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

Four Zero One Associates LLC,
Petitioner,

v

MTT Docket No. 15-005330

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On October 27, 2015, Respondent filed a Motion requesting the Tribunal to enter summary disposition in its favor in the above-captioned case. In support of its Motion, Respondent contends that Petitioner is disqualified from claiming the Michigan Business Tax ("MBT"), Small Business Alternative Credit ("SBAC") for the 2008 tax year because Lawrence F. DuMouchelle ("LFD"), a shareholder and officer of Petitioner, received a $30,000 bonus from Petitioner during 2008, which raised his compensation above the $180,000 statutory threshold for Petitioner to receive the credit for the 2008 tax year.[1]

On November 17, 2015, Petitioner filed a response to the Motion. In its response, Petitioner contends that the statutory definition of what may be included as "compensation"[2] for a given tax year is ambiguous and the rules of statutory construction require that Petitioner's method of accounting be taken into consideration in determining whether or not the bonus should be included as compensation for the 2008 tax year. Therefore, because Petitioner applies the

[1] See MCL 208.1417(1)(b)(*i*).
[2] See MCL 208.1107(3).

accrual method of accounting and reported and deducted the $30,000 bonus in the 2007 tax year, the bonus should not be considered compensation to LFD in 2008; thus, LFD's compensation did not exceed $180,000 for the 2008 tax year.

On February 29, 2016, oral arguments were held on Respondent's Motion. Respondent was represented by Eric M. Jamison, attorney, and Petitioner was represented by Gregory A. Nowak, attorney.

The Tribunal has reviewed the Motion, response, and the evidence submitted and finds that granting Respondent's Motion for Summary Disposition is warranted.

RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends that "[t]here is no dispute that LFD is a shareholder and officer of [DuMouchelle Art Galleries ("DAG")] and LFD received more than $180,000 in compensation in the 2008 tax year."[3,4] Respondent argues that "[t]he Legislature specifically identified six types of remuneration that if made in the tax year on behalf of, or for the benefit of officers, constitute compensation for the purposes of the [Michigan Business Tax ("MBT")] and qualification for the [SBAC]."[5] Respondent further argues that "[t]he Legislature further explained that depending on a taxpayer's method of accounting for federal tax purposes, compensation could also include payments to a pension, retirement, or profit sharing plan."[6] Respondent contends that the "compensation at issue is a $30,000 bonus received [by LFD] in 2008, and is not compensation derived from a pension, retirement or profit sharing plan . . . [and] [a]s evidenced by the statutory definition, the meaning of bonus, plainly does not take into

[3] Petitioner is the owner of DAG and is the designated member of a unitary business group of which DAG is a member.
[4] Respondent's Brief at page 6.
[5] See MCL 208.1107(3).
[6] *Id*.

consideration a taxpayers method of accounting."[7] [Emphasis omitted.] Respondent further contends that:

> The language occurring later in the definition of compensation does take into consideration a taxpayer's method of accounting but is limited to pension, retirement or profit sharing plan payments . . . [therefore] [t]he Legislature clearly knew how to include language regarding a taxpayer's method of accounting, but it chose not to include such language related to compensation from bonuses.[8]

Respondent argues that "[t]he taxpayer's method of accounting is immaterial as it relates to whether a bonus paid to LFD should be included in calculating compensation for the 2008 tax year . . . [and] [m]oreover, Treasury's FAQ's support the plain language of the statute."[9]

Alternatively, Respondent cites a Michigan Supreme Court case for the proposition that if the qualifying language for receiving the credit is clear and does not conflict with Legislative intent as expressed in the statute, then Respondent's interpretation is entitled to respectful consideration.[10] Specifically, Respondent contends that the Tribunal should:

> apply the same reasoning [from *Younkin*] to the facts in this case because Treasury's interpretation of the statute is consistent with the plain language of the statute at issue. The operative statutory language indicates that compensation includes bonuses and other payments made in the tax year . . . [and] if a shareholder or officer received more than $180,000 in compensation, the taxpayer was disqualified from claiming the [SBAC]. Treasury's interpretation is consistent with the language of the statute. LFD received a bonus in 2008, which when added with other compensation he received, was more than $180,000 thus disqualifying [P]etitioner from the credit. Accordingly, Treasury denied the credit. The qualifying language for the credit is clear and does not conflict with the Legislature's intent as expressed in the language of the statute – Treasury's interpretation is entitled to respectful consideration.

During oral argument, Respondent stated that "in this case . . . the legislature was very clear that in relation to a bonus . . . the accounting method was not required to be taken into account."

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[7] Respondent's Brief at page 7.
[8] *Id*. at pages 7 and 8.
[9] Respondent's Brief at page 8.
[10] See *Younkin v Zimmer*, 497 Mich 7, 857 NW2d 244 (2014).

