

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

<u>Tab</u>	<u>Description</u>	<u>Bates-Stamped Document Range</u>
1.	MSC Order for Oral Argument on Respondent-Appellant's Application for Leave to Appeal	App'e. Appx. 000001-000002
2.	May 13, 2016 Correspondence from Lance Wilkinson	App'e. Appx. 000003-000005
3.	Wilkinson LinkedIn Post	App'e. Appx. 000006-000010
4.	<i>28 States Plus D.C. Require Combined Reporting for the State Court Income Tax</i> < https://www.cbpp.org/28-states-plus-dc-require-combined-reporting-for-the-state-corporate-income-tax > (accessed April 23, 2023)	App'e. Appx. 000011-000013
5.	Center on Budget and Policy Priorities, <i>Corporate Lobbyist's Case Against combined Reporting in New Mexico: A Rebuttal</i> < https://www.cbpp.org/research/corporate-lobbyists-case-against-combined-reporting-in-new-mexico-a-rebuttal > (accessed April 23, 2023)	App'e. Appx. 000014-000026
6.	Michigan Corporate Income Tax Financial Institutions and Insurance Companies Frequently Asked Questions ("FAQ"), No 9, https://www.michigan.gov/taxes/questions/cit/insurance/insurance-companies-financial-institutions-9--does-a-unitary-group-of-insurance-companies-have-to-f (last visited July 8, 2025)	App'e Appx. 000027-000028
7.	Petitioners' Supplemental Responses and Restated Objections for Nationwide Mutual Insurance Company Relative to Respondent, Department of Treasury's, First Set of Interrogatories and Requests for Production of Documents to Nationwide Agribusiness Insurance Company	App'e. Appx. 000029-000067
8.	RAB 2018-12	App'e. Appx. 000068-000083
9.	Respondent's Response to Petitioners' Interrogatories, Requests for Production, and Request to Admit	App'e. Appx. 000084-000125
10.	Michigan Court of Appeals Opinion	App'e. Appx. 000126-000134

11.	Timothy Pratschler Email	App'e. Appx. 000135-000137
12.	Transcript of Deposition of Lance Wilkinson	App'e. Appx. 000138-000260
13.	Affidavit of Kyle Shaner	App'e. Appx. 000261-000276
14.	2015 Intent to Assess	000277-000278
15.	Decision and Order of Determination and Informal Conference Recommendation	App'e. Appx. 000279-000284
16.	First Amended Petition	App'e Appx. 000285-000297
17.	Respondent Department of Treasury's Answer to Petition and Affirmative Defenses	App'e. Appx. 000298-000314
18.	Respondent's 08/04/2021 Errata Motion and Brief in Support for Summary Disposition	App'e. Appx. 000315-000336
19.	Proposed Opinion and Judgment	App'e. Appx. 000337-000355
20.	Final Opinion and Judgment of Tax Tribunal	App'e. Appx. 000356-000359
21.	<i>Soave v Dep't of Treasury</i> , __ Mich App __ (2024)	App'e. Appx. 000360-000370
22.	Treasury's Response in Opposition to Nationwide's Motion for Summary Disposition in Tax Tribunal	App'e. Appx. 000371-000393
23.	Nationwide's Motion for Summary Disposition in Tax Tribunal	App'e. Appx. 000394-000414
24.	Spreadsheets re Retaliatory Tax	App'e. Appx. 000415-000421
25.	<i>Schoening v Township of Orion</i> , No 253887, 2005 Mich App LEXIS 2201 (Sept 15, 2005)	App'e. Appx. 000422-000426
26.	<i>Winget v Dep't of Treasury</i> , Mich Tax Tribunal, issued April 4, 2007 (Docket No. 319852) (Per Curiam Order Denying Respondent's Motion for Summary Disposition (2007 Mich Tax LEXIS 14))	App'e. Appx. 000427-000438

27.	<i>Pars Ice Cream Co, Inc v Mich Dep't of Treasury</i> , Mich Tax Tribunal, issued June 28, 2011, (Docket No. 332949)	App'e. Appx. 000439-000460
28.	<i>Pars Ice Cream Co, Inc v Mich Dep't of Treasury</i> , No 305148, 2012 Mich App LEXIS 1579 (Aug 14, 2012)	App'e. Appx. 000461-000464
29.	MCL 206.611	App'e Appx. 000465-000466
30.	MCL 206.691	App'e. Appx. 000467-000468
31.	MCL 8.3b	App'e. Appx. 000469-000471
32.	MCL 206.680	App'e. Appx. 000472-000473
33.	MCL 206.607	App'e. Appx. 000474-000476
34.	MCL 208.1101	App'e. Appx. 000477-000478
35.	MCL 206.685	App'e. Appx. 000479-000480
36.	MCL 206.643	App'e. Appx. 000481-000482
37.	MCL 500.476a	App'e. Appx. 000483-000484
38.	MCL 206.635	App'e. Appx. 000485-000487
39.	MCL 206.637	App'e. Appx. 000488-000489
40.	MCL 206.641	App'e. Appx. 000490-000491
41.	MCL 206.693	App'e. Appx. 000492-000493
42.	MCL 205.21	App'e. Appx. 000494-000498

43.	MCL 205.8	App'e. Appx. 000499-000500
44.	MCL 24.207	App'e. Appx. 000501-000503
45.	Michigan Tax Tribunal Register of Actions	App'e. Appx. 000504-000510
46.	Appellee Brief in the Michigan Court of Appeals	App'e. Appx. 000511-000556
47.	Michigan Corporate Income Tax Financial Institutions and Insurance Companies Frequently Asked Questions ("FAQ"), No 8, https://www.michigan.gov/taxes/questions/cit/insurance/insurance-companies-financial-institutions-8--how-must-a-foreign-insurer-file-for-purposes-of-the-r (last visited July 10, 2025)	App'e. Appx. 000557-000558

Dated: July 24, 2025

Respectfully Submitted,

BODMAN PLC

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Attorneys for Petitioner-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2025, I electronically filed the foregoing paper with the Clerk of the Court using the TrueFiling System, which will send notification to all counsel registered electronically.

Dated: July 24, 2025

Respectfully Submitted,

BODMAN PLC

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APPELLEES' APPENDIX

TAB 1

Order

Michigan Supreme Court
Lansing, Michigan

May 22, 2025

167608

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY,

Petitioner-Appellee,

v

DEPARTMENT OF TREASURY,
Respondent-Appellant.

SC: 167608
COA: 364790
MTT: 21-000039

Megan K. Cavanagh
Chief Justice

Brian K. Zahra
Richard H. Bernstein
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas
Justice

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On order of the Court, the application for leave to appeal the June 20, 2024 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(I)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E) and shall include among the issues to be briefed whether Chapter 12 of the Income Tax Act of 1967, MCL 206.1 *et seq.*, authorizes a unitary business group of insurance companies to file combined returns for collective premiums and retaliatory tax liabilities.

The State Bar of Michigan Taxation Section is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case who are not exempt from the motion requirement under MCR 7.312(H) may move the Court for permission to file briefs amicus curiae.



p0520

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 22, 2025

Clerk

App'e. Appx. 000002

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APPELLEES' APPENDIX

TAB 2



STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

RICK SNYDER
GOVERNOR

NICK A. KHOURI
STATE TREASURER

May 13, 2016

Mr. Timothy Pratschler
Principal – State and Local Tax
PriceWaterhouseCoopers LLP
One Detroit Center
500 Woodward Avenue
Detroit, Michigan 48226

Re: Corporate Income Tax, Combined Filing by Insurance Companies

Dear Mr. Pratschler:

Thank you for your email dated February 19, 2016 (enclosed), in which you proposed that a group of affiliated insurance companies may file a combined annual return (Form 4095). In your email, you also explain your view that combined filing by unitary insurance companies is permitted, if not required.

Revenue Administrative Bulletin (RAB) 1989-34 describes the procedures for issuing technical advice letters as position statements of the Michigan Department of Treasury ("Department"). Since a technical advice letter is binding on the Department as to the specific taxpayer, a request for a technical advice letter must specifically identify the taxpayer. Your request does not meet this requirement. Accordingly, please consider this letter an informal response.

The statute's requirement to include a unitary insurance company in a unitary business group is a separate issue from the question of whether two or more unitary insurance companies are required or permitted to file a combined return to pay the premiums tax under Chapter 12¹. Accordingly, there is no dispute over the following issues:

- The definition of "taxpayer" in section 611² includes an insurance company.
- The definition of "unitary business group" in section 611³ includes an insurance company.
- The affiliated group election in section 691⁴, by way of definition of "affiliated group" in section 603⁵, may apply to an insurance company. The affiliated group election is an election to "have all of the persons that are included in the affiliated group to be treated as a unitary business group."

¹ MCL 206.635-643.

² MCL 206.611(5).

³ MCL 206.607(6).

⁴ MCL 206.691(2).

⁵ MCL 206.603(1).

EXHIBIT 8

Mr. Timothy Prateshler
May 13, 2016
Page 2

- Two or more insurance companies may be unitary with one another and may constitute a unitary group.⁶

Therefore, an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group, even though the insurance company is filing separately. However, the Department is authorized to prescribe forms⁷ and has not developed its forms and systems in way that would accommodate the combined filing you request. To my knowledge, the Department has not yet received such a request, but we will take it into consideration for future years and releases. I will forward your inquiry to the divisions charged with forms and systems development.

If you have any questions regarding this letter, please feel free to contact me at 517-373-9600.

Sincerely,



Lance R. Wilkinson
Administrator, Tax Policy Division

Enclosure

⁶ An insurance company may also be unitary with a C corporation, an entity taxed as a C corporation, or a financial institution, and those persons may comprise a unitary business group.

⁷ MCL 206.693(3).

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APPELLEES' APPENDIX

TAB 3

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Litigation Associate at Bodman PLC
Grand Rapids, Michigan

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Lance Wilkinson has been named the chief deputy treasurer for the Michigan Department of Treasury, effective July 6, 2025.

"Lance's extensive Treasury experience, policy and legal acumen, leadership qualities and even keel make him an ideal Chief Deputy," said State Treasurer Rachael Eubanks. "He has been a mentor and sounding board to a number of us at various levels across the Department. Lance also adds an important perspective and skill set to our senior leadership team. I am looking forward to working with him in his new role to advance Treasury's mission of providing exceptional financial services to Michiganders."

Lance replaces Jeff Guilfoyle who left Treasury last month. Lance currently serves as the director of the Bureau of Tax Policy at Treasury.

As the director of the Bureau of Tax Policy, Lance was responsible for planning, organizing and directing the activities of the Direct Tax Division, Indirect Taxes Division, Hearings Division, Tax Technical Unit, and Tribal Affairs. He supervised the development and revision of rules, procedures and guidance to meet changes in law or policy for internal and external stakeholders, and conferred with state officials, legislators and professional organizations on matters relating to tax policy and administration. Wilkinson also managed and curated the litigation docket for Revenue Act and Major Property Tax Appeals and represented Treasury as a subject matter expert at professional conferences and seminars.

Employed by Treasury since 2006, Lance has held previous positions as administrator of the Tax Policy Division, and administrative law specialist in the Tax Policy Division. Prior to joining Treasury, Lance was an associate attorney at Warner Norcross & Judd and an analyst at Intel Corporation.

Please join us in welcoming Lance into his new position!



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Larry Burton Jr, MBA • 3rd+
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Congrats!
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Congratulations, Lance!! Treasury is in great hands!

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Congratulations, Lance.

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Well deserved Lance! Congratulations!

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Congratulations to the best of the best!!!

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Angela Helm • 3rd+
Labor Relations Manager/State Administrative Manager 15 at Michigan Dept. of...

Congrats Lance!

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Regina Blough • 2nd
Division Administrator at Michigan Department of Treasury

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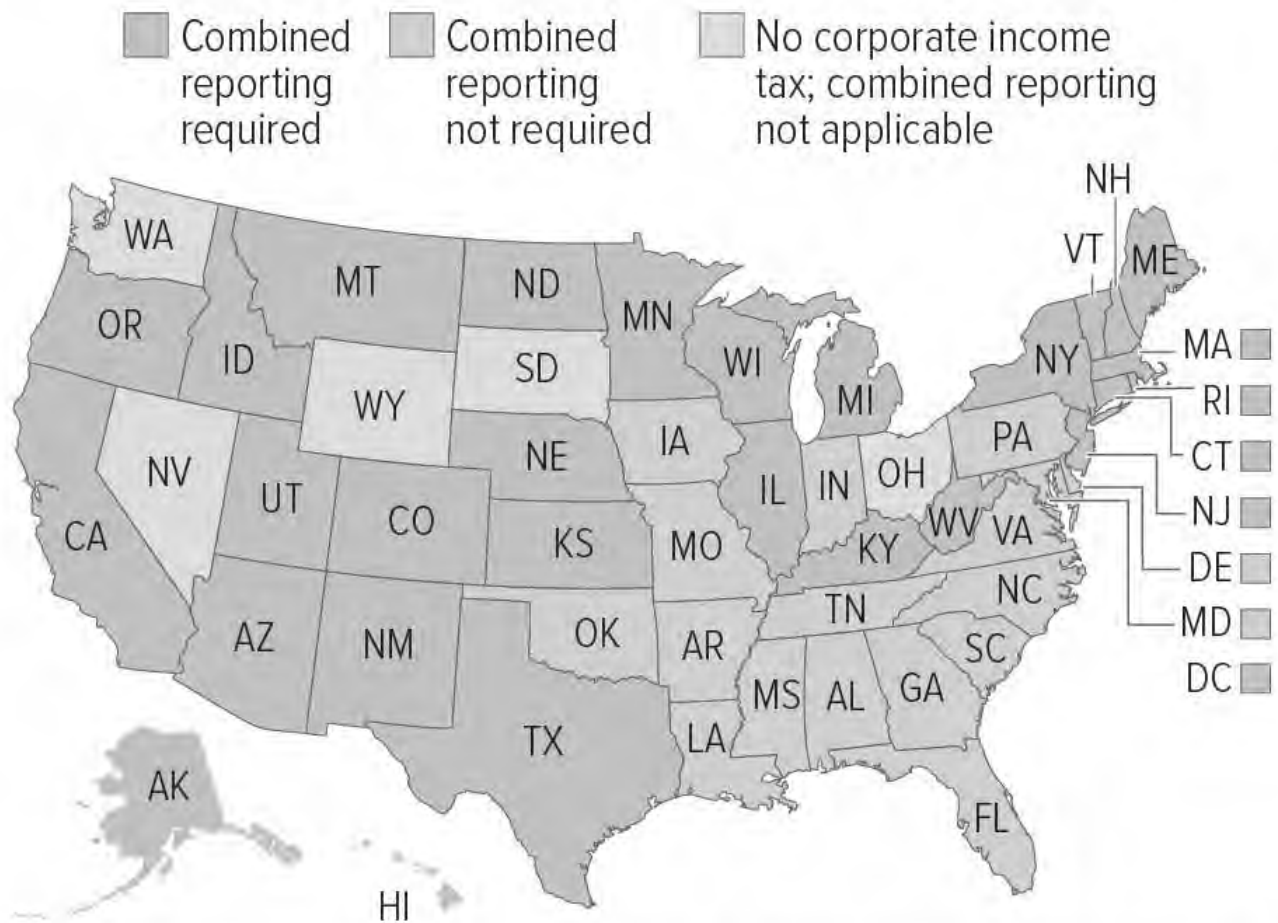
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TAB 4

28 States Plus D.C. Require Combined Reporting for the State Corporate Income Tax



Note: Combined reporting treats a parent company and its subsidiaries as one entity for state income tax purposes, thereby helping prevent income shifting.

Source: John C. Healy and Michael S. Schadeewald, "2019 Multistate Corporate Tax Guide, Vol. 1," Kentucky HB 487 (2018), effective January 1, 2019; New Jersey AB 4262 (2018), effective July 1, 2019; New Mexico, HB 6 (2019), effective January 1, 2020

MORE ON THIS TOPIC

REPORT

Advancing Racial Equity With State Tax Policy

NOVEMBER 15, 2018

STATE OF MICHIGAN
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TAB 5



Corporate Lobbyist's Case Against Combined Reporting in New Mexico: A Rebuttal

DECEMBER 1, 2009 | BY MICHAEL MAZEROV

Introduction and Summary [↗](#)

Richard Minzner, a corporate lobbyist and former Secretary of the New Mexico Department of Taxation and Revenue, has recently written a number of memos for state legislators and columns in New Mexico newspapers criticizing a corporate tax reform measure that has been under consideration in the state for several years.^[1] Minzner's writings contain a number of false, misleading, or factually-unsupported statements. This analysis sets the record straight.

Minzner is criticizing proposed legislation that would require many large multistate corporations to use an accounting method known as "combined reporting" when they compute their New Mexico income taxes. Combined reporting requires a corporation that is taxable in New Mexico to add its income to the income of its parent, sister, and subsidiary corporations, and then calculate its New Mexico taxable income as a share of that combined income. The share is based on the corporation's economic activity in New Mexico (property, payroll, and sales) compared to the economic activity in other states of the overall corporate group. Combined reporting is a comprehensive approach to nullifying an array of tax shelters corporations have developed that involve artificially shifting income that would normally be taxable in one state onto the books of related corporations in other states.

Combined reporting is required in every state west of the Rockies with a corporate income tax except New Mexico. It is also mandatory in a majority of *all* states with corporate income taxes.^[2] Some corporations already use combined reporting in New Mexico, because current law allows them to do so as an option. The proposed legislation would broaden the current law to require all corporations taxable in New Mexico that are members of multi-corporate groups to use this time-tested approach to corporate taxation.

Minzner claims that combined reporting unfairly taxes corporate profits not actually earned in New Mexico, will hurt New Mexico's economy, and is unnecessary and ineffective as a revenue-raising

strategy. In reality:

- The U.S. Supreme Court has rejected the claim that combined reporting unfairly taxes corporate income earned outside the taxing state and has *upheld* combined reporting as a fair means of measuring the portion of income that a member of a corporate group earns in a state.
- Adopting combined reporting is essential to nullifying a wide variety of aggressive tax-sheltering strategies that large multistate corporations are able to implement to reduce or even eliminate their income tax payments. The targeted measure Minzner recommends as an alternative addresses only one of those strategies, some of which can *only* be shut down effectively by combined reporting.
- The states that have had combined reporting in effect for the past 15-20 years have been disproportionately successful in retaining manufacturing jobs – the jobs theoretically most likely to be moved in response to state tax policies corporations find objectionable. For example, 9 of the 11 states that performed better than New Mexico in manufacturing job growth between 1990 and 2007 mandated combined reporting.
- Mandating combined reporting would raise substantial new revenue for New Mexico, particularly when corporate profits begin recovering from the recession. The state's Legislative Finance Committee estimates a 20 percent corporate tax revenue increase would result – funds that will be available to preserve education, health or other services that are good for the state's economy. A revenue estimate of this order of magnitude is consistent with estimates done in other states, including an especially careful estimate recently made in Maryland.
- Mandatory combined reporting would mitigate the competitive disadvantage that some small businesses now face relative to multistate, multi-corporation groups that can lower their taxes by artificially shifting income into other states.

Rebutting Minzner's Key Claims on Combined Reporting ↻

Claim: “The principal effect of combined reporting in New Mexico would be to tax corporate income which is earned in other states by corporations not doing business in New Mexico and which income has not been moved or ‘shifted’ from New Mexico.”

Response: The courts have emphatically rejected this claim. States are prohibited by the Due Process Clause and Commerce Clause of the U.S. Constitution from taxing corporate income that is earned in other states.^[3] The U.S. Supreme Court has twice upheld combined reporting as a fair and legal means of calculating the share of income that is earned within a state by a corporation that is clearly doing business within that state.^[4] When a corporation conducts in-state and out-of-state production and sales activities that contribute to its overall profitability, each state determines the share of the corporation's profit that is deemed to be earned within its borders by applying a formula

to the corporation's *nationwide* profit. The courts have upheld combined reporting as a logical extension of such "formula apportionment." Without combined reporting, corporations could negate a state's use of formula apportionment simply by placing or isolating their out-of-state activities in separate subsidiaries.

Claim: "A national company, profitable in other states, setting up a New Mexico subsidiary, would pay a substantial tax price under combined reporting. The new subsidiary may lose money in the early years. . . . However, that company could owe substantial corporate income tax in New Mexico because of the income other members of the corporate family earn in other states."

Response: It is a longstanding principle of state corporate tax law — quite apart from the issue of combined reporting — that multistate corporations pay state taxes based on their nationwide profitability, multiplied by a simple apportionment factor based on some combination of sales, property, and payroll. This is how every state, including New Mexico, calculates corporate income tax.

The main reason corporate taxes work this way is that it is rarely possible to separate the profitability of a corporation's investments in one state from those in other states in a definitive or reliable way. Consider, for example, a "vertically-integrated" oil company that owns oil fields in California, Texas and North Dakota, refineries in Louisiana and New Jersey, and pipelines and gas stations in 20 other states. If the firm develops a new oil field in New Mexico, its impact on the company's profit has as much to do with the refineries, pipelines and gas stations in other states as it does with the New Mexico operation itself. There is no practical or objective way to determine how much profit was earned in each part of the operation — and thereby determine the relative profitability of the new oil field in New Mexico as compared to the rest of the enterprise. The New Mexico expansion might cost more than the value of the drilled oil but still enhance the profitability of the pre-existing operation (for example, by helping ensure that the refineries always had sufficient oil to be run at optimal capacity). Assigning the additional profit attributable to this economy of scale to a particular state would arguably be completely arbitrary.

In Minzner's example, the parent company has gone one additional step: it has filled out the paperwork to make its New Mexico operations a legally independent corporation. The New Mexico operations may show a loss on paper, but for the reasons described above they may be contributing to the overall profits of the parent corporation. But since New Mexico doesn't mandate combined reporting, the New Mexico operation doesn't pay taxes. Combined reporting would restore the tax liability that the legal maneuver of separate incorporation has taken away.

In sum, combined reporting is based on the conclusion that the profit that an integrated multistate enterprise earns in a specific state generally cannot be objectively measured, a conclusion with which many economists and the courts have concurred.^[5] And the tax liability that results from combined reporting is merely due to the application of existing apportionment formulas to nationwide taxable income, the standard approach; the only difference that combined reporting makes is to prevent the corporation from negating that tax liability by separately incorporating the New Mexico operations. Minzner is free to take issue with the formula apportionment approach to

state corporate taxation, but he should do so forthrightly rather than implying that his criticism only applies to combined reporting. ^[6]

Finally, even if it were assumed for the sake of argument that it is possible to determine objectively that a new New Mexico operation will be “money-losing” in a true economic sense in its start-up phase, it by no means necessarily follows that the adoption of combined reporting would create a disincentive for a profitable out-of-state corporation to expand into the state. Any out-of-state corporation with significant operations in combined reporting states — and recall that a majority of states mandate combined reporting — would pay *less* tax in those states as a result of being able to combine the purported losses of the New Mexico expansion with the profits of the pre-existing enterprise. This could substantially or entirely offset the impact of having a positive tax liability in New Mexico, and thereby substantially or completely eliminate the “disincentive” Minzner hypothesizes.

Claim: “Combined reporting is not the most direct way to prohibit inappropriate income shifting. . . . To prevent the shifting of income it regards as illegitimate, New Mexico could pass . . . ‘add back’ legislation.” ”

Response: Minzner is referring here to a narrow type of legislation that some non-combined-reporting states have enacted to nullify one particular type of tax shelter to which they are vulnerable — the so-called “Delaware Holding Company.”^[7] While enacting an addback statute is indeed something New Mexico should have done years ago, it is no substitute for combined reporting because there are numerous tax-avoidance strategies such statutes cannot nullify — but that combined reporting *can*. These include stashing income-earning assets in subsidiary corporations located in states like Nevada that have no corporate income taxes and so-called “transfer pricing” — in which parent and subsidiary corporations located in different states manipulate the prices at which they buy goods and services from each other. ^[8]

Many of the addback statutes states have enacted are themselves full of loopholes and/or subject to constitutional challenge; in contrast, the Supreme Court has upheld the constitutionality of combined reporting. New York and Massachusetts both initially enacted addback statutes but soon thereafter proceeded to mandate combined reporting. Addback statutes may have been a reasonable stopgap measure at one time, but combined reporting is a more effective, comprehensive, and fully court-approved policy for minimizing state corporate tax avoidance.

Claim: “Combined reporting would be harmful to economic development because it would impose substantial tax obligations on successful businesses simply for establishing New Mexico subsidiaries.”

Response: Combined reporting is good for state economies because it creates a more equitable business tax structure. States that require combined reporting are well-represented among the most economically-successful states in the country. For example, 9 of the 11 states that performed better than New Mexico in manufacturing job growth in the 1990 to 2007 period — including Arizona and Utah —were combined reporting states. ^[9]

Large multistate corporations are unlikely to avoid New Mexico as a location for future investments if the state mandates combined reporting, nor are current New Mexico corporations likely to leave. Studies of major employers in Wisconsin, North Carolina, and Iowa — some of which had raised the possibility of leaving those states if they enacted combined reporting — found that most of them quite willingly maintained facilities in *numerous* combined reporting states.^[10] For example, 60 of the 75 largest North Carolina manufacturers maintained facilities in at least one combined reporting state, almost half had facilities in five or more combined reporting states, and 18 maintained their *headquarters* in combined reporting states.

Minzner suggests that some corporations may be deterred from locating in New Mexico if they have to pay taxes under a combined reporting requirement, but state corporate income taxes simply are not high enough to drive business location decisions. Total state and local taxes paid by corporations average less than three percent of corporate expenses, and state corporate income taxes represent less than 10 percent of that three percent on average.^[11] So it is highly unlikely that the adoption of combined reporting would have a significant enough impact on most corporations' "bottom lines" to affect decisions about whether to invest in New Mexico; those decisions will continue to be driven by the fundamental economics of the investment.^[12]

Corporate executives typically rank taxes low on their list of site selection factors, well below the availability of a high-quality workforce and infrastructure.^[13] As discussed in the next section, the adoption of combined reporting would generate revenue and could thereby mitigate cuts in education and other state services that might otherwise be made. Such cutbacks could lead to further deterioration in the quality of these services and thereby make New Mexico a *less* desirable place for businesses to locate. By forestalling the need for some cuts in services demanded by businesses, the adoption of combined reporting thus could actually have a net positive impact on New Mexico's economy.

Claim: "Combined reporting will not produce much money."

Response: Combined reporting will produce substantial new tax revenues. Prior to the current recession, the Legislative Finance Committee estimated that the enactment of combined reporting would result in a 20 percent increase in corporate income tax collections, or approximately \$90 million annually.^[14] In the current economic climate, the *short-term* revenue yield of mandatory combined reporting is likely to be lower in dollar terms, simply because there are less corporate profits to tax. Nonetheless, recently-released data from Maryland suggest that the 20 percent figure is quite plausible for periods of normal economic growth. Like New Mexico, Maryland is not a combined reporting state, but it required corporations to file hypothetical or "pro-forma" combined reporting-returns for tax year 2006. Newly-released data from those returns indicate a revenue gain from combined reporting of either 13 percent or 20 percent (depending upon which of two alternative approaches to combined reporting were implemented).^[15]

These revenue gain estimates for Maryland are the net result of increased liability for some corporations partially offset by reduced liability for others. Unlike Maryland, New Mexico *already* allows corporations to elect to file on a combined reporting basis and many do so when they pay

less tax as a result.^[16] Accordingly, there are unlikely to be many *new* combined reporting filers with reduced liabilities to offset the revenue gain from corporations paying more income tax under the combined reporting mandate in the proposed legislation. The revenue gain estimates from Maryland therefore suggest that the Legislative Finance Committee's 20 percent revenue impact estimate for New Mexico for a year of normal economic and corporate profit growth is quite credible.

Claim: "The companies that will feel most unfairly treated by mandated combined reporting may be companies, such as renewable energy companies, who have come to New Mexico recently in response to specific tax incentives with the expectation of being taxed at a particular level."

