28, 2014, in the amount of tax $28,287.00 plus updated interest of $8,174.22 for a total due of $36,461.22.

29. Petitioner filed its timely Petition with the Tax Tribunal on May 23, 2014.

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition; thus the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[1]

MCR 2.116(C)(10) provides for summary disposition when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."[2] The Michigan Supreme Court, in *Quinto v Cross and Peters Co*,[3] provided the following explanation of MCR 2.116(C)(10):

> MCR 2.116 is modeled in part on Rule 56(e) of the Federal Rules of Civil Procedure . . .[T]he initial burden of production is on the moving party, and the

[1] See TTR 215.
[2] *Id.*
[3] *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996) (citations omitted).

> moving party may satisfy the burden in one of two ways.
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> First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*. at 361-363. (Citations omitted.)

In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied.[4]

CONCLUSIONS OF LAW

At issue, in this case, is whether the compensation paid by Petitioner to Kristopher Moulds and Michael Jones, as officers of JM Industries, must be considered in determining Petitioner's small business credit under the Single Business Tax Act ("SBTA").

The Single Business Tax ("SBT") was a tax that was repealed by P.A. 2006, No. 325, §1. It was imposed "upon the adjusted tax base of every person with business activity in this state . . . ."[5] The SBT tax base included compensation paid,[6] which meant "all wages, salaries, fees, bonuses, commissions, or other payments made in the taxable year on behalf of or for the benefit of employees, officers, or directors of the taxpayers."[7] Further,

[4] *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).
[5] MCL 208.31(1).
[6] MCL 208.9(5).
[7] MCL 208.4(3).

> For tax years that begin after December 31, 2003, for purposes of determining compensation of a professional employer organization, **compensation includes payments by the professional employer organization to the officers and employees of an entity whose employment operations are managed by the professional employer organization.** Compensation of the entity whose employment operations are managed by a professional employer organization does not include compensation paid by the professional employer organization to the officers and employees of the entity whose employment operations are managed by the professional employer organization. As used in this subsection, 'professional employer organization' means an organization that provides the management and administration of the human resources and employer risk of another entity by contractually assuming substantial employer rights, responsibilities, and risk through a professional employer agreement that establishes an employer relationship with the leased officers or employees assigned to the other entity by doing all of the following:
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> (a) Maintaining the right of direction and control of employees' work, although this responsibility may be shared with the other entity.
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> (b) Paying wages and employment taxes of the employees out of its own accounts.
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> (c) Reporting, collecting, and depositing state and federal employment taxes for the employees.
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> (d) Retaining the right to hire and fire employees.[8]

Taxpayers could claim a credit against the tax imposed under MCL 208.31, except that "[a]n individual, a partnership, or a subchapter S corporation is disqualified if the individual, any 1 partner of the partnership, or any 1 shareholder of the subchapter S corporation receives . . . more than $115,000.00 for tax years commencing after December 31, 1997 as a distributive share of the adjusted business income minus the loss adjustment of the individual, the partnership, or the subchapter S corporation."[9] MCL 208.36(7) also provided that "[a]n affiliated group as defined in this act, a controlled group of corporations as defined in section 1563 of the internal revenue code and further described in 26 CFR 1.414(b)-1 and 1.414(c)-1 to 1.414(c)-5, or an entity under common control as defined by the internal revenue code shall not take the credit allowed by this section unless the business activities of the entities are consolidated."[10]

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[8] MCL 208.4(4) (emphasis added).

[9] MCL 208.36(2)(a).