Respondent further argued that if there is any ambiguity in the statute, the ambiguity should be read in favor of the Treasury, because it's a tax credit case. Respondent also argued that the "absurd results" rule should not apply because the statute at issue is not truly ambiguous. Respondent, citing a Michigan Supreme Court decision, argued that a "provision is not ambiguous just because reasonable minds can differ regarding the meaning of [the] provision. Any good lawyer can find a difference in the definition of a statute."[11]

PETITIONER'S CONTENTIONS

In support of its response, Petitioner contends that it "is entitled to the SBAC because it fulfilled all the requirements of the SBAC for the 2008 tax year as provided under MCL 208.1417(1)."[12] Petitioner states that the "present dispute arises from Treasury's endeavor to assign a $30,000 bonus deducted and reported by [Petitioner] in the 2007 tax year to the 2008 tax year in an attempt to increase the amount of compensation paid to a shareholder above the $180,000 threshold."[13] Petitioner argues that its Amended MBT Return reflects that the compensation paid to [LFD] was deducted by Petitioner based on the accrual method of accounting; and therefore, this method of accounting is the proper measure of compensation for purposes of the SBAC.[14,15] Petitioner alleges that the language in MCL 208.1107(3) "gives no direction regarding whether the cash or accrual method applies to the measurement of compensation, thus creating an ambiguity that requires resort to the rules of statutory construction in order to prevent an absurd result."[16] Petitioner further alleges that:

> Treasury misquotes [MCL 208.1107(3)] to include only the first passage ending "directors of the taxpayers" as if the sentence ended there, and omits the remaining

[11] See *People v Gardner*, 482 Mich 41, 753 NW2d 78 (2008).
[12] Petitioner's Brief at page 3.
[13] *Id*. at page 4.
[14] See MCL 208.1417(1)(b).
[15] Petitioner's Brief at page 5.
[16] *Id*.

> portion of the sentence which continues "and any earnings that are net earnings from self-employment as defined under section 1402 of the internal revenue code of the taxpayer or a partner or limited liability company member of the taxpayer." This passage is critical since it makes it clear that the phrase "payments made in the tax year on behalf of employees, officers, or directors of the taxpayers" modifies the phrase "other" payments only, and does not apply to "wages," "salaries," "fees," "bonuses," or "commissions." The Department's hearing officer similarly attached misplaced significance to the term "made in the tax year" to indicate it applied to wages and bonuses, when in fact that phrase only modifies "other payments." Consequently, the statute on its face is ambiguous and Petitioner contends that the rules of statutory construction compel the conclusion that compensation must be measured based on the method of accounting utilized by the Taxpayer.[17]

Petitioner argues that "the rules of statutory construction compel the conclusion that compensation must be determined based on the taxpayer's method of accounting . . . to avoid absurd results by ensuring consistency with the business income adjustment under MCL 208.1417(1)(b)(ii)(B)."[18] Petitioner further argues that:

> MCL 208.1417(1)(b)(ii)(B) includes a proportionate share of the adjusted business income of the corporation as an element of the $180,000 limiter. There is a need for consistency in the use of the taxpayer's accounting method to measure both compensation and the business income adjustment to avoid the potential for the same income being counted twice in the limitation calculation. Since compensation paid to a shareholder is a deduction that reduces the business income of a corporation, the failure to use the same accounting method to measure both compensation and business income could result in compensation being deducted from business income in one year but being attributed to a later year when received on a cash basis, resulting in a mismatch in the total compensation measurement. [19]

Petitioner alleges that "the reference in MCL 208.1107(3) to the accounting method as it relates to payments to pension, retirement, and profit sharing plans has independent significance and does not require the conclusion that the taxpayer's method of accounting for bonuses should not be considered."[20] Petitioner further alleges that:

> Treasury argues that because the legislature makes reference to payments to a pension, retirement, or profit sharing plan being included "on a cash or accrual basis

[17] *Id.*
[18] *Id*. at page 6.
[19] Petitioner's Brief at page 6.
[20] *Id*. at page 7.

> consistent with the taxpayer's method of accounting," this indicates that the taxpayer's method of accounting is not taken into consideration with respect to other elements of compensation. [Emphasis omitted.] This argument ignores the fact that this provision refers to "payments" which would lead one to conclude that the cash method is mandated for such items, thus necessitating the clarification that they are included based on the taxpayer's method of account. Since the terms, "wages," "salaries," "fees," "bonuses," and "commissions" are used without the phrase "payments" this clarification was not necessary. Indeed if the contrary is true, and if the legislature intended for these items to be included on a cash basis in all cases it would have used the terms "payments for" or some similar phrase to indicate that the cash method was mandated. Instead, consistent with the measurement of distributive income and other benefits these items must be determined based on the taxpayer's method of accounting to avoid absurd results.