Response: Combined reporting has been under serious discussion in New Mexico for years; indeed, the Blue Ribbon Tax Reform Commission recommended in 2003 that the state adopt it.^[17] Companies accepting tax incentives to locate in New Mexico cannot realistically expect to permanently bind future legislatures against making tax changes that might increase their tax liabilities. States routinely raise and lower their taxes in response to changing economic conditions and other factors; in the last year alone, more than 30 states have raised taxes, including roughly a dozen that have changed business taxes. In any case, those that accepted incentives within the last 6 years had fair warning that combined reporting might well be mandated.^[18]

Claim: "The current corporate income tax system is not unfair to small local businesses. Most small businesses pay no corporate income tax or similar tax because they are organized as partnerships or sole proprietorships."

Response: Some relatively small businesses are, in fact, organized as corporations subject to the corporate income tax.^[19] When they are, they are likely to be organized as a single legal entity, and/or to be doing business solely in New Mexico. As such, they cannot take advantage of tax shelters based on establishing non-New Mexico subsidiaries that large corporations employ. Moreover, many large corporations are able to reduce their corporate tax payments substantially in New Mexico by *electing* to file on a combined reporting basis — an option small, single-entity corporations do not have. These tax advantages may enable some multistate corporations to undercut the prices of their small competitors or attract investment capital at lower cost. In short, some small businesses organized as corporations are likely to be at a disadvantage in competing with large corporations able to reduce their income tax expenses by setting up multistate tax shelters or electing to calculate their tax liability using combined reporting.

Even unincorporated businesses not subject to New Mexico's corporate income tax may well be at a disadvantage vis-à-vis their large multistate corporation competitors due to the absence of combined reporting.^[20] Although the profits of such businesses are not subject to New Mexico's corporate income tax, they *are* subject to the state's personal income tax. Individuals with capital to invest can choose to invest it in corporations or unincorporated businesses, and they expect a return on that investment in both cases.^[21] Moreover, the return that matters to them is the return after taxes — whether those taxes take the form of personal income taxes, corporate income taxes, or the two combined. Accordingly, the possibility that the absence of combined reporting may result

in corporate profits in New Mexico being taxed at a lower effective state tax rate than attaches to the profits of non-corporate businesses is an entirely relevant issue, and Minzner is simply wrong to dismiss it on the grounds that “small businesses pay no corporate income tax.”

Moreover, there are reasonable grounds to believe that the profits of large multistate corporations subject to tax by New Mexico are, in fact, often taxed at a lower effective tax rate than are the New Mexico profits of their competitors *not* subject to the state’s corporate income tax. ^[22] Although the top personal income tax rate (4.9 percent) is lower than the top corporate income tax rate (7.6 percent), owners of (and investors in) small unincorporated businesses are likely to pay tax on 100 percent of that income while multistate corporations can shelter substantial portions of their New Mexico profits from taxation through transfer pricing and other tax-avoidance strategies that exploit the absence of combined reporting.^[23] Furthermore, corporate profits often escape taxation at the state level for reasons beyond corporate tax planning. ^[24]

In sum, the current corporate income tax system in New Mexico can indeed be quite unfair to some small businesses, as combined reporting proponents in New Mexico often argue. Small businesses generally cannot exploit the tax-avoidance opportunities afforded large multistate corporations by New Mexico’s failure to require combined reporting. Likewise, most small businesses cannot *elect* combined reporting when it results in a lower tax liability, as large corporations can. Lower tax expenses for corporations may enable them to undercut the prices of or attract capital at a lower cost than their small-business competitors — placing the latter at an unfair disadvantage. Combined reporting helps level the playing field. Perhaps this is one of the reasons that a recent economic study conducted for the federal Small Business Administration concluded that “States with more aggressive corporate income taxes, specifically including combined reporting. . . tend to have higher entrepreneurship rates.” ^[25]

 **PDF of this Report (10pp.)**

End Notes

[1] See, for example: “Combined Reporting: Questions and Answers,” undated, and “ ‘Combined Reporting’ Unfair,” *Albuquerque Journal*, October 18, 2009.

[2] See: Michael Mazerov, “<https://www.cbpp.org/sites/default/files/atoms/files/4-5-07sfp.pdf>,” Center on Budget and Policy Priorities, April 3, 2009.

[3] “The principle that a State may not tax value earned outside its borders rests on the fundamental requirements of both the Due Process and Commerce Clauses that there be ‘some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax.’ ” U.S.

Supreme Court decision in *Allied Signal, Inc. vs. New Jersey Division of Taxation* (1992), quoting *Miller Brothers vs. Maryland* (1954).

[4] *Container Corporation of America vs. California Franchise Tax Board* (1983); *Barclay's Bank PLC vs. California Franchise Tax Board* (1994).

[5] As economist Charles McLure wrote more than 25 years ago:

[S]ubstantial transactions between affiliated firms can make it administratively difficult, and perhaps impossible, to verify that transfer prices are not being manipulated to shift income between affiliated firms, and therefore between jurisdictions. This problem is most likely to be significant where there are vertical transactions in goods and services with no uncontrolled market price, and it becomes insuperable as vertical integration becomes complete. Second, various kinds of interdependence may make it conceptually impossible to determine the income of the individual firms [in a corporate group]. Particularly important are shared costs and other economies of scale and scope and shared know-how. Though interdependence exists particularly in vertically integrated production and distribution, it can also explain horizontal diversification and demand a finding of unity [in the latter circumstance as well].

Charles E. McLure, Jr., "Defining a Unitary Business: An Economist's View," in Economic Perspectives on State Taxation of Multijurisdictional Corporations, Tax Analysts, 1986, p. 68.

Or, as the U.S. Supreme Court famously stated in its 1983 *Container* decision: "[a]llocating income among various taxing jurisdictions bears some resemblance . . . to slicing a shadow."

[6] The same can be said with respect to Minzner's claim in another recent memo that "Combined reporting would impose tax costs on increasing New Mexico payroll or investment and would provide tax reductions for subjecting New Mexicans to layoffs." For a refutation of this argument, see: Michael Mazerov, "<https://www.cbpp.org/sites/default/files/atoms/files/3-27-10sfp.pdf>," Center on Budget and Policy Priorities, pp. 24-27, p. 38. In any case, this is an argument against the inclusion of property and payroll in the apportionment formula and has nothing to do with combined reporting. Given his background as a former Secretary of Revenue, Minzner presumably knows this, and it is disingenuous of him to make this argument.

[7] Under the "Delaware Holding Company" (DHC) tax shelter, a corporation transfers ownership of its trademarks and patents to a subsidiary located in a state that does not tax royalties, interest, or similar types of "intangible income." The subsidiary charges a royalty to the rest of the business for the use of the trademark or patent. The royalty is a deductible expense for the corporation paying it, so it reduces the corporation's profits in the states in which it is taxable. Moreover, the DHC often loans its "profits" back to the rest of the corporation, which can then reduce its taxable profits further by taking a tax deduction for the interest it pays on the loan. DHCs are set up in Delaware because the state has a special income tax exemption for corporations whose activities are limited to owning and collecting income from intangible assets. They are also often set up in Nevada because that state has no corporate income tax at all.

[8] Some of the tax-avoidance strategies to which non-combined reporting states are vulnerable are described in Michael Mazerov, "<https://www.cbpp.org/sites/default/files/atoms/files/10-25-07sfp.pdf>," Center on Budget and Policy Priorities, October 25, 2007.

[9] Michael Mazerov, "[Most Large North Carolina Manufacturers Are Already Subject to 'Combined Reporting' in Other States](#)," Center on Budget and Policy Priorities, January 15, 2009, p. 6. Manufacturing corporations were chosen for this comparison because, in theory, manufacturing jobs are more likely than are service jobs to be moved in response to state tax policies corporations find objectionable. (Manufacturing activity can often be conducted far from the location of customers, while service businesses more often have to be in close proximity to their customers.)

[10] See the source cited in the previous note. See also: Michael Mazerov, "<https://www.cbpp.org/sites/default/files/atoms/files/4-3-08sfp.pdf>," Center on Budget and Policy Priorities, April 3, 2008; Jack Norman, "Combined Reporting: How Closing Corporate Loopholes Benefits Wisconsin," Institute for Wisconsin's Future, February 2009, www.wisconsinsfuture.org/publications_pdfs/tax/iwf_combined_report_feb09.pdf.

[11] See the source cited in Note 9.

[12] In his memorandum to state legislators, Minzner identifies one of his clients as Psychiatric Solutions, Inc., a private, for-profit chain of inpatient behavioral health care service facilities. If such a company wants to tap into the New Mexico market for such services effectively it probably has to have facilities in the state since most people would be reluctant to have family members treated in a distant facility. And, indeed, the company quite willingly does business in other combined reporting states; its annual report to the Securities and Exchange Commission for 2008 indicates that it has facilities in such other long-time combined reporting states as Illinois, Colorado, Utah, Arizona, Minnesota, and California. The annual report also indicates that the company's *nationwide* total state corporate income tax expense in 2008 was approximately \$5 million, representing just 0.3 percent of its total business expenses for the year. (The tax figure was its "provision" for state corporate income taxes, not its actual liability, but it is a reasonable proxy for the latter amount.) Thus, it seems highly unlikely that New Mexico's adoption of mandatory combined reporting would have a large enough impact on this company's "bottom line" to affect its willingness to invest in the state.

[13] For example, in *Area Development* magazine's 2008 annual survey of corporate executives concerning the key factors influencing their location decisions, highway accessibility ranked first, and the availability of skilled labor ranked fourth. The state corporate tax rate ranked ninth.

[14] New Mexico Legislative Finance Committee Fiscal Impact Report for H.B. 51. H.B. 51 was the version of combined reporting legislation introduced in 2008 by (then) Representative Peter Wirth.

[15] business.marylandtaxes.com/pdf/Analysis%20of%20TY2006%20MD%20Corporate%20Information%20Reports.pdf.

[16] In 2005, 483 corporations elected to calculate their New Mexico corporate income taxes using combined reporting, and an additional 1057 corporations elected to file similar “consolidated returns.” Together, these combined and consolidated returns accounted for 46 percent of all New Mexico corporate tax liability in that year. Source: New Mexico Legislative Finance Committee Fiscal Impact Report for H.B. 51, January 31, 2008.

[17] New Mexico Blue Ribbon Tax Reform Commission, table of recommendations (recommendation no. 9), available at <http://legis.state.nm.us/LCS/bluetaxdocs/BTRCTableofRecommendations.pdf>.

[18] Minzner appears to be arguing here on behalf of one of his clients, NextEra Energy, which operates a wind farm in the eastern part of the state and may be eligible for renewable energy tax credits. Construction of that facility began in early 2003 before the Blue Ribbon commission issued its recommendation. Nonetheless, that facility likely has already received the credits for at least five of the ten years for which they may be claimed, and the adoption of combined reporting does not reduce the value of the remaining credits. Indeed, by boosting the company’s tax liability, combined reporting may simply enable them to be claimed immediately rather than carried forward. In any case, it seems highly unlikely that New Mexico’s enactment of combined reporting would significantly increase the company’s New Mexico tax liability in dollar terms. (If the credits are substantially or completely eliminating the company’s New Mexico tax liability, then of course even a small increase in tax liability resulting from combined reporting could represent a large increase in liability in percentage terms.) Press reports at the time it was built indicated that the facility was a \$200 million investment; that is less than one-half of one percent of the total property of the corporate group of which it is a member — Florida Power and Light (FPL) — according to the latter’s annual report to the Securities and Exchange Commission. It employs only 15 people (www.nexteraenergyresources.com/content/where/portfolio/pdf/newmexico.pdf), meaning that its payroll is likely an even smaller share of the corporate group’s than is its property. Finally, it does not appear that FPL has significant electricity sales in New Mexico other than those made by NextEra. In short, it appears that NextEra’s New Mexico “apportionment factors” are likely so miniscule that combined reporting would result in no more than a modest corporate tax liability for the company in the state notwithstanding that the corporate group’s 2008 profit was \$1.6 billion. It is worth noting that for the entire corporate group, its provision for *nationwide* state corporate income tax liability in 2008 was a mere \$40 million— an effective rate of one-quarter of one percent.. Finally, it should be noted that NextEra already has facilities in 13 current combined reporting states — California, Colorado, Kansas, Maine, Massachusetts, Minnesota, New Hampshire, New York, North Dakota, Oregon, Texas, West Virginia, and Wisconsin. (See: http://www.nexteraenergyresources.com/content/where/portfolio/pdf/portfolio_by_fuel.pdf .)

[19] According to the Internal Revenue Service, in 2003, so-called “C” corporations (those subject to federal and state corporate income taxes) with less than \$500,000 in gross receipts comprised almost two-thirds of all C corporations. See: www.irs.gov/pub/irs-soi/03ib01ty.xls.

[20] For the purposes of this discussion, “unincorporated businesses” also include Subchapter S corporations. Although S corporations are regular corporations from a business law standpoint, they

are exempt from federal and state corporate income taxes.

[21] As the Congressional Budget Office observes: "Investments by noncorporate businesses also need to pay investors competitive rates of return. For debt finance, that would be the market interest rate. For equity, the investor-operator of a noncorporate business will want to earn on a marginal investment as much after tax as he or she could earn by buying corporate equity." Congressional Budget Office, "Taxing Capital Income: Effective Rates and Approaches to Reform," October 2005, p. 17.

[22] There are a number of reasons this may well be true notwithstanding the "double taxation" of corporate income that results from corporate profits being subject to the corporate income tax and then again to the personal income tax when paid out as dividends to investors. First, some of those dividends will be received by investors residing in states with no personal income taxes — meaning that the profits will only be taxed once at the corporate level. Second, many dividends will be paid to pension funds or IRAs and not taxed until withdrawn many years later by retirees — meaning that the effective tax rate is sharply reduced. Third, slightly less than half of corporate profits are never paid out as dividends — meaning that the return on the investment takes the form instead of a capital gain that is taxed at a sharply reduced rate by some states or not at all if the stock is transferred at the death of the owner. Finally, a larger share of corporate profits than of non-corporate profits is paid out as tax-exempt interest because corporations can more easily and cheaply obtain debt financing than can smaller unincorporated businesses. (Some of these issues are discussed in the Congressional Budget Office report cited in the previous note.) In sum, the effective rate at which corporate profits are actually taxed is well below the more than 60 percent rate that would apply if the top marginal corporate income and personal income tax rates were summed. Indeed, the CBO estimated that the average effective tax rates on corporate income in 2008 was 26.3 percent and that the effective rate on business income earned by unincorporated businesses was 20.6 percent. (p. 8). (It must be acknowledged that the differential would likely be somewhat larger at the state level due to preferential tax treatment of dividends that exists at the federal level but not the state level.)

[23] Some of the profits of unincorporated businesses received by individuals may also be sheltered from taxation by New Mexico's personal exemptions and itemized or standard deductions.

[24] The state in which the owner of an unincorporated business resides taxes 100 percent of the business's profit under the personal income tax and provides a credit for income taxes paid on any portion of that income taxable in a different state. In contrast, the profits of a corporation are divided among the states in which it is doing business by a formula, and mismatches between these formulas can lead to "nowhere income" — profits that completely escape state taxation. (For a discussion of how this can occur, see pp. 24-27 of the source cited in Note 6.) The profits of a small unincorporated business are much less likely to "slip through the cracks" and escape taxation completely than are the profits of a corporation, even before taking into account the ability of multistate corporations to exploit the absence of combined reporting.

[25] Donald Bruce and John Deskins, "State Tax Policy and Entrepreneurial Activity," November 2006; www.sba.gov/advo/research/rs284tot.pdf.

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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 6



Treasury Taxes

Insurance Companies/Financial Institutions 9. Does a unitary group of insurance companies have to file a combined CIT return?

No. Insurance companies are not specifically excluded from the definition of a unitary business group, found at MCL 206.611(6), and thus may constitute a unitary business group. In practice, however, there is no practical effect of this possibility. The tax on authorized insurance companies is equal to 1.25% of gross direct premiums written on property or risk located or residing in Michigan. MCL 206.635(2). Because the tax is only on property or risk located in Michigan there will be no traditional apportionment for insurance companies. Thus, even if an authorized insurance company is unitary with another authorized insurance company under MCL 206.611(6), this will have no effect in calculating the tax. A combined return will not be necessary.



Insurance Companies/Financial Institutions 9. Does a unitary group of insurance companies have to file a combined CIT return?

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IN THE SUPREME COURT

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APPELLEES' APPENDIX

TAB 7

**STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL**

NATIONWIDE MUTUAL INSURANCE
COMPANY,

Petitioner,

V

DEPARTMENT OF TREASURY,

Respondent.

CONSOLIDATED CASES

MOAHR Docket No. 21-000036-TT; 21-000607

Peter M. Kopke,
Administrative Law Judge

NATIONWIDE AGRIBUSINESS
INSURANCE COMPANY,

Petitioner,

V

DEPARTMENT OF TREASURY,

Respondent.

CONSOLIDATED CASES

MOAHR Docket No. 21-000039-TT; 21-000611

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Administrative Law Judge

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**PETITIONERS' SUPPLEMENTAL RESPONSES AND RESTATED OBJECTIONS
FOR NATIONWIDE MUTUAL INSURANCE COMPANY RELATIVE TO
RESPONDENT, DEPARTMENT OF TREASURY'S, FIRST SET OF
INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO
NATIONWIDE AGRIBUSINESS INSURANCE COMPANY**

Petitioners, by their counsel, hereby supplement their responses and supplement and restate their objections to Respondent's First Set of Interrogatories and Requests for Production of Documents to Nationwide Agribusiness Insurance Company ("Requests") as set forth below. The following responses are made solely for the purposes of this action to provide supplemental responses based on the addition of Nationwide Mutual Insurance Company ("Nationwide Mutual"), the designated filer in the Michigan Corporate Income Tax ("CIT") unitary business group filing and the common parent of the entities included in the unitary business group, as the lead or co-lead Petitioner. Each response is subject to all objections as to relevance, materiality, and admissibility, and to any and all objections on any ground that would require exclusion of any response if it were introduced at hearing.

No incidental or implied admissions are intended by these responses. The fact that Petitioners have objected or responded to any Request shall not be deemed an admission that Petitioners accept or admit the existence of any facts set forth or assumed by such Request or that such objection or response constitutes admissible evidence. The fact that Petitioners have

responded to part or all of any Request is not intended to and shall not be construed to be a waiver by Petitioners of any part of any objection to any Request.

These responses and objections are made on the basis of information and writings currently available to and located by Petitioners upon reasonable investigation. Petitioners expressly reserve the right to modify, revise, supplement, or amend its responses as deem appropriate.

GENERAL OBJECTIONS

1. Petitioners object to the Requests to the extent that they seek information that is protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other recognized privilege. Inadvertent disclosure of any document, information or thing which is subject to a privilege shall not waive such privilege or Defendant's right to object to discovery with respect to such document, information or thing or the content thereof or the use of such document, information or thing or the content thereof in any subsequent proceeding or trial of this or any other action.

2. Petitioners object to the Requests to the extent they seek information or documents that cannot be located by Petitioners after reasonably diligent inquiry, are readily available from public sources, or are available to Respondent from another source or by other means that are more convenient, more appropriate, less burdensome, or less expensive.

3. Petitioners object to the Requests to the extent they seek legal conclusions and/or would require Petitioners to reach a legal conclusion in order to prepare a response.

4. Petitioners object to the Requests to the extent they are argumentative, prejudicial, improper, incorrect, vague, and/or ambiguous.

5. Petitioners object generally to the Requests to the extent that they contain no or an unreasonable time limitation.

6. Petitioners object generally to the Requests to the extent that they call for information of a private, confidential or proprietary nature.

7. Petitioners object generally to the Requests as they seek information that is not relevant to any party's claims or defenses and are not proportional to the needs of the case. Respondent denied Petitioners' claim purely on a legal basis, not based on the relationship among the members of the Unitary Business Group; specifically, Respondent asserted that Petitioners were not authorized by law to file on a unitary basis and that tax attributes, such as credits, could not be used by the taxpayer, which is the Unitary Business Group pursuant to the plain language of the applicable statute.

8. Petitioners expressly reserve all objections, including without limitations, objections as to relevance, competency, materiality, privilege, and/or proportionality, in any subsequent proceeding or trial of this or any other action for any purpose whatsoever.

9. Petitioners have responded to the Requests as they interpret and understand each Request. Petitioners reserve the right to amend or supplement their objections and responses to these requests if Respondent subsequently asserts an interpretation that differs from Petitioners' interpretation or understanding of these requests.

10. All responses are subject to appropriate confidentiality agreements negotiated or to be negotiated between the parties, or as may be imposed by the Tribunal.

INTERROGATORIES

1. Please explain how the entities identified in the petition, ¶ 8(o), have business activities or operations that result in a flow of value between or among each other.

RESTATED OBJECTION: Petitioners object to this Interrogatory to the extent that it mischaracterizes the allegations in ¶ 8(o) of the Petition.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, Petitioners' flow of value between or among each other as a result of its unitary business group is achieved by Nationwide Mutual's group of affiliates engaging in a functionally integrated insurance and financial services business. Nationwide Mutual owns or controls, directly or indirectly, more than 50% of the ownership interests and voting power of the insurance companies identified in ¶ 8(o) of the Petition. The corporate structure of the Unitary Business Group constitutes a parent-subsidary control group of entities. *See* documents produced. All of the insurance companies identified in ¶ 8(o) of the Petition share a pooling of reserves and provide similar, related, or dependent insurance services. *See* documents produced. Nationwide Mutual and the insurance companies identified in ¶ 8(o) of the Petition have common Directors, officers, and management personnel that provide centralized oversight and management of operational decisions for such entities. The insurance companies identified in ¶ 8(o) of the Petition share common administrative functions, including marketing, enterprise reporting, accounting, tax, legal, investment management, and executive team, along with shared technical information purchasing, and distribution of insurance products and services. For example, Nationwide Express™ is a proprietary technology platform that is shared across property and casualty insurance lines to allow agents to quote policy prices for auto, homeowners, or renters insurance in as little as two minutes. This system can also be used to tailor coverages and bind and process policies very quickly and cost-effectively. These factors, along with multiple additional factors, result in a flow of value among the members of the insurance companies identified in ¶ 8(o) of the Petition.

Petitioner Nationwide Agribusiness Insurance Company has produced the Third Amended and Restated Cost Sharing Agreement between Petitioner Nationwide Mutual and certain affiliates. In addition, pursuant to MCR 2.309(E), Petitioner Nationwide Mutual will supplement and produce, among other documents, the 2014 and 2015 annual report for it and other members of the Unitary Business Group, and the Form 851 Affiliations Schedule for 2014 and 2015. Those documents describe in detail how the entities identified in the ¶ 8(o) of the petition have business activities or operations that result in a flow of value between or among each other.

2. Please explain how the entities identified in the petition, ¶ 8(o), have business activities or operations that are integrated with, are dependent upon, or contribute to each other.

RESTATED OBJECTION: Petitioners object to this Interrogatory to the extent that it mischaracterizes the allegations in ¶8(o) of the Petition.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, the integration and dependency of Petitioners' business activities as part of the unitary business group are achieved by the Nationwide Mutual group of affiliates engaging in a functionally integrated insurance and financial services business that included sharing resources. The Nationwide Mutual group of insurance companies has grown and expanded over the past 90 years and now consists of multiple, functionally integrated insurance companies that provide insurance products and services to customers across the United States. Through the shared resources identified in Supplemental Response No. 1, above, each of the affiliated insurance companies identified in ¶ 8(o) of the Petition is an integral part of, and contributes to, the income and value of the group as a whole.

Petitioner Nationwide Agribusiness Insurance Company has produced the Third Amended and Restated Cost Sharing Agreement between Petitioner Nationwide Mutual and certain affiliates. In addition, pursuant to MCR 2.309(E), Petitioner Nationwide Mutual will supplement and produce, among other documents, the 2014 and 2015 annual reports for it and other members of the Unitary Business Group and the Form 851 Affiliations Schedule. Those documents describe in detail how the entities identified in the petition, ¶ 8(o) have integrated and dependent business activities between or among each other.

3. Please explain the economies of scale generated between all entities identified in the petition, ¶ 8(o).

RESTATED OBJECTION: Petitioners object to this Interrogatory because it is vague and ambiguous (“economies of scale generated between). Petitioners further objects to this Interrogatory to the extent that it mischaracterizes the allegations in ¶ 8(o) of the Petition.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, Petitioners generate economies of scale as part of the unitary business group by the Nationwide Mutual group of affiliates engaging in a functionally integrated insurance and financial services business that included sharing resources. Petitioner Nationwide Mutual interprets the term “economies of scale” as a phrase that, in the context of a unitary business group, refers to a relationship between or among business activities that results in a decrease in the overall cost of operations or administrative functions for the entities due to an increase in the operational size of the group. Further, Petitioner Nationwide Mutual notes that "economies of scale" is present in instances in which there exists “some sharing or exchange of value not capable of precise identification or measurement-beyond the mere flow of funds arising out of a passive investment.” *Container Corp of Am v Franchise Bd*, 463 US

159 at 178-179 (1983). The consolidation and sharing of common physical facilities, management team, purchasing, marketing, accounting, human resources, legal affairs, technology, reserve pools and cost sharing agreements are examples of facts applicable to the insurance companies identified in ¶ 8(o) of the Petition that result in decreased costs and thereby create economies of scale.

Petitioner Nationwide Agribusiness Insurance Company has produced the Third Amended and Restated Cost Sharing Agreement between Petitioner Nationwide Mutual and certain affiliates. In addition, pursuant to MCR 2.309(E), Petitioner Nationwide Mutual, will supplement and produce, among other documents, the 2014 and 2015 annual reports for it and other members of the Unitary Business Group, and the Form 851 Affiliations Schedule. Those documents describe in detail how the entities identified in the Petition, ¶ 8(o) have generated or produced economies of scale between or among each other.

4. Please identify all facts on which Petitioner will rely to support its position that all entities identified in the petition, ¶ 8(o) are a unitary business group, as that term is defined in MCL 206.611(6).

RESTATED OBJECTION: Petitioners object that this Interrogatory is vague, ambiguous and burdensome in seeking “all facts” because all facts include the totality of the named entities’ operations, accounting and legal existence. Petitioners object that this Interrogatory seeks information protected by the work product doctrine. MCR 2.302(B)(4). Petitioners further object to this Interrogatory to the extent that it mischaracterizes the allegations in ¶ 8(o) of the Petition.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, pursuant to MCR 2.309(E), Petitioners incorporate herein their

supplemental responses to Interrogatories 1, 2, and 3, above. The Nationwide affiliated companies are commonly owned and together engage in a functionally integrated insurance and financial services business that includes sharing resources. In addition to its supplemental responses to Interrogatories 1, 2, and 3, above, Petitioner Nationwide Agribusiness Insurance Company and the insurance companies identified in the Petition at 8(o) are all direct or indirect subsidiaries of Petitioner Nationwide Mutual, based in Columbus, Ohio. As described in those supplemental responses above, Nationwide Mutual owns, directly or indirectly, more than 50% of the ownership interests of the insurance companies identified in ¶ 8(o) of the Petition and controls more than 50% of the total combined voting power of the shares entitled to vote of these entities. Nationwide Mutual, together with insurance companies identified in the Petition at ¶ 8(o), is a leading US property and casualty insurer with a strong position in the life insurance and retirement product markets. Its property and casualty insurance products range from general personal and commercial coverage -- including auto, home, and business owners policies -- to such specialty lines as professional liability, workers' compensation, agricultural, loss-control, and pet insurance. Through its life insurance affiliates the Nationwide group provides life policies, retirement plans, mutual funds, and annuities. The insurance companies identified in the Petition at ¶ 8(o) maintain common facilities, including a corporate headquarters in Columbus, Ohio, with other large offices in Des Moines, IA, San Antonio, TX and Scottsdale, AZ. The Petitioner and its affiliated insurance companies maintain common executive function, purchasing, marketing, accounting, human resources, legal affairs, and other common business functions and administrative departments. Property casualty, commercial, and life insurance product lines offered by the insurance companies identified in the Petition at ¶ 8(o) are all distributed through the Nationwide group's network of exclusive

and independent insurance agents, together with call center and web based direct-to-customer sales.