[10] *Id*. An affiliated group was defined by the Single Business Tax Act ("SBTA") as "2 or more United States corporations, 1 of which owns or controls, directly or indirectly, 80% or more of the capital stock with voting rights of the other United States corporation or United States corporations." MCL 208.3(1). The Internal Revenue Code defines a "controlled group of corporations" as follows: "(1) Parent-subsidiary controlled group.--One or more chains of corporations connected through stock ownership with a common parent corporation if—(A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d) (1)) by one or more of the other corporations; and (B) the common parent corporation owns (within the meaning of subsection (d) (1)) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of

Respondent acknowledges that Petitioner and JM Industries do not meet the definition of entities under common control for single business tax purposes, which under its interpretation requires a finding of an 80% controlling interest by shareholders common to each entity, [11] but contends that to find a 1% technicality determinative would be to completely disregard the substance of any interaction between Petitioner and JM Industries in favor of form, given the rights that majority shareholders hold under the Michigan Business Corporations Act, MCL 405.1101 *et seq*. Respondent contends that in substance, Moulds and Jones, as incorporators, officers and controlling shareholders of each entity, have ultimate control over both Petitioner and JM Industries and therefore any allocation or separation of control in the Client Services Agreement is ineffective and illusory. [12] As a result, the presumption under MCL 208.5 is determinative and dictates that the compensation be reported by the entity responsible for paying wages and withholding payroll taxes, i.e., Petitioner. The Tribunal disagrees, and as will be explained below, finds that applicable case law supports a finding that the compensation of Moulds and Jones is properly attributed to JM Industries, and not Petitioner.

Petitioner is, as noted by Respondent, prima facie deemed to be the employer of Moulds and Jones under MCL 208.5(2).[13] Consequently, it bears the burden of rebutting that presumption and establishing that JM Industries was Moulds' and Jones' employer. In an attempt to do so, Petitioner relies primarily on the language of the Client Services Agreement and the Michigan Court of Appeal's holding *Mid America Management Corp v Dep't of Treasury*,[14] which was based on the common law principle of control. *Mid America* was cited and relied upon by the Tribunal in a number of cases dealing with the issue of compensation and employee leasing companies within the context of the SBTA, including *McCartney Enterprises, Inc v Dep't of Treasury*.[15] In that case, McCartney Enterprises had signed a contract with Orbis Management Group, an unrelated employee leasing company. Michael McCartney was the sole shareholder and only member of the Board of Directors of McCartney Enterprises, and he also managed the

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shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations. (2) Brother-sister controlled group.--Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2)) stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation. (3) Combined group.--Three or more corporations each of which is a member of a group of corporations described in paragraph (1) or (2), and one of which--(A) is a common parent corporation included in a group of corporations described in paragraph (1), and also (B) is included in a group of corporations described in paragraph (2)." 26 USCA 1563(a).

[11] RAB-89-48.

[12] The Client Services Agreement provides as follows: "The officers of the Client, including but not limited to, Kristopher Moulds and Michael Jones, are to be solely under the control and direction of the Client, and any and all duties they perform are solely for the benefit of the Client. Furthermore, all of the daily duties, employee functions, managerial duties, and officer functions of the above named officers are for the benefit of the Client, and the work they perform is value added to the Client, NOT for the benefit of JMS. As such, all compensation paid to the above mentioned officers of the Client is for the work performed for the Client and therefore allocated to the Client. JMS will be responsible for hiring separate employees for the management, operation, and performance of the day to day duties at JMS." *Id*.

[13] MCL 208.5(2) provides: "'Employer' means an employer as defined in section 3401(d) of the internal revenue code. A person required to withhold for federal income tax purposes shall prima facie be deemed an employer."

[14] *Mid-America Mgt Corp v Dep't of Treasury*, 153 Mich App 446; 395 NW2d 702 (1986).

[15] *McCartney Enterprises, Inc v Dep't of Treasury*, 16 MTTR 447 (2006).

business fulltime. The Tribunal found, that although Mr. McCartney was an employee of Orbis, he controlled the relationship because he had the ability to contract with the company, and thus he received compensation from himself:

> In no practical way does Orbis direct any aspect of Mr. McCartney's actions as owner and president of his business. Mr. McCartney has complete control of the terms of his employment under the contract with Orbis. He can cancel the contract with Orbis. He sets his own hours. He sets his own pay. He decides what customers to work for and provides the tools to do the work. Petitioner went so far as to state that Mr. McCartney spent his time managing landscaping jobs. That is, he operates his business like any other owner. Orbis cannot discharge Mr. McCartney from his business. As applied to Mr. McCartney, no risks of any employment have been transferred to Orbis. Under *Mid America*, Mr. McCartney received compensation from himself.[16]

