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IMPORTANT INFORMATION PERTAINING TO THE ISSUANCE OF PROTECTIVE ORDERS

The Tribunal issued MTT Newsletter 2021-14 on October 28, 2021, addressing its “new procedure” for the issuance of protective orders. As additional issues have arisen, this newsletter provides further clarification specifically relating to:

1. The acceptance of stipulations for entry of protective orders for both discovery and hearing purposes with no *in-camera* review.
2. The application of protective orders issued in a prior tax year appeal to a current tax year appeal for the same property.
3. Whether the failure to enter a protective order for one party, when the Tribunal has entered a protective order for another party, would be a violation of the state and U.S. constitutions.
4. The unconstitutional taking of a party’s property right in confidential information if no protective order is issued.
5. The filing of documents under seal (i.e., valuation disclosures, etc.) with no existing protective order for hearing purposes.

Issue No. 1: The requested acceptance of stipulations for entry of protective orders for both discovery and hearing purposes with no *in-camera* review.

Protection for Discovery Purposes

A stipulation for entry of protective order for discovery purposes is accepted with no *in-camera* review as the purported confidential information would not be filed with the Tribunal or, more specifically, “in the possession of” the Tribunal and, as such, that information would not be subject to disclosure under Freedom of Information Act (FOIA). See TTR 215, MCR 2.302(C)(8), and MCL 15.232(i) and 15.233(1).

If the parties do **not** stipulate to the entry of protective order for discovery purposes, the Tribunal will conduct an *in-camera* review to determine whether any or all of the information is confidential, as clearly required by the Michigan Court of Appeals in *Herald Co.* In that regard, the Tribunal’s authority is limited to the protection of confidential information **only** and, through the *in-camera* review process, the party seeking protection would have to either: (i) demonstrate that the entirety of each document offered contains only protectible confidential information or, more likely, (ii)

identify the specific confidential information on each page of each document for which protection is sought.

Protection for Hearing Purposes

If a stipulation for entry of protective order for discovery purposes has previously been granted, a second stipulation regarding the exact same confidential information is not required. However, since the parties now anticipate filing valuation disclosures containing confidential information or offering other documentation containing confidential information for admission at the hearing to be conducted in the case, an *in-camera* review would also be required, as indicated herein. Prior to the filing of valuation disclosures or any other documentation containing confidential information, the filing party or parties **must** file a Motion for Closed Session, as the Tribunal is precluded from conducting a portion of a hearing as a closed session to discuss confidential information **unless** that information is specifically protected by state or federal statute. In that regard, the conducting of an “open” session to discuss the information would naturally subject the information to public disclosure. Finally, the Tribunal will, if the Motion for Closed Session is granted, schedule an *in-camera* review **unless** an *in-camera* review was previously conducted in the case to consider the confidentiality of the information that is being offered for hearing purposes.

Issue 2: The requested application of protective orders issued in a prior tax year appeal to a current tax year appeal for the same property.

Each case stands on its own merits and an order in a prior case would have **no** applicability to any subsequent case unless provided by the Tribunal in the subsequent case, which would likely require a new *in-camera* review to verify that all of the information being offered in the subsequent tax year case is protectible, as provided by the law applicable to that case (i.e., amendments, etc.). Additionally, as discussed in MTT Newsletter 2021-14, the Tribunal did in the past misapply the decision rendered by the Michigan Court of Appeals in the *Herald Co* case and the application of an order in a prior case may continue that mistaken application.

Issue 3: Whether the failure to enter a protective order for one party, when the Tribunal has entered a protective order for another party, would be a violation of the state and U.S. constitutions (i.e., equal protection, etc.).

The issuance of a protective order is **not** dependent on the parties. Rather, the issuance of a protective order for discovery purposes is dependent on the parties' agreement, if any, and the information for which protection is sought. As for hearing purposes, the issuance of an order closing a portion of the hearing to discuss the information is dependent on the information for which protection is sought and whether that information or any portion thereof, if any, is specifically protected by state or federal statute.

Issue 4: The unconstitutional taking of a party's property right in confidential information if no protective order is issued.

The Tribunal is an administrative court and, as such, is subject to FOIA and the Open Meetings Act (OMA) unlike state courts. More specifically, the Tribunal is precluded from conducting a portion of a hearing as a closed session to discuss confidential information **unless** that information is protected by state or federal statute. See MCL 15.268(h). If the confidential information is **not** protected by state or federal statute **and** is **voluntarily** submitted to the Tribunal for hearing purposes, the Tribunal would be required by law to disclose that information. In that regard, the Tribunal does **not** dictate what information must be submitted for a party to meet their burden of proof. Rather, each party is responsible for determining what information they will submit to meet that burden.

Issue 5: The premature filing of documents under seal (i.e., valuation disclosures filed pursuant to a Prehearing General Call and Order of Procedure, etc.).

Documents or, more specifically, information filed under seal on the basis of confidentiality will be placed on the Tribunal's website for public viewing unless an order has been entered by the Tribunal protecting the disclosure of that information for hearing purposes.

Information Subject to a Protective Order for Discovery Purposes

The submission of "protected" information exchanged during discovery as evidence to be discussed during a closed portion of the hearing conducted in the case requires the submission of a motion for closed session **prior** to the filing of that information or, more specifically, the date for the filing and exchange of valuation disclosures and prehearing statements, as the granting or denial of that motion may impact a party's determination as to what information they will actually file (i.e., redacted or unredacted valuation disclosures, etc.).

Information not Subject to a Protective Order for Discovery Purposes

The submission of information that was **not** subject to a protective order for discovery purposes as evidence to be discussed during a closed portion of the hearing conducted in the case also requires the submission of a motion for closed session **prior** to the filing of that information, as the granting or denial of that motion may, as also indicated above, impact a party's determination as to what information they will actually file (i.e., redacted or unredacted valuation disclosures, etc.)

Additionally, an *in-camera* review will also be required to determine what specific information, if any, is protectible and the order granting a motion for closed session will provide dates for both the *in-camera* review and the filing and exchange of the information to be submitted.

Sincerely,

A handwritten signature in blue ink, appearing to read "Steven M. Bieda". The signature is fluid and cursive, with the first name "Steven" being the most prominent.

Steven M. Bieda
Chairperson, Michigan Tax Tribunal