5. Please identify the individual(s) responsible for responses to Interrogatory Nos. 1 through 4 above.

RESTATED OBJECTION: Petitioners object to the extent that this Interrogatory attempts to limit its rights under the applicable Tax Tribunal Rules, Rules of Evidence, or Rules of Civil Procedure.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, Petitioners state that Mr. Dan Eppley is responsible for the Supplemental Responses to Interrogatory Nos. 1 thru 4, above. In addition, Petitioners hereby revise and update the original response from Petitioner Nationwide Agribusiness by stating that Mr. Dan Eppley is also responsible for the original Responses to Interrogatory 1-4 from Petitioner Nationwide Agribusiness provided April 28, 2021. Mr. Eppley worked in consultation with other employees of the Nationwide Mutual Unitary Business Group, in-house counsel of the Nationwide Mutual Unitary Business Group, and outside counsel to the Nationwide Mutual Unitary Business Group.

6. Did the entities identified in the petition, ¶ 8(o), combine their income, gains, losses, deductions, and/or credits when reporting their federal income tax liability for the tax years at issue?

RESTATED OBJECTION: Petitioners object that this Request is vague and ambiguous to the extent it relies on the term “combine” which is not defined either in Respondent’s Requests or for federal income tax purposes. Petitioners further object to this Interrogatory to the extent that it mischaracterizes the allegations in ¶ 8(o) of the Petition.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving the foregoing objections and its general objections, Petitioners answer yes. Answering further, Petitioners state that federal tax filings included a Consolidated U.S. Property Casualty Insurance Company Tax Return (Form 1120-PC) for entities identified in ¶ 8(o) of the Petition, except for Harleysville Life Insurance Company, which was required to file a U.S. Life Insurance Company Income Tax Return (Form 1120-L) for tax years 2012 through 2017 because it was acquired in 2012.

7. For all entities identified in the petition, ¶ 8(o), please explain whether each entity listed is a participating member, as that term is defined by MCL 500.3303(d), with the Michigan Auto Insurance Placement Facility (MAIPF).

RESTATED OBJECTION: Petitioners object to this Interrogatory on the ground that the request is overbroad, unduly burdensome, and not proportional to the needs of the case under MCR 2.302(B)(1). Petitioners object that this Interrogatory is overbroad in that it is unlimited as to time; only the 214 and 2015 tax years are relevant to this matter. Petitioners further object that this request is overly broad to the extent it seeks information relevant only to the petitions filed by Petitioner Nationwide Mutual's affiliates and not this case inasmuch as the Tribunal has placed those other cases in abeyance.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, and subject to the limitations stated in its objections to this Interrogatory No. 7, Petitioner Nationwide Mutual supplements and responds that it was a participating member of the MAIPF during tax years 2014 and 2015, which are the years at issue in this proceeding, but further responds some of Petitioner Nationwide Mutual's affiliates paid an MACP assessment that was administered by the MAIPF during the tax years 2014 and 2015 regardless of whether they were members. Petitioner answers further that of the other

entities identified in the Petition, ¶ 8(o), Nationwide Agribusiness Insurance Company, Nationwide General Insurance Co., Nationwide Insurance Company of America, Nationwide Property & Casualty Insurance Co., Allied Insurance Company of America, Allied Property & Casualty Insurance Co., Crestbrook Insurance Co., Depositors Insurance Company, Freedom Specialty Insurance Company, Harleysville Insurance Company, Harleysville Preferred Insurance Company, Harleysville Worcester Insurance Company, National Casualty Co., and Scottsdale Indemnity Corp., some were and some were not participating members of the MAIPF during tax years 2014 and 2015.

In addition, Petitioner Nationwide Mutual is producing quarterly MAIPF Membership Participation reports reflecting MAIPF Membership Participation for tax years 2014-2018. *See* Documents produced. Some of the MAIPF Membership Participation reports refer to the entities only by “Company Number.” The Company Numbers are affiliated with the members of the Unitary Business Group as follows:

Entity	Company No.
Nationwide Mutual Insurance Company	06124
Nationwide Agribusiness Insurance Company	09094
Nationwide General Insurance Company	07504
Nationwide Insurance Company of America	07612
Nationwide Property & Casualty Insurance Company	07986
Allied Insurance Company of America	11682
Allied Property & Casualty Insurance Company	07372
Crestbrook Insurance Company	10060
Depositors Insurance Company	07373
Freedom Specialty Insurance Company	09817
Harleysville Insurance Company	08109
Harleysville Preferred Insurance Company	05460
Harleysville Worcester Insurance Company	05746
National Casualty Company	07932
Scottsdale Indemnity Company	07461

8. For all entities identified in the petition, ¶ 8(o), please explain whether each entity listed was subjected to a MAIPF audit during the tax years 2014 through 2018.

RESTATED OBJECTION: Petitioners object that this Interrogatory is overbroad, unduly burdensome, and not proportional to the needs of the case under MCR 2.302(B)(1). Petitioners object that this Interrogatory is overbroad in that seeks information for “tax years 2014 through 2018,” only the 2014 and 2015 tax years are relevant to this matter. Petitioners further object that this request is overly broad to the extent it seeks information relevant only to the petitions filed by Petitioner’s affiliates and not this case inasmuch as the Tribunal has placed those other cases in abeyance.

SUPPLEMENTAL RESPONSE: Subject to, and without waving, the foregoing objections and its general objections, Petitioner Nationwide Mutual supplements that neither it nor any of the other entities identified in Petition, ¶ 8(o) were subject to a MAIPF audit for the 2014 or 2015 tax year, which are the years at issue in this proceeding. Petitioner further responds that it has no record of any of the entities identified in Petition, ¶ 8(o) being subject to a MAIPF audit for the 2016-2018 tax years.

9. For those entities that were subject to a MAIPF audit during the tax years 2014 through 2018, please identify and explain any and all deficiencies identified by the MAIPF audit.

RESTATED OBJECTION: Petitioners object that this Interrogatory is overbroad, unduly burdensome, and not proportional to the needs of the case under MCR 2.302(B)(1). Petitioners object that this Interrogatory is overbroad in that seeks information for “tax years 2014 through 2018,” only the 2014 and 2015 tax years are relevant to this matter.

SUPPLEMENTAL RESPONSE: Subject to, and without waving, the foregoing objections and its general objections, Petitioner, Nationwide Mutual, incorporates its supplemental response to Interrogatory 8, above.

10. In Petitioner's 2015 original return, it claimed an original MAIPF credit amount of \$33,799. Petitioner later amended the return and claimed an additional MAIPF credit amount of \$91,371. Please explain why Petitioner sought a larger credit amount.

RESTATED OBJECTION: Petitioner Nationwide Agribusiness Insurance Company objects to the extent that this Interrogatory mischaracterizes such Petitioner's claimed credits or any other aspect or component of Petitioner's original or amended returns.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, Petitioners state that in a letter from the Michigan Department of Treasury dated May 13, 2016, the Department acknowledged that "an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group, even though the company is filing separately." In accordance with this Departmental Statement and the CIT Act, including MCL Sections 206.611 and 206.607, the entities identified in Petition, ¶ 8(o) are part of a Unitary Business Group. Based on the statutory combination of the members of the Nationwide Unitary Business Group, there was an increase in the aggregate amount of allowable MAIPF credits. Schedules were attached to the amended tax returns that provide details regarding both the creditable assessments and the total credits available to the Unitary Business Group and its component members.

11. Please identify who for Petitioner has the most knowledge about the calculation in the preceding interrogatory.

RESTATED OBJECTION: Petitioners reiterate and restate their Objections to Interrogatory No. 10.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, Petitioner, Nationwide Mutual, supplements and identifies Kyle Shaner.

12. With regards to Exhibit 1, Nationwide Attachment to Line 20C, please explain the term “Latest Return MAIPF” credit.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, its general objections, Petitioners state that terms used in certain attachments, including the term referenced in this Interrogatory, were simply shorthand used by accountants involved in preparing the tax returns to facilitate the preparation of the combined tax return for the Unitary Business Group. Preparation of a combined Unitary Business Group tax return requires the combination of the premiums, tax attributes and credits of each member into a single tax return and, although the Department of Treasury has recognized that insurance companies are authorized to file on a unitary basis, there were no forms, instructions or guidance issued regarding how such combined returns should be prepared. Thus, in the absence of instructions, guidance or forms, the accountants involved in preparing the tax returns at issue used internal terminology to facilitate the combination. Headings, terms, and/or captions used in the tax return work papers and schedules were for convenience or reference of the preparers only and in no way attempted to define, modify, limit or add to any technical substance. Subject to that explanation generally, the term “Latest Return MAIPF Credit” refers to the credit as reported in the prior, separate tax return prior to the preparation of the statutorily-required Unitary Business Group combined return.

13. With regards to Exhibit 1, Nationwide Attachment to Line 20C, please explain the term “Corrected MAIPF” credit.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, its general objections, Petitioners state that terms used in certain attachments, including the term referenced in this Interrogatory, were simply shorthand used by accountants involved in preparing the tax returns to facilitate the preparation of the combined tax return for the Unitary Business Group. Preparation of a combined Unitary Business Group tax return requires the combination of the premiums, tax attributes and credits of each member into a single tax return and, although the Department of Treasury has recognized that insurance companies are authorized to file on a unitary basis, there were no forms, instructions or guidance regarding how such combined returns should be prepared. Thus, in the absence of instructions, guidance or forms, the accountants involved in preparing the tax returns at issue used internal terminology to facilitate the combination. Headings, terms, and/or captions used in the tax return work papers and schedules were for convenience or reference of the preparers only and in no way attempted to define, modify, limit or add to any technical substance. Subject to that explanation generally, the term “Corrected MAIPF Credit” refers to the accountants’ calculated credit applicable to the relevant member in the combining work papers used to prepare the Unitary Business Group’s corrected, combined tax return on a unitary basis.

14. With regards to Exhibit 1, Nationwide Attachment to Line 20C, please explain the term “Transferred MAIPF” credit, including from whom the credit is being transferred.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, its general objections, Petitioners state that terms used in certain attachments, including the term referenced in this Interrogatory, were simply shorthand used by accountants involved in preparing the tax returns

to facilitate the preparation of the combined tax return for the Unitary Business Group. Preparation of a combined Unitary Business Group tax return requires the combination of the premiums, tax attributes and credits of each member into a single tax return and, although the Department of Treasury has recognized that insurance companies are authorized to file on a unitary basis, there were no forms, instructions or guidance regarding how such combined returns should be prepared. In the absence of instructions, guidance or forms, the accountants involved in preparing the tax returns at issue used internal terminology to facilitate the combination. Headings, terms, and/or captions used in the tax return work papers and schedules were for convenience or reference of the preparers only and in no way attempted to define, modify, limit or add to any technical substance. Subject to that explanation, the term “Transferred MAIPF Credit” generally refers to the manner in which the Unitary Business Group and its members’ tax and credits were calculated on a unitary combined basis. On information and belief, the term “transferred” is internal nomenclature used by the accountants to reflect the fact that, on a unitary combined basis, the total allowable credits increased, but this term has no legal effect as there are no transfers to or from any party with respect to a single, unitary taxpayer.

15. With regards to Exhibit 1, Nationwide Attachment to Line 20C, please explain the term “MAIPF Used” credit.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, its general objections, Petitioners state that terms used in certain attachments, including the term referenced in this Interrogatory, were simply shorthand used by accountants involved in preparing the tax returns to facilitate the preparation of the combined tax return for the Unitary Business Group. Preparation of a combined Unitary Business Group tax return requires the combination

of the premiums, tax attributes and credits of each member into a single tax return and, although the Department of Treasury has recognized that insurance companies are authorized to file on a unitary basis, there were no forms, instructions or guidance regarding how such combined returns should be prepared. In the absence of instructions, guidance or forms, the accountants involved in preparing the tax returns at issue used internal terminology to facilitate the combination. Headings, terms, and/or captions used in the tax return work papers and schedules were for convenience or reference of the preparers only and in no way attempted to define, modify, limit or add to any technical substance. Subject to that explanation generally, the term "MAIPF Used Credit" refers to the manner in which the accountants tracked the total available and utilized credits on a combined basis.

16. Please identify who for Petitioner created Exhibit 1, Nationwide Attachment to Line 20C.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, Petitioner, Nationwide Mutual supplements that Exhibit 1 was prepared under the direction of Matt Street.

17. With regards to Exhibit 2, Nationwide Attachment to Line 38B, please explain the term "Latest Return Line-38B Other Assessments."

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, its general objections, Petitioners state that terms used in certain attachments, including the term referenced in this Interrogatory, were simply shorthand used by accountants involved in preparing the tax returns to facilitate the preparation of the combined tax return for the Unitary Business Group. Preparation of a combined Unitary Business Group tax return requires the combination of the premiums, tax attributes and credits of each member into a single tax return and, although

the Department of Treasury has recognized that insurance companies are authorized to file on a unitary basis, there were no forms, instructions or guidance regarding how such combined returns should be prepared. In the absence of instructions, guidance or forms, the accountants involved in preparing the tax returns at issue used internal terminology to facilitate the combination. Headings, terms, and/or captions used in the tax return work papers and schedules were for convenience or reference of the preparers only and in no way attempted to define, modify, limit or add to any technical substance. Subject to that explanation generally, the term “Latest Return Line – 38B Other Assessments” refers to assessments other than MAIPF assessments included in originally filed tax returns.

18. With regards to Exhibit 2, Nationwide Attachment to Line 38B, please explain the term “Corrected Line-38B Other Assessments.”

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, its general objections, Petitioners state that terms used in certain attachments, including the term referenced in this Interrogatory, were simply shorthand used by accountants involved in preparing the tax returns to facilitate the preparation of the combined tax return for the Unitary Business Group. Preparation of a combined Unitary Business Group tax return requires the combination of the premiums, tax attributes and credits of each member into a single tax return and, although the Department of Treasury has recognized that insurance companies are authorized to file on a unitary basis, there were no forms, instructions or guidance regarding how such combined returns should be prepared. In the absence of instructions, guidance or forms, the accountants involved in preparing the tax returns at issue used internal terminology to facilitate the combination. Headings, terms, and/or captions used in the tax return work papers and schedules were for convenience or reference of the preparers only and in no way attempted to define,

modify, limit or add to any technical substance. Subject to that explanation generally, the term “Corrected Line-38B Other Assessments” refers to other assessment amounts creditable under MCL 206.637(c) as corrected for the filing made on a unitary combined basis for the Unitary Business Group.

19. With regards to Exhibit 2, Nationwide Attachment to Line 38B, please explain the term “Transfer Other Assessments,” including from whom the other assessments are being transferred.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, its general objections, Petitioners state that terms used in certain attachments, including the term referenced in this Interrogatory, were simply shorthand used by accountants involved in preparing the tax returns to facilitate the preparation of the combined tax return for the Unitary Business Group. Preparation of a combined Unitary Business Group tax return requires the combination of the premiums, tax attributes and credits of each member into a single tax return and, although the Department of Treasury has recognized that insurance companies are authorized to file on a unitary basis, there were no forms, instructions or guidance regarding how such combined returns should be prepared. In the absence of instructions, guidance or forms, the accountants involved in preparing the tax returns at issue used internal terminology to facilitate the combination. Headings, terms, and/or captions used in the tax return work papers and schedules were for convenience or reference of the preparers only and in no way attempted to define, modify, limit or add to any technical substance. Subject to that explanation generally, the term “Transfer Other Assessments” refers to the manner in which the Unitary Business Group and its members’ tax and credits were calculated on a unitary combined basis. On information and belief, the term “transferred” is internal nomenclature used by the accountants to reflect the fact

that, on a unitary combined basis, the total allowable credits increased, but this term has no legal effect as there are no transfers to or from any party with respect to a single, unitary taxpayer.

20. With regards to Exhibit 2, Nationwide Attachment to Line 38B, please explain the term “Other Assessments Used.”

RESPONSE: Subject to, and without waiving, its general objections, Petitioners state that terms used in certain attachments, including the term referenced in this Interrogatory, were simply shorthand used by accountants involved in preparing the tax returns to facilitate the preparation of the combined tax return for the Unitary Business Group. Preparation of a combined Unitary Business Group tax return requires the combination of the premiums, tax attributes and credits of each member into a single tax return and, although the Department of Treasury has recognized that insurance companies are authorized to file on a unitary basis, there were no forms, instructions or guidance regarding how such combined returns should be prepared. In the absence of instructions, guidance or forms, the accountants involved in preparing the tax returns at issue used internal terminology to facilitate the combination. Headings, terms, and/or captions used in the tax return work papers and schedules were for convenience or reference of the preparers only and in no way attempted to define, modify, limit or add to any technical substance. Subject to that explanation generally, the term “Other Assessments Used” was used by the accountants to report assessments taken into account in the unitary combined return required for the Unitary Business Group.

21. Please identify who for Petitioner created Exhibit 2, Nationwide Attachment to Line 38B.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, its general objections, Petitioner Nationwide Mutual supplements and states Exhibit 2 was prepared under the direction of Matt Street.

22. With regards to Exhibit 3, 2015 Insurance Company Amended Return for Corporate Income and Retaliatory Taxes, Line 33B, please explain what Petitioner deems as “other fees paid” in the amount of \$2,277.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, its general objections, Petitioner Nationwide Mutual supplements and states that the term “Other Fees Paid” references fees other than those specified in the detailed fee captions, including fees assessed pursuant to MCL 500.224(4), that were included in the Unitary Business Group’s tax filings.

23. With regards to Exhibit 3, 2015 Insurance Company Amended Return for Corporate Income and Retaliatory Taxes, Line 38B, please explain what Petitioner deems as “other assessments” in the amount of \$90,026.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, its general objections, Petitioner Nationwide Mutual supplements and states that terms used in certain attachments, including the term referenced in this Interrogatory, were simply shorthand used by accountants involved in preparing the tax returns to facilitate the preparation of the combined tax return for the Unitary Business Group. Preparation of a combined Unitary Business Group tax return requires the combination of the premiums, tax attributes and credits of each member into a single tax return and, although the Department of Treasury has recognized that insurance companies are authorized to file on a unitary basis, there were no forms, instructions or guidance regarding how such combined returns should be prepared. Headings, terms, and/or captions used in the tax return work papers and schedules were for convenience or reference of the

preparers only and in no way attempted to define, modify, limit or add to any technical substance. In the absence of instructions, guidance or forms, the accountants involved in preparing the tax returns at issue used internal terminology to facilitate the combination. Subject to that explanation generally, the term “Other Fees Paid” references fees other than those specified in the detailed fee captions that were included in the Unitary Business Group’s tax filings.

24. Who for Petitioner decided that Petitioner should share credits with the entities identified in the petition, ¶ 8(o)?

RESTATED OBJECTION: Petitioners object that this Request is it is vague and ambiguous to the extend it relies on the term “share credits” which is neither defined in Respondent’s Requests nor used in the Petition.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, Petitioner Nationwide Mutual supplements and states that Carmela Wilson, currently VP, Corporate Chief Risk Officer Enterprise Risk Management of Nationwide Mutual Insurance Company, after consultation and collaboration with the Corporate Tax group and with members of her controllership team, was ultimately responsible for the decision to file the amended return that reported credits on a unitary basis in the manner required by statute.

25. Please identify all witnesses, lay or expert, that you may or will rely upon to provide testimony at a deposition, in an affidavit, or at a trial to support any allegation set forth in the petition and/or to authenticate any documents upon which you may rely upon in this matter.

RESTATED OBJECTION: Petitioners object to this interrogatory as it is premature. Discovery in this case has only just begun and is far from complete. Petitioners object that this interrogatory is overbroad and unduly burdensome in that it, and further objects that it calls for information that is protected by the work product doctrine (in requesting disclosure of “all witnesses, lay or expert that [Petitioner] may rely” on as a witness). This interrogatory is objectionable in that it requests information that will not be known until after additional discovery and investigation is complete. Further discovery and analysis may supply additional information and Petitioners reserve the right to supplement this response and all other responses to the Interrogatories.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and their general objections, Petitioners incorporate all persons identified in these Supplemental Responses.

26. For each individual identified in the preceding interrogatory, please provide his or her name, address, telephone number, title, occupation, and a summary of his or her anticipated testimony.

RESTATED OBJECTION: Petitioners incorporate and restate their objections to the prior Interrogatory. Petitioners further object that this interrogatory calls for information that is protected by the work product doctrine (“summary of his or her anticipated testimony”). Petitioners further object to this interrogatory as it is premature. This interrogatory is objectionable in that it requests information that will not be known until after additional discovery and investigation is complete. Further discovery and analysis may supply additional information and Petitioners reserve the right to supplement this response.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and their general objections, Petitioners state the persons identified in these Supplemental Responses may be contacted through Petitioners' counsel and may testify in connection with the issues on which they are disclosed. With respect to Matt Street, he is a former employee but may be contacted through counsel for Nationwide Mutual Insurance Company, who will make reasonable efforts to make him available as appropriately requested.

27. For each individual who contributed in any way to the responses to these discovery requests, please provide his or her name, address, telephone number, title, occupation, and a summary of his or her anticipated testimony.

RESTATED OBJECTION: Petitioners object to this Interrogatory as vague, unduly burdensome, overbroad, and not proportional to the needs of the case in that it seeks disclosure of each individual who “contributed in any way to the responses to these discovery requests,” and further seeks “a summary of his or her anticipated testimony.”

SUPPLEMENTAL RESPONSE: Subject to, and without waving the foregoing objections or its general objections, Petitioner Nationwide Mutual supplements and identifies the following:

- Alice Brookshire, Assistant Vice President of Enterprise Financial Reporting;
- Kelley Dean, Technical Director, Accounting & Finance Solutions;
- Dan Eppley, VP Tax;
- Jill Kleinhenz, Director, Financial Reporting;
- Benjamin Lewis, CPA, Consultant, Accounting, FSSC Specialized Accounting, Reinsurance Operations;
- Lisa Martin, Financial Reporting;
- Arthur McKinley, Consultant, Financial Reporting;

- Dawn Pollitt-Key, Manager Claims – Casualty Medical, Titan/Nationwide Mutual Fire Insurance Company – Michigan Assigned Claims;
- Ronald S. Porter, Manager, Premium Tax Reporting; and
- Kyle Shaner, Specialist, Financial Reporting.

These individuals may be contacted through Petitioners' counsel. Petitioners further state that the subject matters of these individuals testimony may include, but are not limited to, how Petitioners are part of a Unitary Business Group, the amended return filed by the Unitary Business Group, the Unitary Business Group's entitlement to refunds based on the amended return, or any subjects addressed in these interrogatories.

28. Please identify who is responsible for preparing accounting records for each of the entities listed in the petition, ¶ 8(o).

RESTATED OBJECTION: Petitioners object that this interrogatory is vague and ambiguous (“preparing accounting records”), Petitioners further object to this interrogatory on the ground that the request is overbroad, unduly burdensome, and not proportional to the needs of the case under MCR 2.302(B)(1). Petitioner Nationwide Mutual is a very large, complex Unitary Business Group (of which Petitioner Nationwide Agribusiness Insurance Company is a part) that uses sophisticated, industry-standard data systems to obtain financial data as input by thousands of employees and processes that data into the company's journals and ledgers under the supervision and control of Nationwide's corporate controllership team.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving the foregoing objections or its general objections, Petitioner Nationwide Mutual supplements and states that there is no singular person responsible for the accounting records for the entities listed in the Petition, 8(o). Answering further, Petitioner states that Kyle Shaner can testify how the Unitary Business

Group's journal and ledger systems that reflect financial data inputted by thousands of employees were used to generate the amended tax return of the Unitary Business Group.

29. Please identify who is responsible for tax preparation for each of the entities listed in the petition, ¶ 8(o).

RESTATED OBJECTION: Petitioners object that this interrogatory is overbroad, unduly burdensome, vague and ambiguous (in that it requests Petitioners identify "who is responsible for tax preparation for each of the entities" listed in the Petition).

SUPPLEMENTAL RESPONSE: Subject to, and without waiving the foregoing objections, Petitioner Nationwide Mutual supplements and states that tax filings for the Unitary Business Group for the State of Michigan are currently prepared by Kyle Shaner with the assistance of other employees of the Unitary Business Group. During the tax year at issue, former employee Matt Street was responsible for tax preparation for the entities listed in the Petition, ¶ 8(o).

30. (Originally Labelled as Request for Production 19) For the 2014 through 2018 tax years, please identify and explain all amounts included on Petitioner's tax returns (original and/or amended) that are the product of reallocating amounts among those entities identified in the petition, ¶ 8(o).

RESTATED OBJECTION: Petitioners note that this Request does not seek production and appears to have been intended to be an Interrogatory and Petitioners respond accordingly. Petitioners further object that this Interrogatory is vague and ambiguous ("Petitioner's tax returns"). Petitioners object to the extent "tax returns" is intended to mean anything other than Petitioners' 2014 and 2015 Michigan CIT returns. This Interrogatory is further objectionable as it is overbroad and unduly burdensome. Petitioners object that this Interrogatory is overbroad

in that seeks information for “tax years 2014 through 2018, only the 2014 and 2015 tax years are relevant to this matter.

SUPPLEMENTAL RESPONSE: Without waiving, and subject to, the foregoing objections and its general objections, Petitioner Nationwide Mutual supplements and states that nothing has been reallocated or transferred between entities. Petitioner’s amended return merely reflects the preparation of a return for the Unitary Business Group in accordance with the mandate of Michigan CIT Act.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. Please produce the state tax returns filed with the states of origin for each entity listed in the petition, ¶ 8(o) for tax years 2014 through 2018.

RESTATED OBJECTION: Petitioners object that this Request is overbroad in that it seeks information for “tax years 2014 through 2018,” and only the 2014 and 2015 tax years are relevant to this matter. Petitioners also object that this Request is overbroad to the extent that this Request seeks information that is not relevant to any party’s claims or defenses.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objection and their general objections, and pursuant to the Tribunal’s order of May 13, 2021, Petitioner Nationwide Mutual supplements and is producing the documents for 2014-2015 of the entities

2. Please produce any and all schedules, invoices, and other detail to support the amounts identified on Line 33 of the Corporate Income Tax (CIT) returns for all entities listed in the petition, ¶ 8(o) for the tax years 2014 through 2018.

RESTATED OBJECTION: Petitioners object that this Request is overbroad in that it seeks information for “tax years 2014 through 2018,” and only the 2014 and 2015 tax years are relevant to this matter. Petitioners further object that this Request seeks information in the

possession of, known to, or otherwise equally available to Respondent. Petitioner also objects that this Request is overbroad to the extent that this Request seeks information that is not relevant to any party's claims or defenses.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving the foregoing objections and its general objections, and pursuant to the Tribunal's order of May 13, 2021, Petitioner Nationwide Mutual supplements and is producing the documents for 2014-2015 of the entities (other than Petitioner Nationwide Agribusiness Insurance Company that have already been produced) identified in the Petition.

3. Please produce any and all schedules, assessments, and other detail to support the amounts identified on Line 38 of the CIT returns for all entities listed in the petition, ¶ 8(o) for the tax years 2014 through 2018.

RESTATED OBJECTION: Petitioners object that this Request is overbroad in that it seeks information for "tax years 2014 through 2018," and only the 2014 and 2015 tax years are relevant to this matter. Petitioners further object that this Request seeks information in the possession of, known to, or otherwise equally available to Respondent. Petitioner also objects that this Request is overbroad to the extent that this Request seeks information that is not relevant to any party's claims or defenses.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving the foregoing objections and their general objections, and pursuant to the Tribunal's order of May 13, 2021, Petitioner Nationwide Mutual supplements and is producing the documents for 2014-2015 of the entities (other than Petitioner Nationwide Agribusiness Insurance Company that have already been produced) identified in the Petition.

4. Please produce any and all schedules showing reallocations of MAIPF credits between all entities listed in the petition, ¶ 8(o) for the tax years 2014 through 2018.

RESTATED OBJECTION: Petitioners object that this Request is overbroad in that it seeks information for “tax years 2014 through 2018,” and only the 2014 and 2015 tax years are relevant to this matter. Petitioner further objects that this Request seeks information in the possession of, known to, or otherwise equally available to Respondent. Petitioners also object that this Request is vague and ambiguous with respect to the use of the term “reallocations.” Petitioners also object that this Request is overbroad to the extent that this Request seeks information that is not relevant to any party’s claims or defenses.