Consequently, the Tribunal found that Mr. McCartney's compensation should be included on the SBT return of his own business, McCartney Enterprises, and not that of Orbis. *McCartney* was declared precedential for purposes of defining whether certain compensation to a leased employee should be included in calculating the single business tax based of the lessee entity on November 3, 2006.[17] It served as the basis of the Tribunal's decision in *Associate Resources Inc v Dep't of Treasury*,[18] wherein it was held that the operating company, and not the PEO, was the entity to which officer compensation was attributable. Petitioner, the PEO, leased employees to three different operating companies; two of which were 100% owned by Mark A. Thompson. Mr. Thompson was also a 70% owner of the PEO, which paid his compensation. The Tribunal found the facts of *McCartney* indistinguishable and concluded that Associate Resources did not have sufficient control over Mr. Thompson, who devoted the majority of his work to the operating company, to establish an employer-employee relationship.

In *Adamo Demolition Co v Dep't of Treasury*,[19] however, the Tribunal found its decision in *McCartney* inapposite, as the assessment at issue in that case predated the enactment of MCL 208.4(4).[20] The Department had allocated to Adamo Demolition, compensation paid to Richard M. Adamo, its sole shareholder and president, by Mancorp, Inc. and E Connect, Inc. ("ECI") under co-employment and PEO services agreements. In holding that Mancorp and ECI both qualified as PEOs, and that the compensation paid to Mr. Adamo should be allocated to the same for purposes of the SBT, the Tribunal rejected the Department's argument that *Herald Wholesale* was distinguishable. It noted that if neither Mancorp nor ECI met the requirements of a PEO, with respect to Adamo's sole shareholder because neither company could fire him as the

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[16] *Id.*
[17] See MCL 205.765.
[18] *Associate Resources Inc v Dep't of Treasury*, 19 MTT 541 (2011).
[19] *Adamo Demolition Co v Dep't of Treasury*, 22 MTT 1 (2012).
[20] *Id.* Notwithstanding this finding, and the fact that all prior cases were decided based upon the test set forth in *Mid-America*, the Tribunal noted in *McCartney* that the result may be the same under MCL 208.4(4): "Subsection 4 does not sanction form over substance. The statute could not be more specific in precluding the use of a professional employer organizations under MCL 208.4 as a method of tax accounting . . . ." *Id.*

Department contended, the same argument would have had equal applicability to Herald Wholesale's officers, both of whom were employed by the PEO.[21] The Court of Appeals agreed:

> This Court's decision in *Herald Wholesale* heavily relied on the fact that the professional employer organization paid the corporation's officers solely for their management responsibilities, not for their actions in another capacity. In this case, the parties stipulated that Adamo's duties as officer and director of Adamo Demolition were minimal.
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> * * *
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> The Tribunal found that the service providers did not compensate Adamo as an officer or director of Adamo Demolition. There is no indication that Adamo's compensation was in any way related to his status as the owner of Adamo Demolition. Thus, we conclude that the facts in *Herald Wholesale* are analogous to the facts in this case because there is no evidence in the record that the service providers compensated Adamo for anything other than his managerial and administrative duties.[22]

The Court further held "that the service providers' ability to fire Adamo *as an owner* has no effect on the application of MCL 208.4(4), because the service providers could still fire Adamo *as an employee*."[23] It explained:

> The service providers compensated Adamo for his management and administrative services—not services as an owner—to Adamo Demolition. Nothing in the service providers' agreements indicates that they required Adamo Demolition's consent to hire or fire employees, including Adamo, or provided that they could not replace Adamo with someone else who would provide the same services. Similarly, the service providers' contracts did not exclude Adamo from the employees over whom they had the right to direct or control. Thus, the service providers complied with MCL 208.4(4) because they retained the right to fire Adamo, or the right to direct and control his work, *as an employee* providing administrative and management services.
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> The Department asserts that the service providers did not retain the right to fire Adamo because such an action would have no practical effect. According to the Department, even if fired, Adamo could continue his activities on behalf of Adamo Demolition. However, if the service providers fired Adamo, the practical effect would be that he would no longer be the employee of the service providers.