Lastly, Petitioner contends that the rule of respectful consideration does not entitle Treasury to deference in regard to the incorrect and absurd interpretation of a statute.

During oral argument, Petitioner's attorney argued that "the statute . . . does not tell us whether or not . . . bonuses . . . are intended to be based on a payment, cash methodology, or an expense to the corporation."[21] Petitioner's attorney further argued that, in his opinion, the legislature drafted the MBT looking at the former Single Business Tax ("SBT") which was drafted a certain way because of the compensation "add-back" feature and that the language from the SBT was carried over and is the identical language in the MBT. Respondent alleged that:

> In the later part of the statute, the reference to other employee benefits, which are items that might be deducted by the company one year and not paid for ten years, was specified perhaps because – those are the kind of items that would have been, you know, a current year item. The accrual method for a business was specified to make it clear, but that does not indicate that the method was not to be applied in the context of these other items. So, in our view, this potential distortion is not . . . an absurd result. It's not necessary to resort to the absurd results doctrine but rather as a guide to interpreting the legislature's intent. It's appropriate for the [T]ribunal to consider the implications of any interpretation of language, try to determine the meaning of the words; wages, salaries, fees. It does not say on a cash basis, it does not mandate cash basis.[22]

[21] Oral Hearing Transcript, page 10 lines 23-25 and page 11 lines 1-3.
[22] *Id*. at page 15 lines 5-22.

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.[23] In this case, Respondent moves for summary disposition under MCR 2.116(C)(10). 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."[24] The Michigan Supreme Court, in *Quinto v Cross and Peters Co*,[25] 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 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

[23] See TTR 215.
[24] *Id*.
[25] *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). (Citations omitted.)

> opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[26] (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.[27]

CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion under MCR 2.116(C)(10) and finds that granting the Motion is warranted. The Tribunal finds that no genuine issues of material fact exist and for the reasons explained below the assessment shall be affirmed. The only issue to be determined relates to the interpretation of MCL 208.1107(3).

MCL 208.1417(1)(b)(*i*) states that "[a] corporation . . . is disqualified [from receiving the SBAC] . . . for the respective tax year . . . [if] [c]ompensation . . . of a shareholder or officer exceed $180,000." The statutory construction of MCL 208.1417(1)(b)(*i*) is not at issue. Rather, at issue, is whether the definition of "compensation," pursuant to MCL 208.1107(3), is ambiguous because the first sentence of the section does not expressly consider a taxpayer's method of accounting when discussing specified forms of compensation but, in the third sentence of the section, the taxpayer's methods of accounting is to be considered with regards to other specified forms of compensation. The courts have held that "[w]hen interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature." [28] "The first step when interpreting a statute is to examine its plain language, which provides the most reliable evidence of [legislative] intent."[29] "If the language of a statute is clear and unambiguous, the statute must be enforced as written

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[26] *Id*. at 361-363.
[27] *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).
[28] *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).
[29] *People v McKinley*, 496 Mich 410, 415; 852 NW2d 770 (2014), quoting *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014).

and no further judicial construction is permitted."[30] When an ambiguity does indeed exist, we may "go beyond the statutory text to ascertain legislative intent."[31] A provision of the law is not ambiguous just because reasonable minds can differ regarding the meaning of the provision.[32]

As previously mentioned, the only issue to be determined involves the statutory interpretation of MCL 208.1107(3). Specifically, did the Legislature, in drafting the section, intend that a taxpayer's method of accounting be considered only with regard to the certain types of compensation listed in the third sentence of the section or, did they intend that the taxpayer's method of accounting be considered with regard to the compensation listed in the first sentence, even though they did not expressly include reference to it in that sentence. In order to determine the Legislature's intent, the Tribunal compared the repealed SBT, the current MBT, and numerous bill drafts of the MBT.

Under the SBT, which was repealed by P.A. 2006, No. 325, § 1, "compensation" is defined at MCL 208.4(3) and the first sentence defined "compensation" to include "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." [Emphasis added.] The third sentence of the SBT contained the language referring to a taxpayer's method of accounting and stated, in relevant part, that "compensation, also includes, *on a cash or accrual basis* consistent with the taxpayer's method of accounting for federal income tax purposes . . . payments to a pension, retirement, or profit sharing plan. . . . [33] [Emphasis added.]