RESTATED RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, Petitioner Nationwide Mutual supplements that such non-privileged, responsive documents have previously been produced on April 28, 2021.

5. Please produce any and all MAIPF assessments for which MAIPF tax credits were claimed by the entities listed in the petition, ¶ 8(o) for the tax years 2014 through 2018.

RESTATED OBJECTION: Petitioners object that this Request is overbroad in that it seeks information for “tax years 2014 through 2018,” and only the 2014 and 2015 tax years are relevant to this matter. Petitioners also object that this Request is overbroad to the extent that this Request seeks information that is not relevant to any party’s claims or defenses.

SUPPLEMENTAL RESPONSE: Pursuant to the Tribunal’s order of May 13, 2021, Petitioner Nationwide Mutual supplements and is producing the documents for 2014-2015 of the entities (other than Petitioner Nationwide Agribusiness Insurance Company that have already been produced) identified in the Petition.

6. Please produce any and all MAIPF assessments for which MAIPF tax credits were claimed by AMCO Insurance Company for the 2015 tax year, per Exhibit 1.

RESTATED OBJECTION: Petitioners object that this Request is vague and ambiguous with respect to the use of the term “claimed” in connection with all credits being included in a combined, Unitary Business Group return. Petitioners also object that this Request is overbroad to the extent that this Request seeks information that is not relevant to any party’s claims or defenses.

SUPPLEMENTAL RESPONSE: Pursuant to the Tribunal’s order of May 13, 2021, Petitioner Nationwide Mutual supplements and is producing the documents for 2014-2015 of the entities (other than Petitioner Nationwide Agribusiness Insurance Company that have already been produced) identified in the Petition.

7. Please produce the CIT return, including all supporting schedules, for AMCO Insurance Company for the 2015 tax year.

SUPPLEMENTAL RESPONSE: Pursuant to the Tribunal’s order of May 13, 2021, Petitioner Nationwide Mutual supplements and is producing the documents for 2014-2015 of the entities (other than Petitioner Nationwide Agribusiness Insurance Company that have already been produced) identified in the Petition.

8. Please produce the tax return from the state of origin, including all supporting schedules, for AMCO Insurance Company for the 2015 tax year.

RESTATED OBJECTION: Petitioners object that this Request is overbroad to the extent that this Request seeks information that is not relevant to any party’s claims or defenses.

SUPPLEMENTAL RESPONSE: Pursuant to the Tribunal’s order of May 13, 2021, Petitioner Nationwide Mutual supplements and is producing the documents for 2014-2015 of

the entities (other than Petitioner Nationwide Agribusiness Insurance Company that have already been produced) identified in the Petition.

9. Please produce proof of payment of the MAIPF assessments issued to the entities listed in the petition, ¶ 8(o) for the tax years 2014 through 2018.

RESTATED OBJECTION: Petitioners object that this Request is overbroad in that it seeks information for “tax years 2014 through 2018,” and only the 2014 and 2015 tax years are relevant to this matter. Petitioners also object that this Request is overbroad to the extent that this Request seeks information that is not relevant to any party’s claims or defenses.

SUPPLEMENTAL RESPONSE: Pursuant to the Tribunal’s order of May 13, 2021, Petitioner Nationwide Mutual supplements and is producing the documents for 2014-2015 of the entities (other than Petitioner Nationwide Agribusiness Insurance Company that have already been produced) identified in the Petition.

10. Please produce any and all financial statements filed with the MAIPF or any other public entity for the entities listed in the petition, ¶ 8(o) for the tax years 2014 through 2018.

RESTATED OBJECTION: Petitioners object to this request to the extent it requires Petitioners to make a 50-state search for documents filed with other public entities which information would be redundant. Petitioners object that this Request is overbroad in that it seeks information for “tax years 2014 through 2018,” and only the 2014 and 2015 tax years are relevant to this matter. Petitioners also object that this Request is overbroad to the extent that this Request seeks information that is not relevant to any party’s claims or defenses.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving the foregoing objections and its general objections, and pursuant to the Tribunal’s order of May 13, 2021, Petitioner

Nationwide Mutual supplements and is producing the documents for 2014-2015 of the entities (other than Petitioner Nationwide Agribusiness Insurance Company that have already been produced) identified in the Petition.

11. Please produce any and all applications for placement filed with the MAIPF for the entities listed in the petition, ¶ 8(o) for the tax years 2014 through 2018.

RESTATED OBJECTION: Petitioners object that this Request is overbroad in that it seeks information for “tax years 2014 through 2018,” and only the 2014 and 2015 tax years are relevant to this matter. Petitioners also object that this Request is overbroad to the extent that this Request seeks information that is not relevant to any party’s claims or defenses.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving the foregoing objections and its general objections Petitioner Nationwide Mutual supplements and states that there are no responsive documents.

12. Please produce any and all annual statements filed with the MAIPF for the entities listed in the petition, ¶ 8(o) for the tax years 2014 through 2018.

RESTATED OBJECTION: Petitioners object that this Request is overbroad in that it seeks information for “tax years 2014 through 2018,” and only the 2014 and 2015 tax years are relevant to this matter. Petitioners also object that this Request is overbroad to the extent that this Request seeks information that is not relevant to any party’s claims or defenses.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving the foregoing objections and their general objections, and pursuant to the Tribunal’s order of May 13, 2021, Petitioner Nationwide Mutual supplements that is producing the documents for 2014-2015 of the entities (other than Petitioner Nationwide Agribusiness Insurance Company that have already been produced) identified in the Petition.

13. For those entities listed in the petition, ¶ 8(o) that were subject to a MAIPF audit during the tax years 2014 through 2018, please produce any and all documentation provided to the MAIPF, as well as the final audit determination made by the MAIPF.

RESTATED OBJECTION: Petitioners object that this Request is overbroad in that it seeks information for “tax years 2014 through 2018,” and only the 2014 and 2015 tax years are relevant to this matter. Petitioners also object that this Request is overbroad to the extent that this Request seeks information that is not relevant to any party’s claims or defenses.

SUPPLEMENTAL RESPONSE: Subject to and without waiving the foregoing objections and their general objections, Petitioner Nationwide Mutual supplements and states that there are no responsive documents as there were no audits in 2014 or 2015. See Supplemental Response to Interrogatory No. 9, above.

14. Please produce any and all documentation on which Petitioner will rely to support its position that all entities identified in the petition, ¶ 8(o) are a unitary business group as that term is defined in MCL 206.611(6).

RESTATED OBJECTION: Petitioners object to this Requests as unduly burdensome, overbroad, vague, ambiguous, and not proportional to the needs of the case because it requires Petitioners to prematurely marshal all of its available proof or the proof the Petitioners intend to offer at hearing. Petitioners further object to this Request as vague and ambiguous to the extent that it mischaracterizes the allegations in the Petition. Petitioners have not completed discovery and have not completed preparation for hearing. Further discovery, legal research and analysis may supply additional information and Petitioners reserve the right to supplement this response, as necessary. Petitioners further object that this Request is vague and ambiguous

(“support [Petitioner’s] position”) and calls for information protected by the attorney-client privilege and the work product doctrine.

SUPPLEMENTAL RESPONSE: Subject to and without waving the foregoing objections and its general objections, Petitioner Nationwide Mutual has not determined what documentation it will rely on to support its position. Petitioners may rely on the documents they are producing in response to the interrogatories and/or other requests for production, as well as other documents they identify in the future to support their position.

15. Please produce any and all documentation used to support Petitioner’s answer to Interrogatory No. 10 above, including any and all amended MAIPF assessments issued to Petitioner for the 2015 tax year.

RESTATED OBJECTION: Petitioners object that this Request is vague and ambiguous (“support Petitioner’s answer”) and calls for information protected by the attorney-client privilege and the work product doctrine.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, Petitioner Nationwide Mutual supplements that it is producing non-privileged, responsive documents. Pursuant to the Tribunal’s order, Petitioner Nationwide Mutual is producing the documents for 2014-2015 of the entities (other than the Petitioner Nationwide Agribusiness that have already been produced) identified in the Petition.

16. Please produce all communications between Petitioner and Timothy Pratschler regarding Petitioner’s CIT liability for the tax years at issue.

RESTATED OBJECTION: Petitioners object to the extent that this request seeks information protected by the work product privilege. Petitioners further object to this request as overbroad and vague in that it references “all communications” without defining that term.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections Petitioners state that there are no responsive documents.

17. Please produce all communications between Petitioner and Joseph D'Souza regarding Petitioner's CIT liability for the tax years at issue.

RESTATED OBJECTION: Petitioners object that this Request seek information and documents in the possession of, known to, or otherwise equally available to Respondent, as Mr. D'Souza is an employee of Respondent. Petitioners further object to this request as overbroad and vague in that it references "all communications" without defining that term.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, Petitioner Nationwide Mutual supplements that all such non-privileged, responsive documents have previously been produced on April 28, 2021.

18. Please produce all communications between Matthew P. Street and Scott A. Woodling regarding Petitioner's CIT liability for the tax years at issue.

RESTATED OBJECTION: Petitioners object that this Request calls for information protected by the attorney-client privilege, accountant-client privilege (MCL 339.732), and/or the work product doctrine. Petitioners further object to this request as overbroad and vague in that it references "all communications" without defining that term.

SUPPLEMENTAL RESPONSE: Subject to, and without waiving, the foregoing objections and its general objections, Petitioner Nationwide Mutual supplements that it has not identified any communications between Matthew P. Street and Scott A Woodling that are not privileged.

CERTIFICATION

STATE OF OHIO)
) ss.
COUNTY OF FRANKLIN)

I, Dan Eppley, VP, Tax, of Nationwide Mutual Insurance Company, after a reasonable inquiry and with the assistance of other corporate officers, employees, counsel (both internal and external), and agents, that the foregoing responses are complete and correct as of the date hereof, to the best of my knowledge, information and belief.

Dated: May 26th, 2021

Dan Eppley

Subscribed and sworn before me 26th day of May 2021

Catherine B. Winston, Notary

Franklin County, Ohio

My commission expires: July 7, 2021



CATHERINE B. WINSTON
Notary Public, State of Ohio
My Commission Expires 07-07-2021

AS TO OBJECTIONS,

Respectfully submitted,

BODMAN PLC

Dated: May 26, 2021

By: Wayne D. Roberts

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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 8



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

NICK KHOURI
STATE TREASURER

REVENUE ADMINISTRATIVE BULLETIN 2018-12

Approved: May 23, 2018

CORPORATE INCOME TAX
UNITARY BUSINESS GROUP CONTROL TEST AND RELATIONSHIP TESTS

(This RAB replaces RAB 2013-1)

Pursuant to MCL 205.6a, a taxpayer may rely on a Revenue Administrative Bulletin issued by the Department of Treasury after September 30, 2006, and shall not be penalized for that reliance until the bulletin is revoked in writing. However, reliance by the taxpayer is limited to issues addressed in the bulletin for tax periods up to the effective date of an amendment to the law upon which the bulletin is based or for tax periods up to the date of a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired that overrules or modifies the law upon which the bulletin is based.

RAB 2018-12. Under the Corporate Income Tax (“CIT”), a unitary business group (“UBG”) is two or more qualifying United States persons that satisfy both a *control test* and one of two alternate *relationship tests*, or an affiliated group that has properly elected to be treated as a UBG.¹ A UBG is a single taxpayer under the CIT and must file a combined return.² Foreign persons and foreign operating entities cannot be included in a UBG.³

This Revenue Administrative Bulletin (“RAB”) describes the *control test* and the two alternative *relationship tests* described in MCL 206.611(6). If a group of entities satisfies the control test as described in the statute, and if that same group also satisfies one of two relationship tests described in this RAB, that group of entities will constitute a UBG.

ISSUES

- I. How is a UBG defined under the CIT?
- II. What is the control test under the CIT?
- III. What are controlled groups of entities?

¹ MCL 206.611(6), 206.691(2).

² MCL 206.611(5), 206.691(1).

³ *In re Estate of Wheeler*, 297 Mich App 411 (2012), held that for purposes of Part 1 of the Income Tax Act, there is no water’s edge limitation on apportionment of business income. This holding is not applicable to the CIT, which expressly prohibits a foreign operating entity from being a member of a UBG. See MCL 206.611(6) and 206.607(3).

- IV. How do voting agreements affect the control test?
- V. How is control determined for nonstock nonprofit organizations?
- VI. What is “indirect” ownership?
- VII. What are the relationship tests under the CIT?
- VIII. What special considerations exist in applying the relationship tests?
- IX. What factors should be weighed in determining whether either relationship test is met?

CONCLUSIONS

I. UNITARY BUSINESS GROUP DEFINED

Under the CIT, a UBG is defined as:

a group of United States persons that are corporations, insurance companies, or financial institutions, other than a foreign operating entity, 1 of which owns or controls, directly or indirectly, more than 50% of the ownership interest with voting rights or ownership interests that confer comparable rights to voting rights of the other members, and that has business activities or operations which result in a flow of value between or among members included in the unitary business group or has business activities or operations that are integrated with, are dependent upon, or contribute to each other.⁴

A corporation is a person that is required or has elected to file as a C corporation as defined under section 1361(a)(2) and section 7701(a)(3) of the Internal Revenue Code. A corporation does not include an insurance company or a financial institution.⁵ A group must meet both a control test and one of two alternative relationship tests before that group will be a UBG. Alternatively, Public Act 266 of 2013 amended the CIT to permit affiliated groups to make an election to be treated as a UBG for tax years beginning after December 31, 2012. This RAB does not address UBGs formed pursuant to that election.

II. CONTROL TEST DEFINED

The control test is satisfied when one person owns or controls, directly or indirectly, more than 50% of the ownership interests with voting or comparable rights of the other person or persons.

⁴ MCL 206.611(6).

⁵ MCL 206.605(1).

A person owns or controls more than 50% of the ownership interests with voting rights or ownership interests that confer comparable rights to voting rights of another person if that person owns or controls, directly or indirectly, (1) more than 50% of the total combined voting power of all ownership interests with voting (or comparable) rights **or** (2) more than 50% of the total value of all ownership interests with voting (or comparable) rights. "Ownership interest with voting rights" includes all classes of stock in a corporation entitled to vote that possess the power to elect the members of the board of directors of the corporation. "Ownership interests that confer comparable rights to voting rights" include instruments, contracts, agreements, or other authority demonstrating an ownership interest in an entity that confers power in the owner to vote in the selection of the management of that entity.

Example 1. Corporation A owns 5 shares of class A stock and 10 shares of class B stock in Corporation X. Corporation B owns 40 shares of class B stock in Corporation X. Corporation C owns 50 shares of preferred stock in Corporation X. Corporation X has no other outstanding stock in any class. Each class A share has 10 votes per share of stock owned. The class B shares have 1 vote per share of stock. The preferred shares have no voting rights. Corporation A owns 60% of the total voting rights of Corporation X and satisfies the control test.

III. CONTROLLED GROUPS OF ENTITIES

A person owns or controls more than 50% of the ownership interests with voting rights or ownership interests that confer comparable rights to voting rights of another person if that person owns or controls (1) more than 50% of the total combined voting power of all ownership interests with voting (or comparable) rights **or** (2) more than 50% of the total value of all ownership interests with voting (or comparable) rights. Entities that satisfy the CIT control test constitute "controlled groups of entities." A controlled group of entities is described below.

(A) Parent-Subsidiary Controlled Group of Entities. A parent-subsidiary controlled group of entities satisfies the control test. A parent-subsidiary controlled group of entities means any group of one or more chains of entities connected through ownership with a common parent if (1) the common parent directly or indirectly owns more than 50% of the ownership interests with voting or comparable rights of at least one other entity, and (2) more than 50% of the ownership interests with voting or comparable rights of each entity other than the common parent is owned directly or indirectly by one or more of the other entities.

Example 2. Corporation A owns 51% of Corporation B, which owns 51% of Corporation C, which owns 51% of Corporation D. The common parent owns more than 50% of the stock in at least one other entity (Corporation B), and more than 50% of the stock of each entity other than the common parent is owned by at least one other entity in the chain. Corporations A,

B, C, and D are part of a parent-subsidary controlled group of entities and satisfy the control test for UBGs.

Example 3. Same facts as Example 2, except that Corporation C is a foreign person. Corporations A, B, and D are part of a parent-subsidary controlled group of persons and satisfy the control test for UBGs. Corporation C, as an intervening foreign person, is still used to determine ownership and control, but is excluded from the UBG because it is not a United States person as required under MCL 206.611.

Example 4. Corporation A owns 51% of Corporation B, which owns 51% of Partnership 1. Partnership 1 owns 51% of Corporation C. Corporations A, B, and C are part of a parent-subsidary controlled group of persons and satisfy the control test for UBGs. Partnership 1 is still used to determine ownership and control even if it is excluded from the UBG.

(B) Excluded Ownership Interests. For purposes of determining ownership or control under the control test, the Michigan Department of Treasury (the “Department”) will apply IRC 1563(c) to exclude certain ownership interests from determination of ownership and control.

Example 5. Corporation X owns 50% of Corporation Y. The remainder of Corporation Y is owned by an individual who is also a principal stockholder under IRC 1563(c) of Corporation X. Corporation Y owns 51% of Corporation Z. Because the individual is a principal stockholder of Corporation X, his or her ownership interest in Corporation Y is treated as an excluded ownership interest under IRC 1563(c) as applied to the CIT. For purposes of the control test for UBGs, Corporation X controls 100% of Corporation Y and 51% of Corporation Z.

(C) Controlled Group of Entities Without Common Control. In certain circumstances where a controlled group of entities are not in fact under the control of a member of the controlled group or under common control of any person, the controlled group may fail to satisfy control standards for unitary businesses generally described by U.S. Supreme Court precedent. In most of these cases, the controlled group of entities in question would fail the relationship test under MCL 206.611(6). However, if it is determined – despite satisfying the control test as described in this RAB and the relationship test under MCL 206.611(6) – that the members of the controlled group of entities are not under common control of a person (including a member of the purported controlled group) or group of related persons, then that controlled group of entities will not satisfy the control test for purposes of MCL 206.611(6). One or more persons within the purported controlled group may nonetheless comprise one or more controlled groups of entities or may be required to file separate returns.

IV. VOTING AGREEMENTS

For purposes of this RAB, in determining whether the ownership interests owned by a person possess voting (or comparable) rights, the Department presumes the following, subject to rebuttal by the taxpayer:

- (1) Unless noted otherwise below, ownership interests will be considered as possessing the voting rights accorded to such interests by statute, organizational documents filed with the state, by-laws, certificates, agreements, or other authority.
- (2) If there is any agreement that an owner will not vote his or her interests in an entity, the formal voting rights possessed by his or her interests will be disregarded in determining the percentage of ownership interests with voting rights owned by the other owners of the entity.
- (3) If there is any agreement that an owner will vote his or her ownership interests in the manner specified by another owner of the entity, the ownership interests with voting rights owned by the first owner will be considered to be owned by the other owner.
- (4) If an owner transfers voting power by proxy, voting trust, agreement, or similar device, and that transfer is revocable by the transferor, then the transferor shall be considered to be the owner of any ownership interest with voting rights otherwise transferred.

However, if there is any evidence of an implied or oral agreement or concerted action between or among owners or other persons, the Department will examine all of the facts and circumstances in determining whether the ownership interests owned by a person or persons possess voting (or comparable) rights.

V. NONSTOCK NONPROFIT ORGANIZATIONS

For entities without stock or other forms of ownership interests, such as nonstock nonprofit organizations, a parent entity controls more than 50% of the ownership interests with voting or comparable rights if more than 50% of the directors or trustees of that organization are either representatives of or controlled by the parent organization.

VI. INDIRECT OWNERSHIP

Under MCL 206.611, ownership and control includes indirect ownership and control. In *LaBelle Management, Inc, v Michigan Dep't of Treasury*, the Michigan Court of Appeals defined indirect ownership to mean ownership through an intermediary, as is the case in a parent-subsidary chain of relationships.⁶ The control element cannot be met by

⁶ *LaBelle Management, Inc, v Michigan Dep't of Treasury*, 315 Mich App 23, 37 (2016).

constructive ownership or ownership through attribution whether it be entity attribution or family attribution. By the court's definition, where the ownership or control element of a group of entities is based solely on attribution of ownership between sibling entities, a UBG does not exist as to those entities.

VII. THE TWO ALTERNATIVE RELATIONSHIP TESTS

The definition of a UBG, in addition to satisfying the control test, requires that the group of persons have business activities or operations that:

- (1) result in a flow of value between or among persons in the group; **OR**
- (2) are integrated with, are dependent upon, or contribute to each other.

A taxpayer need only meet one of the two alternative tests to satisfy the relationship test. Affiliated groups making an election to be treated as a UBG under MCL 206.691(2) need not satisfy a relationship test.

(A) Flow of Value Test. The United States Supreme Court described a unitary business as a functionally integrated enterprise whose parts are mutually interdependent such that there is a flow of value between them.⁷ There must exist "some sharing or exchange of value not capable of precise identification or measurement-beyond the mere flow of funds arising out of a passive investment. . . ."⁸ In determining whether a flow of value exists, a relevant question in the inquiry is whether contributions to income resulted from "functional integration," "centralization of management," and "economies of scale."⁹ No one fact determines whether functional integration, centralization of management or economies of scale exist. Rather, the statutory test requires that the totality of facts and circumstances surrounding the business activities and operations be weighed and examined for cumulative effect.

(1) **Functional Integration.** Functional integration refers to transfers between, or pooling among, business activities that significantly affect the operations of the entities. This may include, but is not restricted to, the transfer or pooling of products or services, shared technical information, marketing information, purchasing, distribution systems and intangibles such as patents, trademarks, service marks, copyrights, trade secrets, know-how, formulas, or processes. There is no requirement that a specific type of functional integration exist.

Both horizontal integration and vertical integration may use types of functional integration. Horizontal integration is typified by entities that are engaged in similar business activities or processes, such as two fertilizer plants, or a chain of retail stores. These entities may be functionally integrated when, for example, they share common marketing, purchasing or distribution systems. Vertical integration applies when various

⁷ *Container Corp of Am v Franchise Bd*, 463 US 159 at 178-179 (1983).

⁸ *Id.* at 166.

⁹ *Id.* at 179.

entities each engage in a different step in a structurally coordinated enterprise. An example of vertical integration is a group of entities where one entity mines ore, that raw ore is supplied to another entity that smelts and refines the ore, and a third entity fabricates the refined ore into consumer goods. It is irrelevant that the various steps in the process are operated substantially independent of each other. When the component parts are closely connected to each other, the relationship is functionally integrated and inseparable. When there is functional integration that renders a separation of the different operations unnecessary or impossible, the relationship test is satisfied.

(2) **Centralized Management.** Centralized management entails involvement and oversight by management in the operational decisions of the entities. Directors, officers and other management personnel making decisions that affect the business activities of the entities and that operate to benefit the operations of the group of entities as a whole indicate a centralized management. Centralized management may flow down from parent to subsidiary, up from subsidiary to parent, from one subsidiary to another, or in any combination. The mere decentralization of day-to-day management responsibility and accountability will not preclude a finding that a centralized management exists. When an integrated executive force appears to exist that has control over major policy decisions, this factor is evidence that centralized management exists. Whether centralized management actually exists will be determined by the facts and circumstances of each case. The focus is on the role of management of an entity or entities in the affairs of its affiliates, whether the management process is grounded in its own operational expertise and whether the process is applied to the other entities.¹⁰ For example, the business “guidelines” established by a parent for its subsidiaries, the “consensus” by which a parent’s management process was involved in the subsidiaries’ business decisions, and the oversight and other assistance provided by a parent to its subsidiaries all point to centralized management.

(3) **Economies of Scale.** “Economies of scale” is a phrase that refers to a relationship between business activities that results in a significant decrease in the cost of operations or administrative functions for the entities due to an increase in operational size. Economies of scale may result from the presence of functional integration or centralized management. For example, the decision to pool advertising may indicate functional integration and also indicate that a centralized management decision was made resulting in economies of scale. There is no clear delineation between functional integration, centralized management, and economies of scale. One factor may evidence the satisfaction of one or more of the flow of value standards.

(B) **Contribution/Dependency Test.** The alternate “contribution/dependency” relationship test asks whether business activities are integrated with, are dependent upon or contribute to each other. Business activities that are dependent upon or that contribute to the income or value of the whole demonstrate operations that are engaged in a unitary business.¹¹ The focus is on whether one entity’s business activity is dependent on the business activity of another entity or whether the activity of one entity

¹⁰ *Id.* at 180 n 19.

¹¹ *Edison California Stores v McColgan*, 30 Cal 2d 472; 183 P2d 16 (1947).

contributes to the activity or operations of another entity. This occurs under many of the same circumstances as the flow of value test. Where the facts indicate that business activities are conducted and managed under one centralized system, there is evidence that the entities are dependent upon each other or that they contribute to each other such that the elements of a UBG are present.

VIII. SPECIAL APPLICATION CONSIDERATIONS

(A) Application of Links in a Chain within a Group. It is not necessary for all entities to have a direct relationship connection with every other entity for a unitary group to exist. It is sufficient if the relationship is indirect. So long as each person in a controlled group has a flow of value, or contributes to, or is integrated with at least one other person within the controlled group, the entire group will have a unitary relationship. All that need be established is that an entity forms an inseparable part of a UBG's business wherever conducted. For example, Corporations X, Y, and Z have an indirect relationship in that Corporation X is a raw material supplier to Corporations Y and Z that are wholly owned subsidiaries of Corporation X. Corporation X produces oil, Corporation Y is a fertilizer manufacturer, and Corporation Z produces tires. Corporation X sells petroleum products to the two subsidiaries for use in their respective manufacturing processes. This relationship allows Corporation X to better estimate production needs and provides a diversified market for its oil production. Corporations Y and Z have no common officers, sales, administrative functions, or technologies that are shared or pooled between them. Corporation X is unitary with Corporation Y and Corporation Z when the facts and circumstances surrounding the relationship between Corporation X and each subsidiary demonstrate a flow of value or contribution and dependency when considered alone. Under the "links in the chain" unitary application, the intangible flows of value within the group serve to link the entities together as if they were a single entity. The fact that there is no direct flow of value or dependency between the two subsidiaries, Corporations Y and Z, does not preclude the entities from being part of the unitary group. All three corporations are a single UBG.

(B) Instant Unity: Establishment of a Unitary Relationship. Whether the unitary relationship can arise "instantly" depends on the surrounding facts and circumstances. Instant unity refers to the situation where a new entity is acquired or formed by another entity and the new entity establishes a unitary relationship the instant the entity is formed or the stock or assets are acquired. A unitary relationship may take time to develop when an entity acquires another. This may be so even if the entities are in the same business and are complementary. Many times, the integration of the acquired entity will occur over a period of time and it will continue to operate independently. Such autonomous operation may require a longer period of time for the unitary relationship to develop. In contrast, the acquisition of an entity where there was a pre-existing relationship may support a finding of an instant unitary relationship. For example, if the purchaser had a minority interest and had a presence on the board of directors, or had indirectly influenced operations, or the acquired entity was a supplier of inventory or buyer of products from the purchaser, those facts would be important considerations in determining whether an instant unitary relationship exists.

On the other hand, when a new entity is formed, there may be a financial infusion of capital, the transfer of personnel, transfer of intangibles and knowledge, pooling of expertise, pooled marketing and shared use of established policies, procedures and administrative plans. These factors would tend to support a conclusion that an “instant” unitary relationship exists.

The same relationship tests set out in statute are used for determining if an acquired or newly formed entity is included in the unitary group. There are no legal tests separate from the two standard unitary relationship tests set forth in the statute that are used for determining if instant unity exists. Also, rules governing federal consolidated groups for federal purposes are not dispositive as to whether a UBG is formed for CIT purposes. When a federal consolidated group acquires another entity and it becomes part of the federal consolidated group without further election, the acquired entity may not automatically be included in the UBG for CIT purposes. The acquired or newly formed entity must still meet the control test and either of the two relationship tests to be included in the CIT UBG. There is no specific time requirement that dictates when a person becomes a member of a UBG. Whenever both the control test and one of the two relationship tests are met, that person must file as a member of the UBG, and it remains a member of that group so long as the control test and one of the two relationship tests continue to be met.