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[21] "The Court of Appeals in Herald Wholesale, a published decision, specifically held in its precise, unequivocal decision that: 'We hold, independently of the recently enacted amendment, that where the corporate officers received no compensation as officers and were compensated solely on the basis of their day-to-day management responsibilities, the SBTA, as in effect during the years at issue, does not require plaintiff to include in its SBT tax base the compensation paid by Amstaff to the officer—employees. The Court of Claims erred in upholding the SBT tax assessment on the basis that the managers mere status as corporate officers required that they be deemed employees of plaintiff for the purpose of calculating plaintiff's SBT tax base.'" *Adamo Demolition Co v Dep't of Treasury*, 22 MTT 1 (2012), citing *Herald Wholesale*, 262 Mich App at 691.

[22] *Adamo Demolition Co v Dep't of Treasury*, 303 Mich App 356, 364; 844 NW2d 143, 147-48 (2013).

[23] *Id*. at 364-365.

> They would no longer pay his compensation and withhold his federal income taxes. Thus, any compensation for his performance of the same activities would have to come from Adamo Demolition, not the service providers. In that circumstance, we would agree that Adamo's compensation would be properly attributable to Adamo Demolition. But that is not the circumstance of this case. Here, Adamo provided management and administrative services, and the service providers paid his compensation for providing those services.[24]

The Court also upheld the Tribunal's determination regarding the effect of ECI's service agreement, which delegated responsibility for the day-to-day supervision and control of the employees to Adamo Demolition, and disclaimed itself from "any liability, obligation or responsibility therefore whatsoever."[25]

> MCL 208.4(4)(a) allows a professional employer organization to share 'the right of direction and control of employees' work . . . .' The question here is whether E–Connect's contractual language entirely disclaimed the right to direct and control employees' work or whether it shared that right with Adamo Demolition. The Tribunal concluded that E–Connect's disclaimer effectively shared the right to direct and control employees' work. We agree with the Tribunal's conclusion.
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> Under the plain language of the contract, E–Connect disclaimed only responsibility 'for the *day-to-day* supervision and control' of the employees. E–Connect did not disclaim the right to direct and control employees' nondaily activities, and specifically held rights concerning major employment decisions that did not concern daily activities, such as hiring, firing, discipline, and grievance handling. As a result of the contracts, the service providers were responsible for several significant employment responsibilities, including employees' payroll, tax withholding, benefits, records, insurance, and employment policies. These responsibilities come with significant potential liabilities. We conclude that the Tribunal did not err when it concluded that E–Connect's disclaimer indicated that it and Adamo Demolition *shared* rights to direct and control employees' work, with Adamo Demolition supervising and controlling the employees' daily activities and E–Connect supervising and controlling the employees' nondaily activities.[26]

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[24] *Id*. at 365.

[25] "Although Respondent argues that the PEO Services Agreement releases ECI of any substantial employer risk and any right to direct or control the employee's work, Respondent fails to recognize that the statute specifically provides that the responsibility of maintaining the right of direction of employee's work can be shared with Petitioner . . . . Furthermore, while the PEO Services Agreement states that ECI does not and shall not have any liability, obligation or responsibility therefore whatsoever, that language applies to the day-to-day- supervision and control of the Co-Employees. ECI still remains responsible for providing human resource administration and payroll administration to covered employees, including responsibility for all employment and unemployment decisions and/or actions that arise in the day-to-day operations." *Adamo Demolition Co v Dep't of Treasury*, 22 MTT 1 (2012).

[26] *Adamo Demolition*, 303 Mich App at 366-67 (citation omitted).