Michigan implemented the MBT in 2008 to replace the SBT. "Compensation" is defined at MCL 208.1107(3), and the first sentence of this section defines "compensation" to include "all

[30] *Whitman*, 493 Mich at 311.
[31] *Id*. At 312.
[32] *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008).
[33] See MCL 208.4(3).

wages, salaries, fees, *bonuses*, commissions, other payments *made in the tax year* on behalf of or for the benefit of employees, officers, or directors of the taxpayers, and any earnings that are net earnings from self-employment . . . .” [Emphasis added.] The third sentence of this section contains the language referring to a taxpayer’s method of accounting and states, in relevant part, that “[c]ompensation also includes, *on a cash or accrual basis* consistent with the taxpayer's method of accounting for federal income tax purposes, payments to a pension, retirement, or profit sharing plan . . . .” [Emphasis added.]

The Tribunal finds that the Legislature, in drafting the first sentence of MCL 208.1107(3), intended that “compensation,” for a given tax year, include bonuses paid by a taxpayer to a shareholder or officer *during that year*. The Tribunal compared the same sentence in the SBT and MBT and the only difference between the two sentences is that in the SBT, the first sentence ended after “for the benefit of employees, officers, or directors of the taxpayers.” When the Legislature drafted the MBT, it did not change the language it used in the first sentence of the SBT, but, it did add other types of compensation that were to be included by a taxpayer if paid during a given tax year. Specifically, the Legislature intended that the definition of “compensation” also include “other payments made in the tax year on behalf of or for the benefit of employees, officers, or directors of the taxpayers . . . .” Admittedly, the Legislature could have clarified the first sentence by adding the word “or” before “other payments made;” however, this omission does not render the entire section ambiguous so as to require judicial interpretation. Additionally, the Tribunal finds that the lack of reference to the taxpayer’s method of accounting in the first sentence was intentional. The Tribunal compared the SBT,

various bill drafts of the MBT, and the MBT, and found that all documents are consistent in that they do not refer to a taxpayer's method of accounting in the first sentence.[34]

The Tribunal further finds that the Legislature, in drafting the MBT, intended that the taxpayer's method of accounting was only to be considered with regards to the type of compensation listed in the third sentence of the current section.[35] The Tribunal once again compared the SBT, various bill drafts of the MBT, and the MBT, and found that a taxpayer's method of accounting is consistently only referred to in the third sentence. The only difference between the two sentences in the SBT and the MBT is that the Legislature omitted the parts of the third sentence from the SBT that discussed payments attributable to unfunded accrued actuarial liabilities, payments under the federal insurance contribution act and similar social insurance programs, payments, including self-insurance, for worker's compensation insurance, payments to individuals not currently working, and payments to dependents and heirs of individuals because of current or former labor services rendered by those individuals.

Therefore, the Tribunal finds that the language in MCL 208.1107(3) is clear and unambiguous as to when a taxpayer's method of accounting should be considered; and therefore, judicial interpretation is not necessary. Petitioner paid the $30,000 bonus to LFD in the 2008 tax year. Thus, the $30,000 bonus is considered compensation for the 2008 tax year, as defined by

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[34] There were six bill drafts of 2007 Michigan Senate Bill No. 94, which was the predecessor to MCL 208.1107(3). In the January 25, 2007, May 3, 2007, and June 19, 2007 bill drafts the first sentence of the definition of "compensation" was identical to the first sentence in the repealed MCL 208.4(3). In the May 23, 2007, June 19, 2007, July 5, 2007, and July 12, 2007 bill drafts, the first sentence was drafted to include the identical language used in the current statute. In all of the bill drafts, the only place that the Legislature expressly mentions that the taxpayer's method of accounting should be considered is the third sentence, which is the same as the repealed statute and the current statute.

[35] Petitioner argues that there will be an unbalanced matching of income and expense if a taxpayer's method of accounting is only considered with regard to the type of compensation listed in the third sentence of MCL 208.1107(3). However, the Tribunal finds that the statute is clear and unambiguous and that the Legislature intended that a taxpayer's method of accounting should be considered only for the types of compensation listed in the third sentence of the applicable statute.

MCL 208.1107(3). As such, Petitioner paid compensation to a shareholder or officer in an amount that exceeded the $180,000 threshold and, pursuant to MCL 208.1417 (1)(b)(*i*), Petitioner is disqualified from claiming the SBAC for the 2008 tax year.

JUDGMENT

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

IT IS FURTHER ORDERED that Intent to Assess Number TT36557 is AFFIRMED.

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.[36] 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.[37] 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.[38] Responses to motions for

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

reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[39]

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."[40] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[41] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[42]

By Steven H. Lasher

Entered: April 5, 2016
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[39] See TTR 261 and 257.
[40] See MCL 205.753 and MCR 7.204.
[41] See TTR 213.
[42] See TTR 217 and 267.