As the control test is the more objective of the two unitary group tests, it will often be addressed first. When the control test is met, taxpayers should be prepared to provide explanations of the review conducted to determine that the entities did not meet the relationship test and that they should file separately. If a taxpayer makes a determination that one of the two relationship tests has been met, or has not been met, it must also be able to provide facts and circumstances that support the finding. The taxpayer’s determination, however, may be rebutted by the Department based on the actual facts. If the facts cannot support a finding that one of the two relationship tests has been met for a controlled entity, the taxpayer must indicate the excluded entity on the Department’s form,¹² and state the reason why the entity is not part of the UBG even though the control test is met.

IX. FACTORS DEMONSTRATING A FLOW OF VALUE OR DEPENDENCY

The following factors may support a finding that functional integration, centralization of management, or economies of scale exist. These factors can also support a finding that the entities are dependent upon, or contribute to the business activities of each other. The following factors are not intended to be all-inclusive; they are intended to provide examples of factors that can support a finding that a UBG exists. Further, the factors discussed are not intended to provide a hierarchy of importance; rather, each factor must be weighed in light of the totality of the facts and circumstances.

¹² Form 4896, Michigan Corporate Income Tax Unitary Business Group Affiliates Excluded from the Return of a Standard Taxpayer; Form 4910, Part 3, Michigan Corporate Income Tax Unitary Business Group Combined Filing Schedule for Financial Institutions.

Evidence of functional integration may be provided by the following factors:

1. Intercompany sales, exchanges, or transfers of intangibles, services or products between business entities. Sales at fair market value will not prevent a finding of functional integration because intercompany sales can represent a steady market for a seller or source of products for a buyer. The amount of the intercompany sales as a percentage of total sales and the nature of the items sold will reflect the significance of this factor in establishing functional integration. Sales among horizontally or vertically integrated entities are an indication of functional integration.
2. Transfers of technical information, know-how, trade secrets, research and development or other intangibles that are significant to the operations or activities of the entities.
3. The sharing and use of any administration, accounting, payroll, inventory control or distribution systems that are controlled through a common network.
4. Purchases of substantial quantities of goods, services or intangibles significant to the entities' sales or operations, particularly if the purchases result in cost savings.
5. Common marketing that results in mutual advantage. Common marketing is found when the business entities' products are sold to a common customer, the entities use a common trade name or identification, or the entities identify themselves as members of the same enterprise. Common advertising can exist whether it is obtained through an external or internal advertising provider.
6. Common intercompany financing. This may include the pledging of credit or guarantee by one entity for the benefit of another if the financing serves an operational purpose. An example might be the pledging of credit to secure another member's loan that will be used to expand its manufacturing capabilities. Lending for passive investment purposes does not by itself provide evidence of functional integration. The financing practices must contribute to the operational integration of the entities.

Evidence of centralized management exists when common officers or management participate in decision-making for the various entities. Management may share knowledge or expertise among the entities. When an integrated executive force appears to exist that has control over major policy decisions, this factor is evidence that centralized management exists, but is not conclusive. Common officers, directors or management alone does not provide evidence of centralized management. Whether centralized management exists depends on the actual facts and circumstances and whether the control impacts the overall operational strategy of the entities.

Economies of scale may be evidenced by:

1. Centralized purchasing designed to achieve savings through volume, timing of purchases or interchangeability of parts.
2. Centralized administrative functions such as legal services, accounting, payroll, human resources, and employee benefit administration. An entity that achieves cost savings through affiliation with other entities, which it otherwise would not be able to obtain on its own due to size, market, or financial resources.

The fact that a particular factor may provide evidence of functional integration does not mean that it cannot also provide evidence of economies of scale or centralized management, and vice versa.

Under the alternate “contribution/dependency” relationship test, businesses are “integrated with, are dependent upon, or contribute to each other” under many of the same circumstances that establish flow of value. However, this alternate relationship test is also commonly satisfied when one entity contributes to the financing of operations of another or when intercompany transactions exist, including operational financing. Intercompany financing and loan guarantees may evidence dependency or contribution. Intercompany sales are indicative of market dependency and the contribution of a market source by one entity to another. Contribution or dependency can also exist through executive policymaking, personnel training, research and other functions.

Other indicators that a unitary business exists include business activities in the same line of business or business activities that are different processes in a vertically integrated business. Examples might include a chain of clothing stores or vertically integrated business activities that include the exploration, extraction and processing of natural resources.

Examples. The following examples are not intended to be conclusive as to whether a unitary business exists, but rather provide examples of factors that could support a finding that a UBG exists. When reviewing the facts and circumstances, the factors identified need to demonstrate a significant interrelationship among the related entities such that the entities are considered to be a single unitary group.

Example 6. Corporation A, taxpayer, is one of a nationwide group of six wholly-owned subsidiaries of P Corporation. The group is involved in the manufacturing, assembly, installation, sale, and resale of widgets. Similar manufacturing processes are used by all the entities and process improvements are implemented at all the operations. P Corporation, Corporation A, and another wholly owned subsidiary conduct advertising operations for the entire corporate group. Advertising is conducted through the publication of a catalog and price lists. The catalog reveals that each member of the group merchandises virtually identical products.

P Corporation is principally owned by three individuals. All of P Corporation's directors are also directors of at least one of the subsidiaries, and two of P Corporation's directors are directors of all the subsidiaries. In addition, P Corporation's officers are also officers for several of the subsidiaries. Each entity operates autonomously in day-to-day operations. All entities follow common practices and policies established by management.

Corporation A acquires approximately an equal amount of its inventory from P Corporation and five other vendors. P Corporation purchases less than one percent of its merchandise from Corporation A. P Corporation, however, purchases from its subsidiaries the majority of the items it later sells. Borrowing and financing are arranged by P Corporation for its subsidiaries' cash flow needs. P Corporation signed letters of credit on behalf of three of its subsidiaries for the purchase of depreciable assets. P Corporation also occasionally finances direct purchases of materials used by its subsidiaries. Corporation A has a loan with P Corporation for \$100,000. P Corporation occasionally makes volume discount purchases on behalf of the subsidiaries. The subsidiaries immediately repay P Corporation for the sums advanced for these purchases.

Under this fact pattern, it appears that a sufficient degree of mutual dependency and contribution exists to conclude that a unitary business exists. The subsidiaries are wholly owned by the Parent. While the entities operate autonomously on a daily basis, an integrated executive force appears to exist that controls major policy decisions, demonstrating centralized management. Further, the entities operate similar businesses, use similar manufacturing processes and share know-how among the members of the group. The sharing of know-how and use of similar processes that are significant to the entities' operations indicate functional integration. The decision to implement a common marketing plan through the use of one catalog for identical products results in mutual advantage by reducing marketing costs and achieves economies of scale. This also demonstrates functional integration of the entities, as does the lending of money for operational purposes, the purchasing structure and the financing arrangements for materials used by the subsidiaries that were entered into by the parent.

The substantial flow of products between the entities also demonstrates a dependency upon each other for mutual economic well-being. The subsidiaries provide the parent with a steady source of inventory and, in return, are assured of a market for their products. These factors also indicate that an integrated enterprise exists.

Example 7. Parent, Corporation A, owns 51 percent of Corporation B. Presume Corporations A and B are unitary. Corporation B owns 100

percent of Corporation C. Corporation A manufactures and sells household products. Corporation B manufactures vitamin products and diet supplements. Corporation C is engaged in the business of molding and manufacturing custom-designed plastic parts and products. Several individuals serve as common officers or directors of Corporations B and C. Five of Corporation C's six directors are concurrently officers of Corporation B, including the executive vice president, secretary, and controller.

The board of directors of Corporation C is responsible for the establishment of its company policy. At the same time, the board determines the annual budget for the corporation and makes major decisions impacting the financial resources of the company. In order to keep Corporation B apprised of its current financial condition, Corporation C is required to submit financial reports to Corporation B on a monthly basis. Corporation B is able to further monitor Corporation C's cash flow through its controller who was appointed to Corporation C's board of directors. Last year, Corporation C had a substantial loss. An integrated executive committee comprised of Corporation B and C's management was formed to develop, coordinate, and direct all of Corporation C's administrative, manufacturing, and sales functions. The executive committee also made recommendations on the acquisition of new molding equipment.

In its day-to-day operations, Corporation C functions as an autonomous business. Its employees conduct all of the plastic molding and manufacturing activities. Corporation C does not share facilities or exchange technical information with either Corporation A or B. There are no transfers of personnel between Corporation C and the two parent companies. Nor does Corporation C participate or engage in the centralized purchasing of supplies or in the mutual solicitation of orders. Corporation C directs its own advertising, promotion, and sales campaigns. Accounting, banking, insurance, legal counsel, personnel, administration, employee benefit plans, and research are also independently handled by Corporation C.

Corporation C did not receive any loans from Corporation A. Previously, Corporation B had made loans to Corporation C. Corporation C paid these loans in full with interest by the end of the year. Corporation B charged Corporation C for the costs of providing payroll and financial services. This intercompany charge was discontinued when Corporation C found a vendor to provide the services at a lower cost. Corporation C's tax returns are prepared by the accountants for the parent entities.

Corporation C makes intercompany sales of plastic vitamin bottles to Corporation B and sells other specialized goods used as promotional gifts by both Corporations A and B. The combined intercompany sales

represent about a quarter of Corporation C's total sales. Of this amount, the majority of the sales are to Corporation B. In the immediately preceding year, total intercompany sales amounted to 5 percent of total sales.

From this fact pattern, it appears that a unitary relationship exists between Corporations A, B and C. It is not necessary to find a direct unitary relationship between Corporation C's operations and the operations of Corporation A. It is sufficient if the unitary relationship is indirect. If Corporation C has been engaged in a single unitary business with either Corporation A or B, then Corporation C's operations are unitary with the operations of Corporations A and B.¹³

The existence of an integrated executive force at the top level of management is an indication of centralized management. Five of Corporation C's six directors are concurrently officers of Corporation B, including the executive vice president, secretary, and controller. Although not involved in the day-to-day operations of Corporation C's plastic molding business, Corporation B appears to exercise executive control of Corporation C. The parent company did more than just offer financial guidance with its executives serving in the top management positions of Corporation C. All six directors on Corporation C's board were currently, or had previously been, officers or directors of the parent corporations. The secretary and controller were identical for Corporations B and C. The presence of Corporation B's officers on Corporation C's executive staff and board is relevant to show that it is subject to the implicit control of Corporation B, so as to render the two corporations an integrated enterprise. The ability of the board to set policy for Corporation C demonstrates executive control by Corporation B at the highest level. The creation of the executive committee and the decisions it made regarding acquisitions, sales and administrative policies further indicate an integrated business.

Not only does Corporation B's controller monitor the subsidiary's financial condition, but Corporation C is also required to submit monthly reports and assented to the preparation of its annual tax returns. The executive committee is consulted on the acquisition of new equipment. These facts indicate that the integration of executive members and the centralization of management between Corporation C and its parent have unitary significance. The practice of lending money for operations further indicates functional integration of the entities.

In addition, the substantial flow of products from Corporation C to both parent companies demonstrates that the companies contributed to or were dependent upon each other for their mutual economic well-being. The

¹³ See *Appeals of Monsanto, Co*, Cal St Bd of Equal, 70-SBE-038, Nov 6, 1970.

increase in total sales volume from one year to the next was substantial in the context of Corporation C's total sales figure. The increase in sales between the entities indicates a decision to provide a market for C's products. Further, the increase in sales could be attributed to the decisions of the executive committee comprised of Corporation B and C's management that was formed to develop, coordinate, and direct all of Corporation C's administrative, manufacturing, and sales functions. The fact that these sales might be a small portion of all purchases made by the parent corporations, or that the product flow is one-way or made at market or arms-length prices, does not negate the fact that the intercompany sales are advantageous to Corporation C in that it has a ready and willing buyer for a substantial amount of its production. Intercompany sales allow Corporation C to benefit from the economics of a larger scale operation while guaranteeing the parent corporations have an available source of customized products.

Based on some or all of these factors, Corporation C's business appears to be dependent on and contributes to the activities of both parent corporations to a significant degree. This relationship forms a functionally integrated enterprise between the three companies.

The relationship tests are subjective and all factors present must be reviewed and weighed. Whether a unitary relationship exists will be based on the totality of the facts and circumstances.

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 9

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



DANA NESSEL
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P.O. Box 30754
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July 1, 2021

***Via First-Class U.S. Mail
and E-Mail***

Wayne D. Roberts
Bodman, PLC
99 Monroe Ave. NW, Ste. 300
Grand Rapids, MI 49503

RE: *Nationwide Agribusiness Ins Co v Michigan Dep't of Treasury and
Nationwide Mutual Ins Co v Michigan Dep't of Treasury*
MOAHR Docket No. 21-000039-TT consolidated w/ No. 21-000036-TT

Dear Mr. Roberts:

Enclosed please find, *Respondent Department of Treasury's Response to
Petitioners' Interrogatories and Request for Production, and Request to Admit*, along
with the respective *Proof of Service*, in relation to the above-referenced matter.

If you should have any questions relative to the enclosure, please do not
hesitate to contact this office.

Very truly yours,

/s/ David W. Thompson

David W. Thompson
Michigan Dep't of Attorney General
Assistant Attorney General
Revenue and Tax Division
(517) 335-7584

DWT/kac
Enclosures

cc: Michigan Tax Tribunal, *w/Proof of Service only (via Electronic Filing)*
Joseph S. Shannon, *w/enclosures (Via First-Class U.S. Mail & E-Mail)*
Paul V. McCord, *w/enclosures (Via First-Class U.S. Mail & E-Mail)*
Jeffrey A. Lipps, *w/enclosures (Via First-Class U.S. Mail & E-Mail)*

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL

NATIONWIDE AGRIBUSINESS
INSURANCE CO. and NATIONWIDE
MUTUAL INSURANCE CO.,

Petitioners,

v

DEPARTMENT OF TREASURY,

Respondent.

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Docket No. 21-000039-TT
Consolidated with No. 21-000036-TT

PROOF OF SERVICE

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PROOF OF SERVICE

Kellie Christopher, states that on this 1st day of July, 2021, she served
Respondent Department of Treasury's Response to Petitioners' Interrogatories,
Requests for Production, and Request to Admit, along with a copy of this *Proof of*
Service, upon the following:

Fraser Trebilcock Davis & Dunlap, P.C.
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by depositing same in a receptacle of the United States Post Office in the City of
Lansing, Michigan, enclosed in an envelope, plainly addressed, bearing postage
fully prepaid and via e-mail to the addresses listed above.

I declare that the above statement is true to the best of my knowledge,
information, and belief.

/s/ Kellie Christopher
Kellie Christopher, Legal Secretary

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL

NATIONWIDE AGRIBUSINESS
INSURANCE CO. and NATIONWIDE
MUTUAL INSURANCE CO.,

Petitioners,

v

DEPARTMENT OF TREASURY,

Respondent.

Docket No. 21-000039-TT
Consolidated with No. 21-000036-TT

**RESPONDENT'S RESPONSE TO
PETITIONERS'
INTERROGATORIES,
REQUESTS FOR PRODUCTION,
AND REQUEST TO ADMIT**

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**RESPONDENT DEPARTMENT OF TREASURY'S RESPONSE TO
PETITIONERS' INTERROGATORIES, REQUESTS FOR PRODUCTION,
AND REQUEST TO ADMIT**

NOW COMES Respondent, Department of Treasury (Treasury), through its attorneys, Attorney General Dana Nessel, and Assistant Attorneys General Scott L. Damich, David W. Thompson, and Justin R. Call, and states as follows for its answers to the above-captioned discovery requests.

GENERAL OBJECTIONS

Treasury asserts the following general objections to the discovery requests and such general objections are to be deemed incorporated in each response to each request for admissions, interrogatory, and request for production of documents:

A. Treasury objects to Petitioners' instructions with regard to its discovery requests for the reason that the Michigan Court Rules dictate the procedure for responding to same. Petitioners' instructions with regard to same are overly broad and unduly burdensome and far exceed the requirements set forth in the Court Rules.

B. Treasury objects to the request for documents that are protected from disclosure under the Deliberative Process privilege, attorney-client privilege, and MCL 205.28(1)(f).

C. Treasury objects to the discovery requests to the extent that they seek information that is not relevant to any party's claims or defenses and proportional to the needs of the case.

D. Treasury objects to the discovery requests to the extent they seek production of information protected from disclosure by the attorney-client privilege, the common interest privilege, the deliberative process privilege, the attorney work product doctrine, or any other applicable privilege or protection. Nothing contained in these responses is intended to be a waiver of any applicable privilege.

E. Treasury objects to the discovery requests to the extent they are vague, ambiguous, and/or confusing in that they fail to describe with reasonable particularity the information sought.

F. Treasury objects to the discovery requests to the extent that they are not reasonably limited in time and/or scope.

G. Subject to and without waiving any of the foregoing general objections, which are incorporated into each of the responses below, Treasury responds to the discovery requests as follows:

RESPONSE TO INTERROGATORIES

1. Other than Petitioners, list any taxpayer insurance companies that filed corporate income tax returns on a combined basis as a unitary business group in any tax year from 2012 (the year the CIT was enacted) to present. If Department refuses to list the taxpayer's name in response to Interrogatory No. 1 for any reason, provide the number of such taxpayers.

RESPONSE: Treasury objects to the extent the Interrogatory seeks information that is subject to MCL 205.28(1)(f). Treasury further objects on the basis that the Interrogatory is vague and ambiguous and fails to define the phrase "combined basis as a unitary group." Treasury further

objects to this Interrogatory because it seeks information that is immaterial to the claims at issue.

2. Did the Department reject in whole or in part, any tax returns for a taxpayer identified in the response to Interrogatory No. 1?

RESPONSE: In addition to the General Objections, Treasury objects to the extent the Interrogatory seeks information that is subject to MCL 205.28(1)(f). Treasury further objects on the basis that the Interrogatory is vague and ambiguous and fails to define the phrase “combined basis.” Treasury further objects to this Interrogatory because it seeks information that is immaterial to the claims at issue. Without waiving said objections and in the spirit of discovery, on information and belief, and to the extent “combined basis” refers to the computation of the taxes and sharing of credits on a group-wide basis, Treasury states “yes.”

3. As it relates to the taxpayers identified in response to Interrogatory No. 1, describe the Department’s ultimate determination with respect to the acceptance or rejection of the unitary business group combined return filing and the individual or individuals responsible for making such determination, including any settlement or agreement.

RESPONSE: Treasury objects to the extent the Interrogatory seeks information that is subject to MCL 205.28(1)(f). Treasury further objects on the basis that the Interrogatory is vague and ambiguous and fails to define the phrase “combined basis.” Treasury further objects to this Interrogatory because it seeks information that is immaterial to the claims at issue. Without waiving said objections and in the spirit of discovery, on information and belief, and to the extent “combined basis” refers to the computation of the taxes and sharing of credits on a group-wide basis, Treasury states the tax returns were denied.

4. As it relates to the Wilkinson Letter, attached as Exhibit A, identify the name and title of anyone at the Department who assisted in the drafting of the

letter, revised the letter, or ultimately authorized or approved the final version of the letter.

RESPONSE: Treasury objects to the extent the Interrogatory seeks information that is subject to the deliberative process privilege, work product, and/or MCL 205.28(1)(f). Treasury further objects on the basis that the Interrogatory is vague, ambiguous, and overbroad. Without waiving said objections and in the spirit of discovery, Treasury identifies Angela Matelski, Department Specialist, assisted in drafting the letter; and Lance Wilkinson, Director, Bureau of Tax Policy, authorized and signed the letter.

5. Explain the Department's reasoning for its reversal of its previously stated positions in the Wilkinson Letter that "an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group."

RESPONSE: Treasury objects to the extent the Interrogatory seeks information that is subject to the deliberative process privilege, work product, and/or MCL 205.28(1)(f). Without waiving said objections and in the spirit of discovery, Treasury has not reversed its position. The informal guidance provided by Treasury is consistent with prior guidance issued by the Department in FAQ Question No. 9 on the Treasury website.

6. Identify the name and title of all individuals associated with the Department who had any role in the Department's decision to reverse its previously stated positions in the Wilkinson Letter that "an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group."

RESPONSE: Treasury objects to the extent the Interrogatory seeks information that is subject to the deliberative process privilege, work product, and/or MCL 205.28(1)(f). Without waiving said objections and in the spirit of discovery, Treasury has not reversed its position. The

informal guidance provided by Treasury is consistent with prior guidance issued by the Department in FAQ Question No. 9 on the Treasury website.

7. State the process and procedure the Department used or followed in deciding to reverse its previously stated positions in the Wilkinson Letter that “an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group.”

RESPONSE: Treasury objects to the extent the Interrogatory seeks information that is subject to the deliberative process privilege, work product, and/or MCL 205.28(1)(f). Without waiving said objections and in the spirit of discovery, Treasury has not reversed its position. The informal guidance provided by Treasury is consistent with prior guidance issued by the Department in FAQ Question No. 9 on the Treasury website.

8. Describe in detail the factual and legal bases for the Department’s position that an insurance company cannot file a Michigan tax return as a unitary business group.

RESPONSE: Treasury objects on the basis that the interrogatory is vague and ambiguous as it fails to define the phrase “file a Michigan tax return as a unitary business group.” Treasury further objects to this Interrogatory because it seeks a detailed “legal and factual basis,” which is over broad, incapable of a complete response, and not proportional to the needs of the case. Without waiving said objections and in the spirit of discovery, to the extent the phrase “file a Michigan tax return as a unitary business group” refers to the computation of the taxes and sharing of credits on a group-wide basis, such calculation is not provided for under Chapter 12 of the Corporate Income Tax (CIT) Act. Treasury processes returns of insurance companies according to Chapter 12 of the CIT Act, MCL 206.635 to MCL 206.643. Each authorized insurance company is required by law to report gross direct premiums or retaliatory tax under Chapter 12. There is no provision under Chapter 12 for insurance companies to calculate taxes and share credits on a group-wide basis.

9. If you contend that any number, figure, calculation, etc., in Petitioner's Combined Return is erroneous, identify the alleged error and describe in detail the factual and legal bases for your contentions.

RESPONSE: Treasury objects on the basis that the interrogatory is vague and ambiguous as it fails to identify the phrase "Combined Return." Without waiving said objections and in the spirit of discovery, on information and belief, Petitioners did not file a combined return, but rather separate individual tax returns. Short of an audit, Treasury presumes that the insurance companies correctly reported accurate numbers. Further, calculation of the credit and taxes on a group-wide basis is not provided for under Chapter 12 of the CIT Act and Treasury assessed the insurance companies based on the required reporting by each insurance company.

10. If you contend that Petitioner does not meet the requirements of a Unitary Business Group as defined in MCL 206.611(6), describe in detail the factual and legal bases for your contentions in this regard.

RESPONSE: Whether a group of United States persons meet the control, and one of the two alternative relationship tests is a factual determination based on the facts and circumstances. Treasury has no first-hand knowledge of the facts and circumstances to determine whether the insurance companies are or are not unitary. Each insurance company, however, must determine its tax pursuant to Chapter 12 of the CIT Act regardless of whether it is a member of a unitary business group or not.

RESPONSE TO REQUESTS FOR PRODUCTION

1. Produce all versions, comments, and revisions of the Wilkinson Letter, whether on the document itself or by separate communication, regardless of whether the Department considered, rejected, or accepted the comments or revisions in drafting the letter.

RESPONSE: Treasury objects to this request on the grounds that it seeks documents that are subject to the deliberative process privilege and/or

MCL 205.28(1)(f). Without waiving said objections and in the spirit of discovery, Treasury provides non-privileged documents attached as Exhibit A.

2. Produce all Department communications, both external and internal, regarding the Wilkinson Letter, its drafting, revision, and approval both during and after its issuance.

RESPONSE: Treasury objects to this request on the grounds that it is overbroad and not proportional to the needs of the case. Treasury further objects to this request to the extent it seeks documents that are subject to the deliberative process privilege and/or MCL 205.28(1)(f). Without waiving said objections and in the spirit of discovery, Treasury provides non-privileged documents attached as Exhibit A.

3. Produce all Department communications, internal and external, referencing or relating to insurance companies' eligibility to file as unitary business groups.

RESPONSE: Treasury objects to this request on the grounds that it seeks "all" and therefore is overbroad and not proportional to the needs of the case. Treasury further objects to this request to the extent the request seeks information that is subject to the deliberative process privilege, work product, and/or MCL 205.28(1)(f). Without waiving said objections and in the spirit of discovery, Treasury provides non-privileged documents attached as Exhibit A. Treasury further identifies its published FAQ Question No. 9 on the Treasury website¹ and provided in Exhibit B.

¹ Michigan Department of Treasury, *Taxes* <https://www.michigan.gov/taxes/0,4676,7-238-75545_59682-268043--,00.html> (accessed June 30, 2021).

4. Produce all internal notes, memoranda, or analyses performed by or for the Department and relating to insurance companies' eligibility to file as unitary business groups or related to Petitioner's unitary business group return.

RESPONSE: Treasury objects to this request on the grounds that it is overbroad and not proportional to the needs of the case. Treasury further objects to this request on the grounds that it seeks documents that is subject to the deliberative process privilege and/or MCL 205.28(1)(f).

5. Produce all documents identified herein or relied upon in responding to these Requests for Production of Documents, Requests for Admissions and Related Interrogatories and Interrogatories.

RESPONSE: Treasury objects to this request to the extent it seeks documents that are subject to the deliberative process privilege and/or MCL 205.28(1)(f). Without waiving said objections and in the spirit of discovery, Treasury provides non-privileged documents attached as Exhibit A. Treasury further identifies its published FAQ Question No. 9 on the Treasury website and provided in Exhibit B.

RESPONSE TO REQUEST FOR ADMISSIONS AND RELATED INTERROGATORIES

1. Admit that the definition of "taxpayer" in MCL 206.611(5) includes an insurance company.

RESPONSE: Treasury objects to this request and neither admits nor denies for the reason that the request does not relate to statements or opinions of fact or the application of applicable law to fact. See MCR 2.312(A). The statute speaks for itself.

2. Admit that the definition of "unitary business group" in MCL 206.611(6) includes a unitary business group of insurance companies.

RESPONSE: Treasury objects to this request and neither admits nor denies for the reason that the request does not relate to statements or

opinions of fact or the application of applicable law to fact. See MCR 2.312(A). The statute speaks for itself.

3. Admit that the affiliated group election in section MCL 206.691(2), by way of the definition of “affiliated group” in MCL 206.603(1), applies to an affiliated group of insurance companies that may make such election.

RESPONSE: Treasury objects to this request and neither admits nor denies for the reason that the request does not relate to statements or opinions of fact or the application of applicable law to fact. See MCR 2.312(A). The statutes speak for themselves.

4. Admit that the affiliated group election under MCL 206.691(2) is an election to “have all of the persons that are included in the affiliated group to be treated as a unitary business group.”

RESPONSE: Treasury objects to this request and neither admits nor denies for the reason that the request does not relate to statements or opinions of fact or the application of applicable law to fact. See MCR 2.312(A). The statute speaks for itself.

5. Admit that two or more insurance companies may be unitary with one another and may constitute a unitary group.

RESPONSE: Treasury objects to this request and neither admits nor denies for the reason that the request does not relate to statements or opinions of fact or the application of applicable law to fact. See MCR 2.312(A).

6. Admit that on May 13, 2016, Lance R. Wilkinson was an Administrator of the Tax Policy Division.

RESPONSE: Admit.

7. Admit that as an Administrator of the Tax Policy Division, Wilkinson had the training to opine on corporate income tax matters on behalf of the Department as of May 13, 2016.

RESPONSE: Admit.

8. Admit that responding to taxpayer questions was within the responsibilities of Wilkinson's job as Administrator of the Tax Policy Division.

RESPONSE: Admit.

9. Admit that as an Administrator of the Tax Policy Division, Wilkinson responded to an inquiry from Mr. Pratschler by stating in the Wilkinson letter that "an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group . . . [.]"