The affidavits of Moulds and Jones suggest that the compensation paid to them was related to their management responsibilities, as opposed to their actions in another capacity, i.e., as owners of JM Industries,[27] and JM Industries appears to have retained control only over the day-to-day "duties, employee functions, managerial duties, and officer functions" of its officers under the Client Services Agreement, leaving Petitioner responsible for most major employment decisions and responsibilities. Thus, it would appear under both the Tribunal and the Court of Appeal's holdings in *Adamo Demolition*, discussed above, that the compensation is properly attributable to Petitioner. The Tribunal finds, however, that the facts in this appeal are distinguishable from those in *Adamo Demolition*, as well as all of the other cases discussed above, and are more akin to those in *B L Rentals, Inc v Dep't of Treasury*.[28] At issue in that case was whether compensation paid to Brian DeDoes by B L Rentals Management ("Management") had to be considered in determining B L Rental's eligibility for the small business tax credit. Mr. DeDoes was the president and sole employee of Management, which was owned by a third party, but had been incorporated by DeDoes as a way to allocate his salary among several Michigan corporations. "Through his employment with Management, DeDoes provided overall management for [B L Rentals] and the other two corporations. Petitioner paid a management fee to Management, which covered administrative costs, wages, and other benefits for DeDoes. Management paid DeDoes' compensation, and it withheld his federal and state income taxes."[29] In concluding that the compensation was not reportable in the tax base of the management company, the Tribunal reasoned as follows:

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[27] The affidavit of Kristopher Moulds, which was filed in conjunction with Petitioner's Motion for Summary Disposition, states as follows: "I was an employee of JM Industries, Inc. in 2007 and devoted my entire working day to my duties as President of JM Industries, Inc. My responsibilities at JM Industries, Inc. were as follows: Handle all matters at the corporate level; attended and hold periodic meetings with corporate advisors including consultants, attorneys, and accountants; Meet with attorneys as necessary over contracts and purchase orders. Revise companies' terms and conditions to protect the corporate interests. Develop process to meet the requirements of the lien laws to protect the companies' receivables; meet with accountants over various accounting matters, including record keeping, inventory control and valuation, tax planning, reporting, and equipment acquisitions lease versus buy; purchasing all insurance including general liability, auto insurance, equipment insurance, Inventory, machinery, tools and equipment; Meet with various banking and lending institutions and supply them with their required information. Negotiate loans as needed; represent JM at various industry trade organizations meetings; daily review of sales posted, open orders, back orders, delivery options; inventory status report review. Study the inventory turnover by product and product category. Anticipate orders based on the trends in these orders. Work with the General Manager on purchases of materials for stock; explore transportation options as it pertains to freight on incoming and outgoing materials; institute computer networking with corporate clients to meet their requirements. Continue to work on website development; handle all corporate matters; meet with customers to insure their requirements and needs are being met. Institute procedural changes to meet or exceed the customers' JM and expectations. Attend various meetings with related organizations to promote business; attend and hold meetings with other officers and employees in charge of various areas of the company's business; meet with accounting personnel to review billing matters and receivable matters. Make contact with customers' accounts payable or job superintendents to expedite payments." *Id*. The affidavit of Michael Jones states: "My responsibilities as Vice-President of JM Industries, Inc. were as follows: Meet with consultants; meet with attorneys; meet with accountants; represent JM at various industry trade organizations meetings; daily review of operations; order processing, inventory control and shipping; training; assist the president in all corporate matters; sales; manage billing and receivable collections." *Id*.

[28] *B L Rentals, Inc v Dep't of Treasury*, 13 MTT 187 (2004).

[29] *B L Rentals, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2006 (Docket No. 257578).

> As President and corporate officer of B L Rentals, Inc., Mr. DeDoes has sole control over what services are to be performed, what results are to be accomplished along with the details and means to accomplish them. Mr. DeDoes, as President of B L Rentals, Inc., has the right to discharge the leased management (himself) of B L Rentals Management from performing the services. Mr. DeDoes, as President and sole officer of B L Rentals, Inc., had indistinguishable control over the hiring, firing, recruiting, disciplining, and establishing the wages of the sole management leased employee (himself), President and sole officer of B L Rentals Management, who received the only remuneration for those services. There were no other corporations B L Management provided services for other than Brian DeDoes' three corporations. Brian DeDoes, as President and sole officer of B L Rentals, Inc., paid himself as President and sole officer of B L Management, compensation for the work as the President of B L Rentals, Inc., who had been paid and was entitled to receive compensation as President of B L Rentals, Inc. The Tribunal finds no distinction between the time spent as Brian DeDoes, President and officer of B L Rentals, Inc., and Brian DeDoes, President, officer and employee of B L Rentals Management. B L Rentals, Inc., with full control over the leased employee of B L Rentals Management, should be considered as the common law employee and officer of B L Rentals, Inc.[30]

The Tribunal's determination was upheld by the Michigan Court of Appeals in an unpublished opinion.[31] In discussing the applicability of *Herald Wholesale v Dep't of Treasury*,[32] the Court noted that it had rejected the Department's assessment in that case due to the rebuttable presumption created by MCL 208.5(2):

> The same presumption applies here, and its rebuttal depends on who had the right to direct and control DeDoes. Because Management withheld DeDoes' federal and state income taxes, respondent had the burden of rebutting the presumption that Management, and not petitioner, was DeDoes' SBTA employer . . . . Unlike the situation in *Herald Wholesale,* DeDoes created Management 'for administrative convenience . . . 'as a way to allocate [his] salary among the other business entities that he was involved in,' as a common paymaster rather than employee leasing.' Management was neither created, nor operated, as a human resources management company. DeDoes had sole control over both petitioner and Management. He had the right to allocate his resources as he saw fit, including discharging the ostensibly leased management services. There was no distinction between DeDoes, as president and officer of petitioner, and DeDoes, as president, officer and employee of Management. As the MTT noted, contrary to *Mid America*, *supra,* and *Herald Wholesale*, *supra,* 'where the owners and companies involved in both ends of the leasing of employees were separate and

[30] *B L Rentals, Inc v Dep't of Treasury*, 13 MTT 187 (2004).
[31] *B L Rentals, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2006 (Docket No. 257578).
[32] *Herald Wholesale v Dep't of Treasury*, 262 Mich App 688; 687 NW2d 172 (2004).

> distinct from those leased employees, the case at hand involves one person associated with and as both lessee and lessor.'[33]

Although Petitioner was both created and operated as a professional employer organization and human resources management company, Moulds and Jones are associated with both lessee and lessor. And, as in the case of *B L Rentals*, the Tribunal finds no distinction between Moulds and Jones, officers and sole shareholders of JM Industries, and Moulds and Jones, officers, majority shareholders, and "employees" of Petitioner. This is true, notwithstanding that Steve Summers is both an officer and minority shareholder of Petitioner, because as noted by Respondent, "Corporations are controlled by their directors and those who, under the articles of incorporation, have the right to select them."[34]

JUDGMENT

Given the above, the Tribunal finds that there is no genuine issue of material fact with respect to the validity of the assessment at issue in this appeal or Petitioner's eligibility for the small business credit. Moulds and Jones, though compensated by Petitioner, are employees of JM Industries, and all compensation paid to them is properly attributed to the same. Petitioner is entitled to judgment as a matter of law. Therefore,

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

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

IT IS FURTHER ORDERED that Final Assessment TK68840 is CANCELLED.

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.

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[33] *B L Rentals, Inc. v. Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2006 (Docket No. 257578) (citations omitted).
[34] *City of Ann Arbor v Univ Cellar, Inc*, 401 Mich 279, 286; 258 NW2d 1 (1977).

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 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]

Entered: February 24, 2016 By: Steven H. Lasher
ejg

[35] See TTR 261 and 257.
[36] See TTR 217 and 267.
[37] See TTR 261 and 225.
[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.