RESPONSE: Treasury admits that Mr. Wilkinson signed the letter responding to an inquiry from Mr. Pratschler. The letter speaks for itself.

10. Admit that the Department has not provided or published tax forms or other guidance to direct a unitary business group of insurance companies how to file a unitary business group return pursuant to the Michigan Corporate Income Tax Act.

RESPONSE: Denied. Treasury has provided guidance in FAQ Question No. 9 stating insurance companies do not file combined returns. Further, Treasury has published tax forms and instructions for insurance companies to report its gross direct premium tax or retaliatory tax that are consistent with Chapter 12 of the CIT Act.

11. Admit that for tax year 2015 the Department has no basis to dispute that Petitioner Nationwide Mutual Insurance Company does not own or control, directly, or indirectly, more than 50% of the ownership interests with voting rights or ownership interests that confer comparable rights to voting rights of their subsidiaries that were included in the 2016 Amended Unitary Business group Refund Claim.

RESPONSE: Treasury objects to this request on the basis that the Request to Admit is vague and ambiguous and fails to define the phrase “2016 Amended Unitary Business Group Refund Claim” and fails to identify the “subsidiaries.” Without waiving said objection, Treasury cannot truthfully admit or deny the request because the admission sought by Petitioners relates to Petitioners’ own actions and circumstances to which Treasury has no first-hand knowledge. MRE 602. After reasonable inquiry, the information known or readily obtainable is insufficient to enable Treasury to admit or deny. MCR 2.312(B)(2) and (3).

12. If your response to Request for Admission No. 11 was anything other than an unequivocal admission, identify all information and documents that the Department relies upon which tends to suggest that Request for Admission No. 11 is not correct.

RESPONSE: No response necessary as Treasury neither admits nor denies based on the fact that Treasury has no personal knowledge as to the matter identified, MRE 602, and after a reasonable inquiry the information known or readily obtainable is insufficient to enable Treasury to admit or deny.

13. Admit that the Department has no basis to dispute that Petitioners and their insurance company subsidiaries form a group that has business activities

and operations that result in a flow of value between or among members included in the 2016 Amended Unitary Business Group Refund Claim.

RESPONSE: Treasury objects to this request on the basis that the Request to Admit is vague and ambiguous and fails to define the phrase “2016 Amended Unitary Business Group Refund Claim” and fails to identify the “subsidiaries.” Without waiving said objection, Treasury cannot truthfully admit or deny the request because the admission sought by Petitioners relates to Petitioners’ own actions and circumstances to which Treasury has no first-hand knowledge. MRE 602. After reasonable inquiry, the information known or readily obtainable is insufficient to enable Treasury to admit or deny. MCR 2.312(B)(2) and (3).

14. If your response to Request for Admission No. 13 was anything other than an unequivocal admission, identify all information and documents that the Department relies upon which tends to suggest that Request for Admission No. 13 is not correct.

RESPONSE: No response necessary as Treasury neither admits nor denies based on the fact that Treasury has no personal knowledge as to the matter identified, MRE 602, and after a reasonable inquiry the information known or readily obtainable is insufficient to enable Treasury to admit or deny.

15. Admit that the Department has no basis to dispute that Petitioners and their insurance company subsidiaries form a group that has business activities and operations that are integrated with, are dependent upon, and contribute to each other.

RESPONSE: Treasury objects to this request on the basis that the Request to Admit is vague and ambiguous and fails to identify the “insurance company subsidiaries” and time frame. Without waiving said objection, Treasury cannot truthfully admit or deny the request because the admission sought by Petitioners relate to Petitioners’ own actions and circumstances to which Treasury has no first-hand knowledge. MRE 602.

After reasonable inquiry, the information known or readily obtainable is insufficient to enable Treasury to admit or deny. MCR 2.312(B)(2) and (3).

16. If your response to Request for Admission No. 15 was anything other than an unequivocal admission, identify all information and documents that the Department relies upon which tends to suggest that Request for Admission No. 15 is not correct.

RESPONSE: No response necessary as Treasury neither admits nor denies based on the fact that Treasury has no personal knowledge as to the matter identified, MRE 602, and after a reasonable inquiry the information known or readily obtainable is insufficient to enable Treasury to admit or deny.

17. Admit that by filing the 2016 Amended Unitary Business Group Refund Claim, Petitioners and their subsidiaries included in such return affirmatively filed as a single, unitary business group “taxpayer” as required by law and, in the alternative, made an election, as an affiliated group, “to be treated, and to file, as a unitary business group under section 691(2).”

RESPONSE: Treasury objects to this request on the basis that the Request to Admit is vague, confusing, ambiguous and fails to define the phrase “2016 Amended Unitary Business Group Refund Claim,” fails to identify the “subsidiaries,” and fails to identify the context and meaning of the term “taxpayer.” Without waiving said objections, and to the extent “2016 Amended Unitary Business Group Refund Claim” refers to a single combined return Treasury denies on the basis that Petitioners each filed separate individual tax returns. Further, according to MCL 206.685(1), Petitioners are required to file an “annual or final return . . . with the department in the form and content prescribed by the department” MCL 206.685(1). Treasury has not prescribed a form for a combined return for a unitary business group of insurance companies. However, to the extent “2016 Amended Unitary Business Group Refund Claim” refers to the computation of the taxes and credits on a group-wide basis, such calculation is not provided for under Chapter 12 of the CIT Act. Each

insurance company is required to report gross direct premiums or retaliatory tax under Chapter 12 of the CIT Act. Each insurance company must report its direct gross premiums on Michigan property or risks and pay tax under Chapter 12 of the CIT Act as required by law. Finally, Treasury denies Petitioners made an election, as an affiliated group, to be treated as a unitary group, as required under MCL 206.691(2). According to that statute, a taxpayer who elects to make an election, as an affiliated group, is required to make the election “on a form or in a format as prescribed by the department” Petitioners have failed to make such an election on a form or in a format prescribed by Treasury.

18. Admit that Petitioners and their subsidiaries included in the Amended Unitary Business Group Refund Claim constitute an affiliated group for purposes of the CIT Act.

RESPONSE: Treasury objects to this request on the basis that the Request to Admit is vague and ambiguous and fails to define the phrase “Amended Unitary Business Group Refund Claim” and fails to identify the “subsidiaries.” Without waiving said objections and in the spirit of discovery, Treasury cannot truthfully admit or deny the request because the admission sought by Petitioners relate to Petitioners’ own actions and circumstances to which Treasury has no first-hand knowledge. MRE 602. After reasonable inquiry, the information known or readily obtainable is insufficient to enable Treasury to admit or deny.

19. Admit that Petitioners and their subsidiaries included in the 2016 Amended Unitary Business Group Return constitute a unitary business group.

RESPONSE: Treasury objects to this request on the basis that the Request to Admit is vague and ambiguous and fails to define the phrase “2016 Amended Unitary Business Group Return.” Without waiving said objections and in the spirit of discovery, Treasury cannot truthfully admit or deny the request because the admission sought by Petitioners relates to Petitioners’ own actions and circumstances to which Treasury has no first-hand knowledge. MRE 602. After reasonable inquiry, the information known or readily obtainable is insufficient to enable Treasury to admit or deny.

20. Admit for the Petitioners' 2016 Amended Unitary Business Group

Return that the entire unitary business group is the "taxpayer" for purposes of the CIT Act.

RESPONSE: Treasury objects to this request and neither admits nor denies on the basis that the Request to Admit is vague, confusing, and ambiguous and fails to define the phrase "2016 Amended Unitary Business Group Return," fails to identify the "entire unitary business group," and fails to identify the context and meaning of the term "taxpayer." The term "taxpayer" is defined by the CIT Act as "a corporation, insurance company, financial institution, or unitary business group, whichever is applicable under each chapter." MCL 206.611(5). Although the CIT Act specifically defines a "taxpayer" to include a unitary business group as a taxable entity, the premiums tax and the retaliatory tax under Chapter 12 is levied upon "each insurance company." "Each insurance company" is required to file and report gross direct premium or retaliatory tax under Chapter 12 of the CIT Act as required by law. There is no provision under Chapter 12 of the CIT Act for insurance companies to calculate tax liability and share tax credits as a unitary business group. Further, to the extent "2016 Amended Unitary Business Group Return" refers to filing a "combined return" as a unitary business group under MCL 206.691, Treasury maintains Petitioners did not file a combined return, but rather separate individual returns on forms prescribed by Treasury as required by law.

21. If your response to Request for Admission No. 19 was anything other than an unequivocal admission, identify all information and documents that the Department relies upon which tends to suggest that Request for Admission No. 19 is not correct.

RESPONSE: No response necessary as Treasury neither admits nor denies based on the fact that after a reasonable inquiry the information known or readily obtainable is insufficient to enable Treasury to admit or deny.

22. Admit that the Department was required to provide forms or guidance regarding the preparation and filing of a combined CIT return for a unitary business group of insurance companies.

RESPONSE: Treasury neither admits nor denies to the extent this request seeks a legal conclusion to which no response is required. To the extent a response may be required, Treasury admits it has not prescribed a combined return for insurance companies but denies this was required. The premium tax and retaliatory tax are determined and levied upon “each insurance company” according to Chapter 12 of the CIT Act. Treasury has provided forms and instructions that comport with Chapter 12 of the CIT Act.

23. Admit that the only method available for Petitioners and their subsidiaries to file the unitary business group return was to prepare an Amended Unitary Group Refund Claim with its own documentation to support the combined return amounts reported for the group.

RESPONSE: Treasury objects to this request on the basis that the Request to Admit is vague and ambiguous and fails to define the phrase “unitary business group return” and fails to define the phrase “Amended Unitary Group Refund Claim.” Without waiving said objections and in the spirit of discovery, to the extent “unitary business group return” and “Amended Unitary Group Refund Claim” refers to the computation of the taxes and sharing of credits on a group-wide basis, such calculation is not provided for under Chapter 12 of the CIT Act. Treasury processes returns of insurance companies according to Chapter 12 of the CIT Act, MCL 206.635 to MCL 206.643. Each authorized insurance company is required by law to report gross direct premiums or retaliatory tax under Chapter 12. There is no provision under Chapter 12 for insurance companies to calculate taxes and share credits on a group-wide basis.

24. If your response to Request for Admission No. 22 was anything other than an unequivocal admission, identify all information and documents that the

Department relies upon which tends to suggest that Request for Admission No. 22 is not correct.

RESPONSE: Treasury relies on Chapter 12 of the CIT Act, MCL 206.635 through MCL 206.643. Further see FAQ Question No. 9 on the Treasury website.

Respectfully submitted,

DANA NESSEL
Attorney General

/s/ David W. Thompson
Scott L. Damich (P74126)
David W. Thompson (P75356)
Justin R. Call (P80892)
Assistant Attorneys General
Michigan Dep't of Attorney General
Revenue and Tax Division
Attorneys for Respondent
P.O. Box 30754
Lansing, MI 48909
(517) 335-7584

Dated: July 1, 2021

VERIFICATION

I declare that Respondent Department of Treasury's answers to the foregoing discovery requests are true to the best of my information, knowledge and belief, and based upon information I obtained or information that was obtained or gathered by persons who report to me. Further, on behalf of the Department, I assert the Deliberative Process privilege as to all items where such privilege is identified above.

/s/ Stewart Binke
Stewart A. Binke
Administrator
Tax Policy Division
Michigan Department of Treasury

Subscribed and sworn before me this
30th day of June, 2021.

/s/ Melissa Sue Collins
Melissa Sue Collins, Notary Public
Ingham County, Michigan
My Commission Expires: 8/10/2024
Acting in Eaton County
Notarized using electronic/remote technology

Exhibit A

Call, Justin (AG)

From: timothy.s.pratcshler@us.pwc.com
Sent: Wednesday, July 20, 2016 10:44 AM
To: Wilkinson, Lance R. (Treasury); ""@INTL.michigan.gov
Cc: Matelski, Angela (TREASURY)
Subject: RE: CIT Insurance Premiums Tax - Combined Filing

Hi Lance,

I wanted to follow up on this. If you could provide an update on timing, I would greatly appreciate it.

Thanks!

Tim Pratschler

PwC | Principal - State & Local Tax
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PricewaterhouseCoopers LLP
One Detroit Center, 500 Woodward Avenue, Detroit, Michigan 48226
<http://www.pwc.com/us>

Thoughts don't need paper to take shape.

From: "Wilkinson, Lance R. (Treasury)" <WilkinsonL@michigan.gov>
To: Timothy S Pratschler/US/TLS/PwC@Americas-US
Cc: "Bacigal, Angela (TREASURY)" <BacigalA@michigan.gov>
Date: 06/22/2016 11:24 AM
Subject: RE: CIT Insurance Premiums Tax - Combined Filing

Mr. Pratschler–

Sorry for the delay in responding to you. We did receive your inquiry and are looking into it. Specifically, we're researching the issue of insurance credits being applied to other insurance companies. I expect we'll have a response to you within 2-3 weeks. Thank you.

–Lance

From: timothy.s.pratcshler@us.pwc.com [<mailto:timothy.s.pratcshler@us.pwc.com>]
Sent: Tuesday, June 14, 2016 8:29 AM
To: Wilkinson, Lance R. (Treasury) <WilkinsonL@michigan.gov>
Subject: Fw: CIT Insurance Premiums Tax - Combined Filing

Lance,

I wanted to follow up on my email below from last week. Could you confirm receipt and let me know if you have any input? Thanks so much in advance!

Tim Pratschler

PwC | Principal - State & Local Tax

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Thoughts don't need paper to take shape.

----- Forwarded by Timothy S Pratcshler/US/TLS/PwC on 06/14/2016 08:28 AM -----

From: Timothy S Pratcshler/US/TLS/PwC
To: WinkinonL@michigan.gov
Date: 06/06/2016 01:00 PM
Subject: Fw: CIT Insurance Premiums Tax - Combined Filing

Lance,

I greatly appreciate the informal guidance you provided related to the ability of a unitary business group of insurance companies to file a combined return and/or utilize the attributes on a group basis. As a result of that informal guidance, one of my clients has prepared a statement which it plans to attach to its separate Michigan Insurance Premium Tax returns to provide the Department information on the sharing of attributes. However, before submission of those returns I am hoping you, or someone from the Department, may be able to take a look at the attached and let me know if it has sufficient detail to ensure the returns are processed appropriately.

Please let me know if you have any questions or would like to discuss.

Thanks!

Tim Pratcshler

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Thoughts don't need paper to take shape.

----- Forwarded by Timothy S Pratcshler/US/TLS/PwC on 06/06/2016 11:35 AM -----

From: Timothy S Pratcshler/US/TLS/PwC
To: WinkinonL@michigan.gov
Date: 02/19/2016 10:00 AM
Subject: CIT Insurance Premiums Tax - Combined Filing

Lance,

Per our discussion, the situation involves multiple insurance companies that currently file separate Michigan premiums tax returns using MI Form 4905. The entities are all affiliated (owned greater than 80%) under federal and Michigan definitions. The entities would like to file as a unitary business group on one MI Form 4905 that includes all related premiums tax filers. Filing as a unitary business group appears to be acceptable (if not required) based on the following statutory code sections:

- MCL 206.611(5) - 'taxpayer means ... an insurance company or unitary business group ...'.
- MCL 206.611(6) - 'unitary business group means a group of United States persons that are ... insurance companies ...
- MCL 206.691(1) - 'except as otherwise provided under section 680(3), a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group ...'

In addition to the above code sections, filing as a unitary group is appropriate as there are no provisions indicating that insurance companies do not constitute a unitary group for purposes of the insurance tax and should not file combined. In fact, section 206.691(1) requires it. However, as the Supreme Court stated in *Malpass*, the taxpayer would have the ability to file either way - on a separate entity basis or on a combined basis. Even though *Malpass* was an individual income tax case, the analysis is similar in this context.

Secondarily and equally authoritative as the above, MCL Section 206.611(6) provides that a 'Unitary business group includes an affiliated group that makes the election to be treated, and to file, as a unitary business group under MCL Sec. 206.691(2). MCL Sec. 206.691(2) provides for the election and again, there's no mention of it not applying to an insurance company group. Furthermore, MCL Sec. 206.691(2) provides that the election may be done without the consent of the department. Based on these statutes, again, an insurance company group of affiliated companies can elect to file a unitary combined return in Michigan for purposes of the premiums tax once the election is made. If necessary, our client would make the election to file a combined return.

From a practical perspective, the filing of a single return would alleviate having to file multiple forms. As the forms are not currently set up to allow for a combined filing, our client proposes to simply prepare an attachment to Form 4905 that calculates the tax, listing each entity's activity and eliminating any intercompany activity; those calculations would be combined and those combined results would be entered on Form 4905.

Thank you for your consideration. Please let me know if you agree with the position described above, have any questions, or would like to discuss.

Tim Pratschler

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Thoughts don't need paper to take shape.

The content of this email is limited to the matters specifically addressed herein and is not intended to address other potential tax consequences or the potential application of tax penalties to this or any other matter.

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RECEIVED by MSC 7/24/2025 4:17:16 PM

RECEIVED by MCOA 4/26/2023 1:26:40 PM

Call, Justin (AG)

From: timothy.s.pratcshler@us.pwc.com
Sent: Wednesday, June 22, 2016 11:30 AM
To: Wilkinson, Lance R. (Treasury); ""@INTL.michigan.gov
Cc: Matelski, Angela (TREASURY)
Subject: RE: CIT Insurance Premiums Tax - Combined Filing
Attachments: Michigan Department of Treasury - Combined Premiums Tax Returns 5.13.16.pdf

Lance,

Thanks so much for your email. I've attached the informal guidance you previously provided related to unitary groups of insurance companies for your reference given your current research of use of insurance credits by other insurance members of a UBG. Hopefully that assists you in expediting your response. If you have any questions or would like to discuss, please do not hesitate to reach out to me.

Thanks!

Tim Prateshler

PwC | Principal - State & Local Tax
Office: (313) 394-6508 | Mobile: (248) 302-8226 | Fax: (813) 281-6131
Email: timothy.s.pratcshler@us.pwc.com
PricewaterhouseCoopers LLP
One Detroit Center, 500 Woodward Avenue, Detroit, Michigan 48226
<http://www.pwc.com/us>

Thoughts don't need paper to take shape.

From: "Wilkinson, Lance R. (Treasury)" <WilkinsonL@michigan.gov>
To: Timothy S Prateshler/US/TLS/PwC@Americas-US
Cc: "Bacigal, Angela (TREASURY)" <BacigalA@michigan.gov>
Date: 06/22/2016 11:24 AM
Subject: RE: CIT Insurance Premiums Tax - Combined Filing

Mr. Prateshler—

Sorry for the delay in responding to you. We did receive your inquiry and are looking into it. Specifically, we're researching the issue of insurance credits being applied to other insurance companies. I expect we'll have a response to you within 2-3 weeks. Thank you.

—Lance

From: timothy.s.pratcshler@us.pwc.com [<mailto:timothy.s.pratcshler@us.pwc.com>]
Sent: Tuesday, June 14, 2016 8:29 AM
To: Wilkinson, Lance R. (Treasury) <WilkinsonL@michigan.gov>
Subject: Fw: CIT Insurance Premiums Tax - Combined Filing

Lance,

I wanted to follow up on my email below from last week. Could you confirm receipt and let me know if you have any input?
Thanks so much in advance!

Tim Prateshler

PwC | Principal - State & Local Tax
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----- Forwarded by Timothy S Prateshler/US/TLS/PwC on 06/14/2016 08:28 AM -----

From: Timothy S Prateshler/US/TLS/PwC
To: Wi kinsonL@michigan.gov
Date: 06/06/2016 01:00 PM
Subject: Fw: CIT Insurance Premiums Tax - Combined Filing

Lance,

I greatly appreciate the informal guidance you provided related to the ability of a unitary business group of insurance companies to file a combined return and/or utilize the attributes on a group basis. As a result of that informal guidance, one of my clients has prepared a statement which it plans to attach to its separate Michigan Insurance Premium Tax returns to provide the Department information on the sharing of attributes. However, before submission of those returns I am hoping you, or someone from the Department, may be able to take a look at the attached and let me know if it has sufficient detail to ensure the returns are processed appropriately.

Please let me know if you have any questions or would like to discuss.

Thanks!

Tim Prateshler

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----- Forwarded by Timothy S Prateshler/US/TLS/PwC on 06/06/2016 11:35 AM -----

From: Timothy S Prateshler/US/TLS/PwC
To: Wi kinsonL@michigan.gov
Date: 02/19/2016 10:00 AM
Subject: CIT Insurance Premiums Tax - Combined Filing

Lance,

Per our discussion, the situation involves multiple insurance companies that currently file separate Michigan premiums tax returns using MI Form 4905. The entities are all affiliated (owned greater than 80%) under federal and Michigan definitions. The entities would like to file as a unitary business group on one MI Form 4905 that includes all related premiums tax filers. Filing as a unitary business group appears to be acceptable (if not required) based on the following statutory code sections:

- MCL 206.611(5) - 'taxpayer means ... an insurance company or unitary business group ...'.
- MCL 206.611(6) - 'unitary business group means a group of United States persons that are ... insurance companies ...
- MCL 206.691(1) - 'except as otherwise provided under section 680(3), a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group ...'

In addition to the above code sections, filing as a unitary group is appropriate as there are no provisions indicating that insurance companies do not constitute a unitary group for purposes of the insurance tax and should not file combined. In fact, section 206.691(1) requires it. However, as the Supreme Court stated in *Malpass*, the taxpayer would have the ability to file either way - on a separate entity basis or on a combined basis. Even though *Malpass* was an individual income tax case, the analysis is similar in this context.

Secondarily and equally authoritative as the above, MCL Section 206.611(6) provides that a 'Unitary business group includes an affiliated group that makes the election to be treated, and to file, as a unitary business group under MCL Sec. 206.691(2). MCL Sec. 206.691(2) provides for the election and again, there's no mention of it not applying to an insurance company group. Furthermore, MCL Sec. 206.691(2) provides that the election may be done without the consent of the department. Based on these statutes, again, an insurance company group of affiliated companies can elect to file a unitary combined return in Michigan for purposes of the premiums tax once the election is made. If necessary, our client would make the election to file a combined return.

From a practical perspective, the filing of a single return would alleviate having to file multiple forms. As the forms are not currently set up to allow for a combined filing, our client proposes to simply prepare an attachment to Form 4905 that calculates the tax, listing each entity's activity and eliminating any intercompany activity; those calculations would be combined and those combined results would be entered on Form 4905.

Thank you for your consideration. Please let me know if you agree with the position described above, have any questions, or would like to discuss.

Tim Pratschler

PwC | Principal - State & Local Tax
Office: (313) 394-6508 | Mobile: (248) 302-8226 | Fax: (813) 281-6131
Email: timothy.s.pratschler@us.pwc.com
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Call, Justin (AG)

From: timothy.s.pratcshler@us.pwc.com
Sent: Monday, February 29, 2016 9:14 AM
To: Wilkinson, Lance R. (Treasury)
Subject: Re: CIT Insurance Premiums Tax - Combined Filing

Follow Up Flag: Follow up
Flag Status: Completed

Lance,

I wanted to follow up on my email below and see if you have had the opportunity to consider it in detail. If you could let me know, I would greatly appreciate it. If you have any questions or would like to discuss, please let me know.

Thanks!

Tim Prateshler

PwC | Principal - State & Local Tax
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Email: timothy.s.pratcshler@us.pwc.com
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From: Timothy S Prateshler/US/TLS/PwC
To: Wi kinsonL@michigan.gov
Date: 02/19/2016 10:00 AM
Subject: CIT Insurance Premiums Tax - Combined Filing

Lance,

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- MCL 206.611(5) - 'taxpayer means ... an insurance company or unitary business group ...'.
- MCL 206.611(6) - 'unitary business group means a group of United States persons that are ... insurance companies ...'
- MCL 206.691(1) - 'except as otherwise provided under section 680(3), a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group ...'

In addition to the above code sections, filing as a unitary group is appropriate as there are no provisions indicating that insurance companies do not constitute a unitary group for purposes of the insurance tax and should not file combined. In fact, section 206.691(1) requires it. However, as the Supreme Court stated in *Malpass*, the taxpayer would have the ability to file either way - on a separate entity basis or on a combined basis. Even though *Malpass* was an individual income tax case, the analysis is similar in this context.

Secondarily and equally authoritative as the above, MCL Section 206.611(6) provides that a 'Unitary business group includes an affiliated group that makes the election to be treated, and to file, as a unitary business group under MCL Sec. 206.691(2). MCL Sec. 206.691(2) provides for the election and again, there's no mention of it not applying to an insurance company group. Furthermore, MCL Sec. 206.691(2) provides that the election may be done without the consent of the department. Based on these statutes, again, an insurance company group of affiliated companies can elect to file a unitary combined return in Michigan for purposes of the premiums tax once the election is made. If necessary, our client would make the election to file a combined return.

From a practical perspective, the filing of a single return would alleviate having to file multiple forms. As the forms are not currently set up to allow for a combined filing, our client proposes to simply prepare an attachment to Form 4905 that calculates the tax, listing each entity's activity and eliminating any intercompany activity; those calculations would be combined and those combined results would be entered on Form 4905.

Thank you for your consideration. Please let me know if you agree with the position described above, have any questions, or would like to discuss.

Tim Pratschler

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2025 4:17:16 PM

SAMPLE STATEMENT FOR REVIEW

STATEMENT ATTACHED TO AND MADE PART OF
FORM 4905
2015 INSURANCE COMPANY ANNUAL RETURN FOR
CORPORATE INCOME AND RETALIATORY TAXES
UNITARY BUSINESS GROUP FILING

1. MCL 206.611(5) states in relevant part that, "'Taxpayer' means a corporation, insurance company, financial institution, or unitary business group...." Further, MCL 206.611(6), a "'Unitary business group' means a group of United States persons that are corporations, insurance companies, or financial institutions...." Additionally, MCL 206.691(1) states "Except as otherwise provided under section 680(3), a unitary business group shall file a combined return...." As a result of these sections of the Michigan Corporate Income Tax Act, two more more insurance companies may be unitary with one another and constitute a unitary business group.
2. As a result of the statutory authority outlined in paragraph 1 above, the Taxpayer has analyzed its business activities and determined that it and its related insurance company affiliates constitute a unitary business group as defined by MCL 206.611(6) as each affiliated insurance company meets both the control (80% or greater owned) and relationship tests. Pursuant to MCL 206.691(1), a unitary business group typically files a combined return the Department is authorized to prescribe forms for insurance companies to report their tax due under the Corporate Income Tax.
3. While the Department's forms do not afford a unitary group of insurance companies the opportunity to file a combined return, members of a unitary business group of insurance companies may utilize benefits of the inclusion in a unitary business group even though the Department's forms prescribe a separate filing.
4. Certain members of the Taxpayer's in the unitary business group have excess premium tax credits available and two members of the in the unitary business group of insurance companies, Company 6 and Company 7 can utilize the credits to offset their premium tax liability.
5. The schedule below provides details, by each member of the unitary business group of insurance companies, of the credits available, credits utilized and the excess credits available for utilization by other members of the unitary business group. **(Amounts below do not represent actual amounts and are included for illustrative purposes.)**

	Company 1 xx-xxxxxxx	Company 2 xx-xxxxxxx	Company 3 xx-xxxxxxx	Company 4 xx-xxxxxxx	Company 5 xx-xxxxxxx	Company 6 xx-xxxxxxx	Company 7 xx-xxxxxxx	Total
Line 19. Tax before credits	500,000	9,500,000	5,000,000	-	4,000,000	2,000,000	60,000	21,060,000
Credits								
Line 20a. Workers Compensations Placement Facility		-	-	-	-	-	-	-
Line 20c. Michigan Automobile Insurance Placement Facility	2,000,000	16,500,000	11,500,000	-	5,000,000	1,500,000	-	36,500,000
Line 22b Michigan Examination Fee @ 50%	10,000	100,000	85,000	-	40,000	20,000	-	255,000
Total credits available	2,010,000	16,600,000	11,585,000	-	5,040,000	1,520,000	-	36,755,000
Total credits utilized before unitary calculation (Line 21 plus 22b)	500,000	9,500,000	5,000,000	-	4,000,000	1,520,000	-	20,520,000
Additional credits utilized from other unitary entities	-	-	-	-	-	480,000	60,000	540,000
Line 25. Total Michigan Tax	-	-	-	-	-	-	-	-
Line 47. Total payments	200,000	3,500,000	1,800,000	-	1,670,000	900,000	65,000	8,135,000
Line 53. Overpayment	200,000	3,500,000	1,800,000	-	1,670,000	900,000	65,000	8,135,000
Line 55. Refund	200,000	30	1,800,000	-	1,670,000	900,000	65,000	8,135,000
Total credits available to offset other unitary entities	1,510,000	7,100,000	6,585,000	-	1,040,000	-	-	16,235,000
Less credit utilized by Company 6	(480,000)							(480,000)
Less credit utilized by Company 7	(60,000)							(60,000)
Total credits not utilized	970,000	7,100,000	6,585,000	-	1,040,000	-	-	15,695,000



STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

RICK SNYDER
GOVERNOR

NICK A. KHOURI
STATE TREASURER

May 13, 2016

Mr. Timothy Pratschler
Principal – State and Local Tax
PriceWaterhouseCoopers LLP
One Detroit Center
500 Woodward Avenue
Detroit, Michigan 48226

Re: Corporate Income Tax, Combined Filing by Insurance Companies

Dear Mr. Pratschler:

Thank you for your email dated February 19, 2016 (enclosed), in which you proposed that a group of affiliated insurance companies may file a combined annual return (Form 4095). In your email, you also explain your view that combined filing by unitary insurance companies is permitted, if not required.

Revenue Administrative Bulletin (RAB) 1989-34 describes the procedures for issuing technical advice letters as position statements of the Michigan Department of Treasury (“Department”). Since a technical advice letter is binding on the Department as to the specific taxpayer, a request for a technical advice letter must specifically identify the taxpayer. Your request does not meet this requirement. Accordingly, please consider this letter an informal response.

The statute’s requirement to include a unitary insurance company in a unitary business group is a separate issue from the question of whether two or more unitary insurance companies are required or permitted to file a combined return to pay the premiums tax under Chapter 12¹. Accordingly, there is no dispute over the following issues:

- The definition of “taxpayer” in section 611² includes an insurance company.
- The definition of “unitary business group” in section 611³ includes an insurance company.
- The affiliated group election in section 691⁴, by way of definition of “affiliated group” in section 603⁵, may apply to an insurance company. The affiliated group election is an election to “have all of the persons that are included in the affiliated group to be treated as a unitary business group.”

¹ MCL 206.635-643.

² MCL 206.611(5).

³ MCL 206.607(6)

⁴ MCL 206.691(2).

⁵ MCL 206.603(1).

Mr. Timothy Pratschler
May 13, 2016
Page 2

- Two or more insurance companies may be unitary with one another and may constitute a unitary group.⁶

Therefore, an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group, even though the insurance company is filing separately. However, the Department is authorized to prescribe forms⁷ and has not developed its forms and systems in way that would accommodate the combined filing you request. To my knowledge, the Department has not yet received such a request, but we will take it into consideration for future years and releases. I will forward your inquiry to the divisions charged with forms and systems development.

If you have any questions regarding this letter, please feel free to contact me at 517-373-9600.

Sincerely,



Lance R. Wilkinson
Administrator, Tax Policy Division

Enclosure

⁶ An insurance company may also be unitary with a C corporation, an entity taxed as a C corporation, or a financial institution, and those persons may comprise a unitary business group.

⁷ MCL 206.693(3).

Exhibit B

INSURANCE COMPANIES/FINANCIAL INSTITUTIONS

Insurance Companies/Financial Institutions 1. Are mortgage companies financial institutions under the Corporate Income Tax?

ANSWER:

Possibly. MCL 206.651(f) defines a financial institution as:

(i) A bank holding company, a national bank, a state chartered bank, a state chartered savings bank, a federally chartered savings association, or a federally chartered farm credit system institution.

(ii) Any entity, other than an entity subject to the tax imposed under chapter 12, who is directly or indirectly owned by an entity described in subparagraph (i) and is a member of the unitary business group.

(iii) A unitary business group of entities described in subparagraph (i) or (ii), or both.

Thus, even though a mortgage company is not expressly defined as a financial institution, it will be considered a financial institution if it is owned directly or indirectly by a financial institution and is a member of the unitary business group of which the parent financial institution is also a member.

Insurance Companies/Financial Institutions 2. Does the \$100 liability threshold apply to insurance companies and financial institutions?

ANSWER:

Yes. Section 685 of 2011 PA 38 provides for a filing threshold and a liability threshold, stating:

a taxpayer, other than a taxpayer subject to the tax imposed under chapter 12 or 13, whose apportioned or allocated gross receipts are less than \$350,000.00 does not need to file a return or pay the tax imposed under this part... A taxpayer whose tax liability under this part is less than or equal to \$100.00 does not need to file a return or pay the tax imposed under this part.

This section clearly excludes insurance companies and financial institutions from the \$350,000 filing threshold but does not similarly limit the liability threshold. Therefore, an insurance company or financial institution with an annual liability of \$100 or less is not required to file a CIT annual return or pay the tax.

Insurance Companies/Financial Institutions 3. Do nonresident financial institutions located outside Michigan whose only activity in Michigan consists of an ownership interest in loans secured in whole or in part by real property located in Michigan have nexus under the CIT?

ANSWER:

A nonresident financial institution located outside Michigan whose only activity in Michigan consists of an ownership interest in loans secured in whole or in part by mortgages on real property located in Michigan will not have physical presence nexus under the CIT. However, nexus is determined by evaluating all facts and circumstances. To the extent that the nonresident financial institution, or its employee, agent, or independent contractor acting in a representative capacity, has physical presence in Michigan for more than one day, nexus is

established. Additionally, nexus exists if the nonresident financial institution actively solicits sales in Michigan and has Michigan gross receipts of \$350,000 or more, or if the taxpayer has an ownership interest or a beneficial interest in a flow-through entity, directly, or indirectly through 1 or more other flow-through entities, that has substantial nexus in this state. MCL 206.621.

Insurance Companies/Financial Institutions 4. The CIT franchise tax provides financial institutions with a tax base deduction for “the average daily book value of United States obligations and Michigan obligations.” MCL 206.655(1). Does “average daily book value” include the premiums and discounts for U.S. obligations?

ANSWER:

Yes, where the premiums and discounts are reflected in the book value of the U.S. obligations.

The CIT defines United States obligations as:

all obligations of the United States exempt from taxation under 31 USC 3124(a) or exempt under the United States constitution or any federal statute, including the obligations of any instrumentality or agency of the United States that are exempt from state or local taxation under the United States constitution or any statute of the United States. MCL 206.651(s).

Michigan obligation is defined as:

a bond, note, or other obligation issued by a governmental unit described in section 3 of the shared credit rating act, 1985 PA 227, MCL 141.1053. MCL 206.651(k).

“Average daily book value” is not a defined term in the CIT or the Federal IRC. “Book value” is commonly understood to be the value at which an asset is carried on the taxpayer’s balance sheet. Black’s Law Dictionary, 8th ed. Thus, in order to reach the average daily book value of U.S. obligations a financial institution will calculate the daily value of the obligation as it appears on the institution’s balance sheet and average this value over the days in the financial institution’s tax year. If the book value of the U.S. obligation is affected by premiums and discounts on the institution’s balance sheet then these amounts will also be included in the computation of average daily book value for purpose of the tax base calculation.

Insurance Companies/Financial Institutions 5. Financial Institutions are required to calculate the net capital tax base using a five year look-back period to find the average of net equity and certain deductions. Should a CIT taxpayer look to years under the MBT in order to calculate the 5 year period?

ANSWER:

Yes. MCL 206.655 requires a financial institution to compute its net capital tax base “by adding the financial institution’s net capital as of the close of the current tax year and preceding 4 tax years and dividing the resulting sum by 5.” This look-back period will require taxpayers to use data from MBT years for the first 4 tax years under the CIT.

Insurance Companies/Financial Institutions 6. (Rescinded beginning with tax year 2017) Financial Institutions must calculate the net capital tax base five year look-back period to find the average of net equity and certain deductions. The CIT provides guidance in the case of a

merger or acquisition of a financial institution for future tax years only. How does a financial institution that has combined with another financial institution by acquisition calculate the five year averaging period for the year prior to an acquisition?

ANSWER:

The net capital of each of the combined entities should be included separately in the tax base look back period for years prior to the acquisition. The sum of these separate calculations should then be combined to reach net capital of the surviving financial institution entity. Net capital from the look back period for both the surviving and acquired entities should be included in the calculation of the tax base.

Insurance Companies/Financial Institutions 7. Financial Institutions pay tax under the CIT on net capital. Computation of this tax base requires a financial institution to average the past five years of net equity with certain deductions. How does a unitary business group of financial institutions perform this calculation for entity members that have not been a part of the UBG for five years but became members of the group sometime within the five year look-back period?

ANSWER:

The term "financial institution" includes a unitary business group of financial institutions. MCL 206.651(f). A financial institution must compute the current tax year tax base by taking a five year average of net capital. MCL 206.655(2). For a UBG of financial institutions each member entity of the group must compute net capital, using the five year average, individually. The group then sums the results of the entities' calculations to reach net capital for the group. Once a member entity is considered a part of a UBG of financial institutions, it must compute its individual net equity in accordance with this requirement. This means that an entity that was newly added to the UBG will compute its net capital by using the average of five years of net capital and then adding this result to the results of the other member entities of the group. A shorter look-back period may apply if the new UBG member has not itself been in existence for five years. MCL 206.655(2).

Insurance Companies/Financial Institutions 8. How must a foreign insurer file for purposes of the retaliatory tax when the insurer's state of incorporation requires unitary filing?

ANSWER:

A foreign insurer must calculate its burden for purposes of the Michigan retaliatory tax according to the laws of its state of incorporation. If the insurer's state of incorporation requires filing on a unitary basis, the insurer should compute its retaliatory tax burden using this method.

The retaliatory tax is calculated by first computing the burden to the foreign insurer doing business in Michigan and then computing the burden that would be imposed upon a hypothetical Michigan insurer as if it was performing the identical business activity in the foreign state. When making this calculation it should be assumed that the hypothetical Michigan insurer would calculate its liability in the same manner required of the foreign insurer.

Insurance Companies/Financial Institutions 9. Does a unitary group of insurance companies have to file a combined CIT return?

ANSWER:

No. Insurance companies are not specifically excluded from the definition of a unitary business group, found at MCL 206.611(6), and thus may constitute a unitary business group. In practice, however, there is no practical effect of this possibility. The tax on authorized insurance

companies is equal to 1.25% of gross direct premiums written on property or risk located or residing in Michigan. MCL 206.635(2). Because the tax is only on property or risk located in Michigan there will be no traditional apportionment for insurance companies. Thus, even if an authorized insurance company is unitary with another authorized insurance company under MCL 206.611(6), this will have no effect in calculating the tax. A combined return will not be necessary.

Insurance Companies/Financial Institutions 10. Under the CIT “insurance company” is defined as an “authorized insurer” at MCL 206.605(5). What is the meaning of “authorized insurer”? If an insurance company is not an “authorized insurer” how is it taxed under the CIT? If a non-nexus insurance member of a unitary business group is not an “authorized insurer” how is this member treated?

ANSWER:

An authorized insurer is an insurer as defined by the insurance code of 1956, 1956 PA 218, MCL 500.106, as “any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds organization, fraternal benefit society, and any other legal entity, engaged or attempting to engage in the business of making insurance or surety contracts,” which is authorized according to the insurance code at section 108. “Authorized” means “an insurer duly authorized, by a subsisting certificate of authority issued by the [insurance] commissioner, to transact insurance in this state.” Thus, an insurance company under the CIT is an insurer as defined and authorized by the insurance code.

If an insurance entity does not meet these requirements, that entity is taxed as a standard taxpayer under the CIT. Likewise, a non-nexus insurance member of a unitary business group which is not an “authorized insurer” will be treated as a standard taxpayer and its corporate income and sales will determine the liability of the group.

The direction of MCL 206.691, that any corporate income and sales attributable to the insurance company be eliminated from the UBG return, is not applicable because the unauthorized insurance company is not “subject to the tax under chapter 12.”

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 10

If this opinion indicates that it is “FOR PUBLICATION,” it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY,

Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,

Respondent-Appellee.

FOR PUBLICATION

June 20, 2024

9:10 a.m.

No. 364790

Tax Tribunal

LC No. 21-000039

Before: O'BRIEN, P.J., and M. J. KELLY and FEENEY, JJ.

FEENEY, J.

This tax dispute involves a Unitary Business Group (UBG) of insurance companies and its dispute with the Department of Treasury regarding the treatment of the premiums tax imposed under MCL 206.635, the so-called retaliatory tax imposed under MCL 500.476a, and the calculation of the Michigan automobile insurance placement facility (MAIPF) credit under MCL 206.637(1)(c). Fortunately, this dispute is more a war of words than of numbers. That is, at least for purposes of this appeal, both sides seem to agree that the other correctly calculates the amount owed under their interpretation of the relevant statutes, with the disagreement being over the correct interpretation of the statutes. And in this respect, we agree with petitioner's interpretation and we reverse the Tax Tribunal's ruling in favor of respondent and remand the matter to the Tribunal for entry of summary disposition in favor of petitioner.

The history of this case is largely irrelevant to the resolution of the dispute. Briefly, petitioner initially filed separate returns but later filed amended combined returns with the other members of the UBG, seeking to aggregate their tax liability. Respondent initially accepted these amended returns, issued refunds, but later rejected them and ordered the return of those refunds. Respondent assessed penalties along with interest. Petitioner is an insurance company with "principal offices" in Ohio. Petitioner is "affiliated with Nationwide Mutual Insurance Company" located in Ohio. Petitioner is part of a UBG comprised of other insurance companies. Petitioner's

UBG status is undisputed. The tax years in dispute appear to be 2014 and 2015.¹ For those two years, petitioner and each of the UBG members initially filed separate corporate income tax (CIT) returns in which they calculated their tax liability on an individual basis. The UBG group collectively paid approximately \$4.5 million in taxes for 2014 and 2015.

In November 2018, petitioner and the UBG members filed “amended returns for the tax years at issue, reporting its gross premiums, subtractions, and credits as a unitary group.” The exact numbers and specifics of the returns are not material or in dispute for purposes of this appeal. When they filed their amended returns, they included a “[s]chedule” (“the Schedule”) “show[ing] that premiums taxes and tax attributes were being calculated and applied at the unitary business group level” The Schedule was used because there was “no form available to file a combined tax return,” and the Schedule “computed the tax liability of the unitary business group and then allocated taxes and tax attributes to separate tax forms in a manner that could be interpreted as though tax attributes were being shared among the members of the group.” The Schedule “aggregate[d] the taxable premiums, credits, and other tax attributes from each component member of the Nationwide Group [i.e., the UBG], and . . . appl[ied] the Nationwide Group’s tax credits against the same group’s aggregate Michigan corporate income tax (*i.e.*, premiums tax) liability.” Moreover, the Schedule “calculate[d] the Nationwide Group’s Michigan tax liability, after credits, in a manner that is consistent with other unitary business group combined filings.”

Initially, respondent accepted the amended returns and issued a refund of approximately \$3.3 million to the UBG for the 2014 and 2015 tax years, but respondent did not issue all of the claimed refunds. Moreover, respondent subsequently issued a variety of assessments and notices seeking to recover the refunds already paid. Petitioner and the UBG filed appeals to contest this effort. Respondent appears to have treated the group members as though they were separate filers, with some group members being issued their claimed refunds while others were denied.

In short, respondent rejected petitioner’s attempts to file combined returns and calculate certain credits and taxes on a group-wide basis; instead, respondent treated each insurance company separately despite their UBG status. Respondent issued bills for taxes it was due from individual members. In the information conference recommendation in the “Hearings Division,” the referee stated that “[t]he crux of the [respondent]’s contention is that the premium and retaliatory taxes are only levied upon ‘each insurance company.’ ” The referee agreed with respondent’s position that the premiums tax and retaliatory tax cannot be calculated on a group-wide basis for a UBG of insurance companies. An administrator of the Hearings Division agreed with the referee’s determination “that groupwide computation and the sharing of credits is not

¹ The amended petition and bill for taxes due suggested that the disputed tax years were only 2015 and 2016, but petitioner’s motion for summary disposition as well as Kyle Shaner’s affidavit provided that the disputed tax years were 2014 and 2015, and involved the amended returns for those years. Confusingly, respondent listed the disputed tax years as being 2014 through 2016. On appeal, petitioner continues to list the disputed tax years as being 2014 and 2015, while respondent continues to list the disputed tax years as being 2014 through 2016. Ultimately, this discrepancy has no bearing on the outcome of the appeal because only legal issues are raised and do not touch on the exact tax years.

available to members of a unitary group that are insurance companies,” and respondent denied petitioner’s claim for a refund.

Plaintiff then filed its petition with the Tax Tribunal. The parties filed cross-motions for summary disposition under MCR 2.116(C)(10). Without any oral arguments, the Administrative Law Judge (ALJ) issued a proposed opinion and judgment (POJ) ordering that summary disposition be granted in favor of respondent and denied as it related to petitioner. The ALJ concluded that “[t]he relevant statutes are clear that Petitioners are not permitted to file as a UBG for premium and retaliatory taxes and reap the benefits of claiming MAIPF tax credits. Therefore, the assessments issued by Respondent must be upheld.” At the outset, the ALJ stated that there was “no question” that petitioner met the elements for a UBG. It also framed the issue as being “whether the more general provisions of the CIT Act that Petitioners cite control the ability of insurance companies to file combined returns for premiums and retaliatory taxes, or whether the more specific provisions of Chapter 12 of the CIT Act preclude the ability of insurance companies to file combined returns for premiums and retaliatory taxes.”

The ALJ interpreted MCL 206.611(5) to mean “that the entity being taxed depends on the type of tax being assessed.” This meant that “an entity may be taxed as a UBG if the provision for which the tax is assessed allows for it. However, if a provision does not allow for UBGs to file jointly, then an entity must file individually.” The ALJ interpreted MCL 206.691 to apply to “general corporate income taxes, and not every subcategory of taxes.” The ALJ determined that, if our Legislature intended for the provision to apply to all taxes, it could have done so. Accordingly, the ALJ concluded that, “although MCL 206.691 requires UBGs to file combined returns for taxpayers subject to a corporate income tax base, it does not require UBGs to file combined returns for premiums and retaliatory taxes.”

The ALJ determined that, because MCL 206.635(1) and MCL 206.637 did not include UBGs but only insurance companies, this was “presumed to be intentional” by our Legislature, which meant our “Legislature did not intend to have premiums tax calculated on a group wide basis.” The ALJ acknowledged that MCL 8.3(b) allowed for the singular form of “insurance company” to be changed to its plural form. The ALJ was unwilling to extend this to mean that “insurance company” could be changed to “UBGs” because the two were “totally different.”

The Tax Tribunal issued a final order adopting the POJ as its own.

“Absent fraud, our review of Tribunal decisions is limited to determining whether [the Tribunal] erred in applying the law or adopted a wrong legal principle.”² On the other hand, if this Court’s “review requires the interpretation and application of a statute, that review is *de novo*.”³ In this case, the Tax Tribunal erred in its interpretation of the relevant statutes.

² *Power v Dep’t of Treasury*, 301 Mich App 226, 229-230; 835 NW2d 662 (2013) (quotation marks and citation omitted; alteration in original).

³ *Id.* at 230.

This Court summarized the applicable principles of statutory construction in *D'Agostini Land Co LLC v Dept of Treasury*:⁴

With respect to statutory interpretation, this Court is required to give effect to the Legislature's intent. *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630, 643; 872 NW2d 710 (2015). The Legislature is presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992). “A statutory provision is ambiguous only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning.” *People v Fawaz*, 299 Mich App 55, 63; 829 NW2d 259 (2012) (quotation marks and citation omitted). Only when ambiguity exists does the Court turn to common canons of construction for aid in construing a statute's meaning. *People v Borchard-Ruhland*, 460 Mich 278, 284-285; 597 NW2d 1 (1999).

As this Court explained in *D'Agostini*,⁵ not only does the tax code define what a UBG is, it also requires that a UBG file a unitary tax return:

A unitary business group is not a separate and distinct legal entity, like a corporation, limited liability company, or partnership; rather, the group is purely a creation of tax law. In general, a unitary business group is a group of related US persons whose business activities are sufficiently interdependent. MCL 206.611(6) (CIT); MCL 208.1117(6) (MBT). To qualify as a unitary business group, one member of the proposed group must own or control more than 50% of the other members and there must be a sufficient connection between the members to meet one of two relationship tests. MCL 206.611(6) (CIT); MCL 208.1117(6) (MBT). *If a group of businesses qualifies as a unitary business group in a particular tax year, then the group must file a unitary tax return for that year.* MCL 206.691(1) (CIT); MCL 208.1511 (MBT). *Michigan, like several other states, has adopted the unitary-business-group concept in an effort to measure more accurately the related group's taxable activities in the state.*

Unitary business groups were not taxed as such under the SBT [Single Business Tax Act]. When it enacted the MBT, the Legislature added “unitary business group” to the list of persons who qualify as a “taxpayer” under state law. MCL 208.1117(5). Membership in a unitary business group was open to individuals as well as a wide range of legal entities, including corporations, limited liability companies, and partnerships. MCL 208.1117(6) and (7). With the CIT, the Legislature retained the concept of a “unitary business group” in the definition of a

⁴ 322 Mich App 545, 554-555; 912 NW2d 593 (2018).

⁵ 322 Mich App at 551-552.

“taxpayer,” but it restricted membership in such a group to corporations, *insurance companies*, and financial institutions. MCL 206.611(6). [Emphasis added.]

Moreover, as this Court observed in *Soave v Dept of Treasury*,⁶ “a taxpayer can be either an individual or a UBG but not both. . . . This leads to the conclusion that once an entity is considered to be part of a UBG, that single entity ceases to be a separate taxpayer.”

These cases lead to two inescapable conclusions that control this case. First, whether a petitioner is a UBG or a group of separate taxpayers is not a matter of choice by petitioner or grace by respondent. And the parties do not dispute that petitioners meets the statutory definition of a UBG. This, in turn, leads to the second inescapable conclusion: that the separate entities within the UBG (in this case, the various insurance companies) cease to be separate taxpayers and we are left with a single taxpayer, the UBG itself.

The ALJ interpreted MCL 206.611(5) to mean “that the entity being taxed depends on the type of tax being assessed.” That subsection reads as follows:

(5) "Taxpayer" means a corporation, insurance company, financial institution, or unitary business group, whichever is applicable under each chapter, that is liable for a tax, interest, or penalty under this part. For purposes of chapters 11 and 14, taxpayer does not include an insurance company or a financial institution. For purposes of chapter 12, unless specifically included in the section, taxpayer does not include a corporation or a financial institution. For purposes of chapter 13, taxpayer does not include a corporation or an insurance company.

That is to say, an insurance company is exempt from the provisions of chapters 11, 13, and 14. Rather, the taxing of insurance companies is covered by chapter 12. The ALJ interpreted this to mean that “an entity may be taxed as a UBG if the provision for which the tax is assessed allows for it. However, if a provision does not allow for UBGs to file jointly, then an entity must file individually.”

This conclusion is in direct contradiction to this Court’s holdings in *D’Agostini* and *Soave*. As discussed above, both cases make it clear that when a group of companies qualify as a UBG, the UBG, and not the individual companies within the UBG, is the taxpayer and the UBG is required to file a unitary tax return. As we observed in *Soave*,⁷ where there is a UBG, “a single return for the UBG should have been filed and no returns for the individual entities should [be] filed and are nullities” That is, where there is a UBG, tax returns by individual entities within the UBG have “no meaningful existence.”⁸ The ALJ’s opinion cites *SBC Health Midwest, Inc v Kentwood*,⁹ a case which does not involve a UBG or the corporate income tax, for the ALJ’s proposition that the “Legislature intended for this provision to concern general corporate income

⁶ ___ Mich App ___, ___ NW2d ___ (2024), slip op at 4-5.

⁷ Slip op at 5.

⁸ *Id.*

⁹ 500 Mich 65, 73; 894 NW2d 535 (2017).

taxes, and not every subcategory of taxes. If the Legislature intended for this provision to apply to all taxes, it would have said so in this provision.” But, as already discussed, the Legislature enacted MCL 206.691(1) which states that “a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group.” The only exception listed in the statute is that provided under MCL 206.680(3), which deals with members of a UBG that are entitled to certificated credits under the prior Michigan business tax act (MBT), which is not involved here.

Indeed, this provision demonstrates that the ALJ had it exactly backwards; the question is not whether the Legislature intended to include every subcategory of tax, but whether the Legislature intended to exempt any particular subcategory, which it did with the MBT credits. Moreover, the definition of “taxpayer” in MCL 206.611(5) sets forth which entities are excluded from the definition of “taxpayer” under particular chapters of the tax code.

As respondent points out in its brief, the income tax act imposes three separate taxes, depending on the nature of the entity involved. These are found in Part 2 of the act.¹⁰ Chapter 11¹¹ imposes a tax on general corporations, Chapter 12¹² imposes a tax on insurance companies, and Chapter 13¹³ imposes a tax on financial institutions. Respondent points to the language of MCL 206.635 that refers to “each insurance company,” as well as other references to “an” insurance company. We reject the argument that this requires each individual insurance company within the UBG to separately calculate the tax under Chapter 12.

First, such an approach would defeat the purpose of including insurance companies within the definition of a UBG. It would be illogical to include insurance companies within a UBG’s definition yet then exclude UBGs from the provisions of Chapter 12—the only chapter that imposes a tax on insurance companies. Second, it would be contrary to the UBG’s primary purpose. As pointed out in *D’Agostini*,¹⁴ “Michigan, like several other states, has adopted the unitary-business-group concept in an effort to measure more accurately the related group’s taxable activities in the state.” And, third, it ignores the statutory-construction rule in MCL 8.3b that “[e]very word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number.”

In addition to the premiums tax under Chapter 12, MCL 206.641(1)(c) provides for a credit for payments made to the MAIPF. It logically follows that if a tax return under Chapter 12 involving a UBG must be a unitary return, including the calculation of the premiums tax on a

¹⁰ MCL 206.601 through MCL 206.699.

¹¹ MCL 206.621 *et seq.*

¹² MCL 206.635 *et seq.*

¹³ MCL 206.651 *et seq.*

¹⁴ 322 Mich App at 551.

unitary basis, then the calculation and application of the MAIPF credit must also be done on a unitary basis.

In sum, to exclude a UBG of insurance companies from the provisions of Chapter 12 of the tax act would contradict the Legislature's inclusion of insurance companies within the definition of a UBG. Indeed, it would render the insurance companies' inclusion within the definition of UBGs as unnecessary.¹⁵ Accordingly, we agree with respondent that the Tax Tribunal erred in concluding that a UBG of insurance companies do not file a unitary return for calculation of the premiums tax and related credits under Chapter 12 of the tax act.

There remains the issue of the retaliatory tax under MCL 500.476a. Our Supreme Court explained the purpose and application of the tax in *TIG Ins Co, Inc v Dep't of Treasury*.¹⁶

This case involves the retaliatory tax that Michigan imposes on foreign insurers doing business in Michigan. Under the retaliatory tax, when an insurer's state of incorporation imposes a larger aggregate tax burden on a Michigan insurer doing business in that state than Michigan imposes on a company from that state doing business in Michigan, the foreign insurer must pay Michigan a tax equal to the difference in the aggregate tax burdens. See MCL § 500.476a. Thus, to compute the retaliatory tax due from a foreign insurer, if any, Michigan tallies all the taxes, fines, penalties, and other burdens it otherwise imposes on the foreign insurer doing business in Michigan. Michigan then tallies the burden a hypothetical Michigan insurer would pay to that insurer's home state were the hypothetical Michigan insurer doing the same amount of business there. If the other state's total burden on the hypothetical Michigan insurer doing the same amount of business in that state would be larger than the burden Michigan imposed on the foreign insurer, the actual burden Michigan imposes is subtracted from the other state's burden on the hypothetical insurer, and the difference is the retaliatory tax the foreign insurer owes Michigan. These taxes have been common in insurance taxation since the nineteenth century, see *Western & Southern Life Ins Co v State Bd of Equalization*, 451 US 648, 668; 101 S Ct 2070; 68 L Ed 2d 514 (1981), and Michigan has had a form of a retaliatory tax since 1871. See 1871 PA 80, § 4 (adding what was then § 28 to the insurance code).

¹⁵ We are not entirely unsympathetic to the policy arguments raised by respondent at oral argument in this case. But they are just that—policy arguments. And as such they need to be addressed by the Legislature and not this Court. Respondent raises important questions regarding the inclusion of insurance companies in the UBG scheme and whether there needs to be some adjustment to the treatment of provisions such as the MAIPF credits and the retaliatory tax. But those are questions in need of thoughtful consideration by the Legislature, not resolution by litigation before a Court that must apply a statute that clearly includes insurance companies within the UBG scheme without explicit exception or modification.

¹⁶ 464 Mich 548, 551-552; 629 NW2d 402 (2001).

The distinction with the retaliatory tax is that it is not imposed under the tax act, but rather under the insurance code. But we find this to be a distinction without a difference. With apologies to Gertrude Stein,¹⁷ a tax is a tax is a tax. And, as petitioner points out, while the retaliatory tax is created in the insurance code, it is incorporated into Chapter 12 of the tax code in MCL 206.643(1). Accordingly, we reach the same conclusion as with the premiums tax and the MAIPF credit: the retaliatory tax is part of the tax code's requirement that a UBG file a unitary return and, therefore, is calculated and imposed at the UBG level.

In sum, we conclude that the Tax Tribunal erred in granting summary disposition to respondent and denying summary disposition to petitioner. Rather, summary disposition should have been granted in petitioner's favor. In light of our conclusions on the above issues, we need not consider petitioner's alternative arguments raised on appeal.

Reversed and remanded for entry of judgment in favor of petitioner. We do not retain jurisdiction. Petitioner may tax costs.

/s/ Kathleen A. Feeney
/s/ Colleen A. O'Brien
/s/ Michael J. Kelly

¹⁷ See Stein, "Sacred Emily," *Geography and Plays* (1922).

STATE OF MICHIGAN
IN THE SUPREME COURT

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COMPANY, ET AL.,

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v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

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Tax Tribunal No. 21-000039-TT

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APPELLEES' APPENDIX

TAB 11

Call, Justin (AG)

From: timothy.s.pratcshler@us.pwc.com
Sent: Monday, February 29, 2016 9:14 AM
To: Wilkinson, Lance R. (Treasury)
Subject: Re: CIT Insurance Premiums Tax - Combined Filing

Follow Up Flag: Follow up
Flag Status: Completed

Lance,

I wanted to follow up on my email below and see if you have had the opportunity to consider it in detail. If you could let me know, I would greatly appreciate it. If you have any questions or would like to discuss, please let me know.

Thanks!

Tim Pratechler

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Thoughts don't need paper to take shape.

From: Timothy S Pratechler/US/TLS/PwC
To: WilkinsonL@michigan.gov
Date: 02/19/2016 10:00 AM
Subject: CIT Insurance Premiums Tax - Combined Filing

Lance,

Per our discussion, the situation involves multiple insurance companies that currently file separate Michigan premiums tax returns using MI Form 4905. The entities are all affiliated (owned greater than 80%) under federal and Michigan definitions. The entities would like to file as a unitary business group on one MI Form 4905 that includes all related premiums tax filers. Filing as a unitary business group appears to be acceptable (if not required) based on the following statutory code sections:

- MCL 206.611(5) - 'taxpayer means ... an insurance company or unitary business group ...'.
- MCL 206.611(6) - 'unitary business group means a group of United States persons that are ... insurance companies ...'
- MCL 206.691(1) - 'except as otherwise provided under section 680(3), a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group ...'.

In addition to the above code sections, filing as a unitary group is appropriate as there are no provisions indicating that insurance companies do not constitute a unitary group for purposes of the insurance tax and should not file combined. In fact, section 206.691(1) requires it. However, as the Supreme Court stated in *Malpass*, the taxpayer would have the ability to file either way - on a separate entity basis or on a combined basis. Even though *Malpass* was an individual income tax case, the analysis is similar in this context.

Secondarily and equally authoritative as the above, MCL Section 206.611(6) provides that a 'Unitary business group includes an affiliated group that makes the election to be treated, and to file, as a unitary business group under MCL Sec. 206.691(2). MCL Sec. 206.691(2) provides for the election and again, there's no mention of it not applying to an insurance company group. Furthermore, MCL Sec. 206.691(2) provides that the election may be done without the consent of the department. Based on these statutes, again, an insurance company group of affiliated companies can elect to file a unitary combined return in Michigan for purposes of the premiums tax once the election is made. If necessary, our client would make the election to file a combined return.

From a practical perspective, the filing of a single return would alleviate having to file multiple forms. As the forms are not currently set up to allow for a combined filing, our client proposes to simply prepare an attachment to Form 4905 that calculates the tax, listing each entity's activity and eliminating any intercompany activity; those calculations would be combined and those combined results would be entered on Form 4905.

Thank you for your consideration. Please let me know if you agree with the position described above, have any questions, or would like to discuss.

Tim Prateshler

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Thoughts don't need paper to take shape.

The content of this email is limited to the matters specifically addressed herein and is not intended to address other potential tax consequences or the potential application of tax penalties to this or any other matter.

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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 12

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STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL

NATIONWIDE MUTUAL INSURANCE
COMPANY,

CONSOLIDATED CASES

Petitioner,

vs.

MOAHR Docket No. 21-000036-TT;
21-000608

DEPARTMENT OF TREASURY,
Respondent.

Peter M. Kopke,
Administrative Law Judge

NATIONWIDE AGRIBUSINESS
INSURANCE COMPANY,

CONSOLIDATED CASES

Petitioner,

vs.

MOAHR Docket No. 21-000039-TT;
21-000611

DEPARTMENT OF TREASURY,
Respondent.

Peter M. Kopke,
Administrative Law Judge

ZOOM DEPOSITION OF LANCE WILKINSON

Taken by the Petitioners on Thursday, July 22,
2021, via Zoom video teleconference, with all parties in
separate locations, at 10:03 a.m.

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REPORTED BY: Terri L. Zimmerman, CSR-2882
Certified Shorthand Reporter

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TABLE OF CONTENTS

WITNESS:	PAGE
LANCE WILKINSON	
Examination by Mr. Lipps	4
Examination by Mr. Thompson	73
Reexamination by Mr. Lipps	73
EXHIBITS:	IDENTIFIED
Exhibit 2 - Department of Treasury Organizational Chart	6
Exhibit 7 - E-Mails from Pratechler February 2016	27
Exhibit 8 - May 13, 2016, Letter from Wilkinson to Pratechler	29
Exhibit 9 - E-Mail Chain between Pratechler and Wilkinson	46
Exhibit 10 - Sample Statement for Review from Pratechler	51
Exhibit 11 - E-Mail Chain between Pratechler and Wilkinson	56
Exhibit 12 - Frequently Asked Questions regarding Insurance Companies/Financial Institutions	60
Exhibit 17 - MCLA 206.691	33
Exhibit 18 - Revenue Administrative Bulletin 2018-12	20

1 Thursday, July 22, 2021 - 10:03 a.m.

2 COURT REPORTER: I am not in the same location as
3 the witness and this deposition is being conducted remotely.
4 Is there any objection to my administering the oath remotely?

5 MR. LIPPS: Jeff Lipps on behalf of the Petitioner.
6 No, we have no objection.

7 MR. THOMPSON: David Thompson on behalf of Treasury
8 and no objection.

9 LANCE WILKINSON,
10 HAVING BEEN CALLED BY THE PETITIONERS AND SWORN:
11 EXAMINATION

12 BY MR. LIPPS:

13 Q. All right, Mr. Wilkinson. We're here for your deposition by
14 agreement and notice and for use in the pending proceeding.

15 What I'd like to start with is just have you state
16 your name and your business address.

17 A. Lance Wilkinson. Business address is 430 West Allegan,
18 Lansing, Michigan.

19 Q. And you're currently employed by the Department of Treasury?

20 A. Yes.

21 Q. What position do you currently hold?

22 A. Director of the Bureau of Tax Policy.

23 Q. And to whom do you report?

24 A. Chief Deputy Treasurer, Jeff Guilfoyle.

25 Q. And is that the highest career officer within Treasury?

1 MR. THOMPSON: Form.

2 THE WITNESS: Could you ask the question a
3 different way?

4 BY MR. LIPPS:

5 Q. Yeah. Obviously, the treasurer, but that's a political
6 position. I'm asking whether the Chief Deputy Treasurer, to
7 whom you report, is the highest career office within the
8 department.

9 A. So I believe the Deputy Treasurers, including the Chief
10 Treasurer, are appointed, by contract, by the Treasurer.
11 I'm -- you know, classificationwise, I don't know. I think
12 my director level position 18 is, within Treasury anyway, one
13 of the highest level civil service classified positions.

14 Q. Okay. And you've held the position as the Director of the
15 Bureau of Tax Policy since -- what? -- 2019?

16 A. Yes.

17 Q. And what position did you have prior to that?

18 A. Administrator of the Tax Policy Division.

19 Q. And was there a director at the time you were the
20 administrator?

21 A. Yes. The director was Mike Eschelbach.

22 Q. And was that to whom you reported as the administrator?

23 A. Yes.

24 Q. And what years did you hold the administrator position within
25 the Bureau of Tax Policy?

1 A. I believe I took that position in 2011.

2 Q. And you've been in the Department of Treasury since 2006; is
3 that right?

4 A. Yes.

5 Q. What positions did you have between 2006 and 2011? Let me
6 just withdraw that.

7 Were all your positions within the Bureau of Tax
8 Policy?

9 A. Yes.

10 Q. And so then, tell me what positions you had from 2006 to
11 2011.

12 A. I was Administrative Law Specialist.

13 Q. Any others?

14 A. No.

15 Q. And you are a lawyer, correct?

16 A. Yes.

17 Q. You got your law degree from the University of Michigan?

18 A. Yes.

19 Q. All right. Let me just direct your attention, just briefly,
20 to Exhibit No. 2, which is the Organizational Chart for the
21 Department of Treasury. Do you have that in front of you,
22 sir?

23 A. I do.

24 Q. All right. Now, with respect to the preparation of tax forms
25 for filing state taxes, is that done within the Bureau of Tax

- 1 Policy or one of the other divisions, to your knowledge?
- 2 A. Preparation of tax forms, like creating the forms?
- 3 Q. Correct.
- 4 A. Let me take a look. So we have a forms division or office
- 5 of -- I don't know what they're called. They're responsible
- 6 for actually creating the form. You know, design of the
- 7 forms -- of the forms that they, then, sort of create and
- 8 publish, are done collaboratively. And Tax Policy usually
- 9 has a representative on those forms teams.
- 10 Q. I'm sorry. You kind of blurred together. What did you say
- 11 at the very end?
- 12 A. So there's a -- there's a difference between -- we have a
- 13 group that I believe is in the Office of Departmental
- 14 Services, that's part of the Bureau of Financial and
- 15 Administrative Services, that handles actual, you know,
- 16 drafting and publication of the forms. I forget what they're
- 17 called. Darron Birchmeier, I think, is the person in charge
- 18 of that.
- 19 But the -- you know, how the forms are designed and
- 20 what they should look like is sort of a collaborative effort
- 21 across bureaus. But Tax Policy does, typically, have a
- 22 representative in those teams.
- 23 Q. Okay. And then is there something called a Technical
- 24 Services Division or Unit within the Department of Treasury?
- 25 A. Yes.

- 1 Q. And what's the function of the Technical Services Division or
2 Department, to your knowledge?
- 3 A. So they report to -- they report up through -- so they sit in
4 sort of a weird spot. But they report through to Glenn
5 White, who is one of the deputy treasurers. They sort of
6 handle more technical issues. So questions that Returns
7 Processing or the call center can't handle, they'll refer to
8 the Technical Services Unit. And then Technical Services
9 also handles a lot of the refund requests that come in.
- 10 Q. Do you know somebody by the name of Regina Blough in
11 Technical Services?
- 12 A. So Regina Blough is administrator of the Hearings Division,
13 and she reports to me.
- 14 Q. Okay. So the Hearings Division is within your line of
15 reporting?
- 16 A. Yeah. Technical Services is not, though.
- 17 Q. Okay. Now, this particular organizational chart is April of
18 this year. Do you know whether there was any substantial
19 difference in the organization chart, as it relates to Bureau
20 of Tax Policy in 2016?
- 21 A. In terms of organization, no. I mean, different people.
- 22 Q. All right.
- 23 A. But in terms of structure, no.
- 24 Q. All right. And when you were -- you were an administrator in
25 2016, correct?

1 A. Yes.

2 Q. And how would you describe your areas of responsibility as an
3 administrator in 2016?

4 A. So I was administrator of the Tax Policy Division. We draft
5 guidance. We work with our Legislative Affairs Office to
6 analyze and, at times, draft legislation. We work with the
7 AGs on litigation matters. We represent the department in
8 small claims matters at the Michigan Tax Tribunal. We
9 respond to, you know, questions and technical inquiries from
10 internal and external customers.

11 Q. By "internal" you mean it could be other divisions within the
12 Department of Treasury?

13 A. Yes.

14 Q. And by "external" you mean outside tax professionals and/or
15 companies that have to deal with the tax filings; is that
16 fair?

17 A. Yes.

18 Q. All right. Now, as an administrator, did you have groups or
19 people that were reporting to you?

20 A. Yes.

21 Q. And I'm asking in 2016.

22 A. Yes.

23 Q. And let's just start with groups. Did you have particular --
24 like the Hearings Group, did they report to you as
25 administrator?

- 1 A. No.
- 2 Q. What groups, if any, would report to you as the administrator
3 in 2016?
- 4 A. Well, I had people that reported to me, so I -- sorry if I
5 confused that. I didn't have any other divisions or anything
6 reporting to me. But I had -- 2016 -- probably 11
7 administrative law specialists that reported to me, one
8 accountant specialist that reported to me, and several
9 analysts.
- 10 Q. Okay. Did you have, in 2016, someone reporting to you by the
11 name of Angela Bacigal. I'm not sure if I'm pronouncing it
12 right. How is it pronounced?
- 13 A. It's -- back then it was Bacigal. She's since married and
14 changed her name, but I don't remember what year that was.
15 But Angela Bacigal is Angela Matelski and she reported to me.
- 16 Q. And what -- of those three different positions, analyst and
17 two different specialists, which bucket would she fall in?
- 18 A. She's a specialist.
- 19 Q. Administrative law specialist?
- 20 A. No. She is a specialist. She was -- she's not a lawyer.
21 She's a CPA.
- 22 Q. The administrative law specialists would have law degrees?
- 23 A. Yeah. They all have law degrees.
- 24 Q. And the accounting specialist would be -- what? -- a CPA?
- 25 A. It doesn't have to be a CPA. Angela happens to be CPA, but

1 that position is not required to be a CPA.

2 Q. Okay. And what were Angela's responsibilities in 2016, to
3 your knowledge?

4 MR. THOMPSON: I'm just going to put an objection
5 for relevance. But you can answer.

6 THE WITNESS: Angela did much of -- really did
7 everything that -- you know, so when I described the duties
8 of -- or the scope of responsibility for the Tax Policy
9 Division, she could have done any or all of those.

10 Typically, we would not have assigned her to work
11 with the AG on cases, unless there was some technical issue
12 she needed to be involved in. And she did not handle very
13 many small claims cases, just because she wasn't an attorney,
14 even though you don't have to be an attorney to do so at the
15 tribunal. But she did all of the other things.

16 BY MR. LIPPS:

17 Q. All right. I think you described one of your
18 responsibilities as the administrator in 2016 was to draft
19 guidance. Do you remember something that?

20 A. I do.

21 Q. And by "drafting guidance," do you mean both informal and
22 formal guidance?

23 A. Yes. I mean, when I say "draft guidance," I'm particularly
24 referring to formal guidance. But our, you know, responses
25 to inquiries from external stakeholders, for example, could

1 be informal guidance.

2 Q. And with respect to the process that was used -- I don't want
3 to, necessarily, get into any particular content -- is the
4 process, in responding to an informal guidance versus a
5 formal guidance, different or was it different in 2016?

6 A. Yes.

7 Q. Okay. Could you tell me what the differences were between an
8 external stakeholder asking for informal guidance versus the
9 issuance of formal guidance?

10 A. Well, formal guidance, since it's published, or at least
11 literally published -- tech advice letters are published in
12 redacted form now, but I don't think they were back in 2016.
13 Those had to go through the Deputy Treasurer, who was, in
14 2016, the Deputy Treasurer would have been Greg Gursky. I
15 think that was Greg Gursky. And then it would also have to
16 go through the director, who was Mike Eschelbach. Informal
17 guidance, depending on the issue, probably only went to Mike.

18 Q. The director?

19 A. Yes.

20 Q. For internal, within the Bureau of Tax Policy and the role
21 that you were playing in 2016, there was, from your
22 perspective, no process difference between what you would do
23 in reaching a point where you had either informal or formal
24 guidance; is that fair?

25 A. I mean, the scope of our analysis could be different.

1 Because formal guidance is published, there's a much higher,
2 sort of, burden on the taxpayer to provide facts and
3 information and disclose who the taxpayer is and all that
4 kind of stuff. So in that sense, there's more work upfront
5 to work with the taxpayer on getting that groundwork laid.
6 And then there's more review at the end.

7 Q. Yeah. The review at the end would be -- at least I think you
8 had identified, the director would certainly be involved and
9 the chief deputy treasurer would be involved, if it's going
10 to be formal published guidance.

11 A. Yeah. The deputy treasurer, yeah.

12 Q. Deputy treasurer. Now, is it fair to say that, even with
13 respect to informal guidance, when you were the
14 administrator, you were making every effort to be accurate in
15 the guidance you were providing?

16 A. We tried to be.

17 Q. And you didn't just -- let's say, you didn't cut corners just
18 because it was informal guidance versus a technical published
19 guidance. You tried to analyze the issue and provide the
20 appropriate advice or guidance; is that fair?

21 A. I think that's fair. I think the difference might be the
22 amount of information we had to go on at the time. You just
23 can't vet a taxpayer that it is undisclosed and unanimous,
24 right, so . . .

25 Q. Yeah. I understand that. If it was material to your

1 analysis to have certain facts, where there was an informal
2 request for guidance, would you make an effort to ask for
3 that additional information typically?

4 A. Probably.

5 Q. Okay. Now, did you know somebody in 2016 by the name of
6 Timothy Pratschler?

7 A. Yeah. Yes, he was a frequent-flier practitioner.

8 Q. Say that again.

9 A. He was a practitioner that I talked to many times.

10 Q. Okay. And he was at Price Waterhouse at the time, 2016?

11 A. I think so.

12 Q. And was he someone that you had familiarity as somebody that
13 dealt with tax issues that, from time to time, would seek
14 your guidance, either formally or informally?

15 A. Yeah. I mean I don't recall if he ever requested formal
16 guidance. But he was somebody that I talked to relatively
17 frequently.

18 Q. Okay. And you would -- you would both talk to him over the
19 telephone and e-mail back and forth, as well as sending
20 communications, fair?

21 A. Yes.

22 Q. All right. Do you recall an inquiry from Mr. Pratschler in
23 the summer -- or I guess it was in the winter of February
24 time frame of 2016, related to unitary business groups and
25 insurance companies?

- 1 A. I had to refresh my recollection, but yes.
- 2 Q. Okay. Now, by refreshing your recollection, you mean you
- 3 looked at some things before today's deposition; is that
- 4 right?
- 5 A. Yes.
- 6 Q. What do you recall looking at in order to prepare yourself
- 7 for today?
- 8 A. Well, I mean, I actually looked at this when we were, you
- 9 know, requested to produce, you know, response to the
- 10 interrogatories and request for production. But yeah, I
- 11 recall the exchange that Mr. Pratchler and I had regarding
- 12 insurance companies and unitary business groups and his, you
- 13 know, initial request to be able to file combined return.
- 14 Q. All right. And so I understand, Mr. Wilkinson, from your
- 15 testimony, that you were involved or at least your group was
- 16 involved in responding to some discovery that my client had
- 17 served on the department; is that fair?
- 18 A. Could you say that again?
- 19 Q. Yeah. I thought I understood you to say that when my client
- 20 served some discovery on the department asking for certain
- 21 documents and information, that you were involved in
- 22 gathering some of that information?
- 23 A. Yeah. Yes, I was.
- 24 Q. And at that time that's when you saw some of the materials
- 25 that you had exchanged with Mr. Pratchler for the first time

1 since 2016; is that fair?

2 A. Probably, yes.

3 Q. All right. Now, in advance of today's deposition, because
4 there's some time between when the answers were provided and
5 today, did you familiarize yourself with -- did you continue
6 to familiarize yourself by looking at additional documents?

7 A. I looked at that -- the correspondence I had with
8 Mr. Pratschler.

9 Q. Okay. So you saw both e-mails and a letter that went out on
10 department letterhead; is that fair?

11 A. Yes. Yeah.

12 Q. Any other material that you looked at in -- in today's -- in
13 advance of today's deposition that you recall?

14 A. No. I mean, just, you know, took a look at the statute
15 again. But just trying to refresh my memory of issues.

16 Q. And when you say you looked at the statute, what statute do
17 you recall or statutes do you recall looking at?

18 A. CIT.

19 Q. Anything specific within the CIT?

20 A. I mean, we're litigating an insurance issue. I looked at the
21 insurance section of the statute.

22 Q. Chapter 12? Chapter 12?

23 A. Yes. Yes. Sorry.

24 Q. All right. So did you have any familiarity with this
25 litigation before you were asked to provide information in

1 response to discovery?

2 A. I mean, I knew the lawsuit had been filed.

3 Q. And that was just as a point of information, or were you
4 involved in some other capacity in defending against the
5 lawsuit?

6 A. No. So when lawsuits come in, they're served on Treasury.
7 It will go to the administrator of the Tax Policy Division,
8 which was the role I used to have. I don't have now. That
9 person would assign that case to somebody on the Tax Policy
10 Division to assist the AGs with, you know, the departments,
11 as a contact or for the department. But I'm also -- I
12 generally am aware. I'm copied on those, so I do see the
13 lawsuits that are filed.

14 Q. And who is the current administrator?

15 A. Stewart Binke.

16 Q. And he reports to you, right?

17 A. Yes.

18 Q. You did not have any direct involvement with the review of
19 the returns that were filed by the petitioners in this
20 matter, at the time they were filed, right? That's not
21 within --

22 A. Right.

23 Q. -- your scope of responsibility, fair?

24 A. Yes.

25 Q. All right. So you wouldn't have known about the returns

1 coming in, their processing, and any refunds that would have
2 been issued; is that fair?

3 A. You know, that's -- that's fair.

4 Q. Now, when an assessment is issued, do you have -- do you get
5 knowledge of that or would it only be after a lawsuit was
6 filed?

7 A. It would only be after a lawsuit is filed that we would get
8 involved in any particular assessment. I mean, we did --
9 when the returns at issue in this case started coming in, I
10 think there was many, right? Maybe not just this case. I
11 think there's other related litigation. You know, there was
12 some involvement between tech services and tax policy and
13 making sure that the returns were handled consistent with,
14 you know, our interpretation of the law. But we never -- I
15 never reviewed any returns or anything.

16 Q. Okay. And would tech services be involved when the returns
17 come in with reviewing and approving refunds, if they went
18 out?

19 A. Yes.

20 Q. And do you know the individual at tech services that was
21 involved in reviewing the returns for the petitioners here?

22 A. I don't.

23 Q. Okay.

24 A. Tech services reports to Clay Cornelius, so he -- he was the
25 -- I think he's changed positions. But he was in charge of

1 tech services. But I don't know what analyst or auditor
2 would have reviewed any particular return.

3 Q. Now, I kind of got lost in these boxes in Exhibit No. 2. Can
4 you tell me which box, if any of those boxes, tech services
5 would fall in?

6 A. They don't.

7 Q. So they're not on this org chart anywhere?

8 A. So they report to the deputy treasurer of Revenue Services.
9 But they're not a separate bureau. They're -- I don't know
10 what they are, exactly. They're a specialized unit that
11 reports directly to the deputy. But they don't fall under
12 any of the bureaus.

13 Q. So they're not in any box on here, other than you know they
14 report to the deputy treasurer for Revenue Services; is that
15 right?

16 A. That's how I read it, yes.

17 Q. Okay. Now, for Revenue Administrative Bulletins, does your
18 group issue those?

19 A. Yes.

20 Q. And as an administrator and as the director, would you be
21 involved in either writing, reviewing, or approving the
22 Revenue Administrative Bulletins that went out?

23 A. Yes.

24 Q. And are you familiar with Revenue Administrative Bulletin
25 2018-12, which deals with Unitary Business Group Control Test

- 1 and Relationship Tests?
- 2 A. Yes.
- 3 Q. And were you involved in the drafting of that particular
- 4 bulletin?
- 5 A. No.
- 6 Q. And do you know who was, within the policy group?
- 7 A. I'm -- I'm pretty sure Bryan Kurtz was one of the
- 8 administrative law specialists that would have worked on
- 9 that. I believe there may have been a team. But I don't
- 10 recall right now who else would have been on that team.
- 11 Q. Now, the administrative bulletin that I've seen -- I've
- 12 marked it as Exhibit 18, if you want to just look at it for
- 13 just a moment.
- 14 A. I have it up.
- 15 Q. Okay. And it shows that it was approved May 23, 2018. Do
- 16 you see that?
- 17 A. Yes.
- 18 Q. And it appears to be replacing one that was issued in 2013?
- 19 Am I correct on that?
- 20 A. Yes.
- 21 Q. And did you have any involvement in either drafting or
- 22 reviewing the predecessor to 2018-12?
- 23 A. Is that an exhibit?
- 24 Q. Pardon?
- 25 A. Is -- you're referring to RAB 2013-1?

- 1 Q. Yes. And no, it's --
- 2 A. It's not an exhibit?
- 3 Q. It's not an exhibit. I'm asking you to read --
- 4 A. Can I look it up or . . . ?
- 5 Q. I can't look it up.
- 6 A. Okay. I don't remember.
- 7 Q. Okay. Do you remember, in connection with the inquiry from
- 8 Mr. Pratchler, consulting with an administrative bulletin
- 9 about unitary business groups, in connection with the work
- 10 that was being done?
- 11 A. I don't recall that.
- 12 Q. Okay.
- 13 A. Is it in the letter?
- 14 Q. We'll get to the letter in just a second.
- 15 A. Okay.
- 16 Q. I'm just trying to get your recall, sir, as we sit here.
- 17 A. Yeah. I don't remember if I would have consulted the RAB or
- 18 not.
- 19 Q. All right. And in the Exhibit 18, which is 2018-12 -- RAB
- 20 2018-12 -- that's an official policy statement from the
- 21 Department of Treasury; is that right?
- 22 A. Yes.
- 23 Q. And that's something that the taxpayers can rely on in
- 24 reviewing and preparing their returns; is that fair?
- 25 A. Yes.

1 Q. And in that bulletin, in the first paragraph, underneath the
2 box, there's a sentence that says, "A UBG is a single
3 taxpayer under the CIT and must file a combined return." Do
4 you see that?

5 A. I do.

6 Q. And then it cites to 611(5) and 691(1). Do you see that?

7 A. Yes.

8 Q. And those statutory sections are sections you're familiar
9 with; is that right?

10 A. Generally, yeah.

11 Q. Okay. And do you recall whether or not that particular
12 sentence that, "A UBG is a single taxpayer under the CIT and
13 must file a combined return," was a new statement as of 2018
14 or was one that was and had been in existence in Michigan for
15 years prior to that, as a policy statement by the department?

16 A. I expect that that was repeated in the prior RAB as well.

17 Q. Okay. And are you -- well, before we leave Exhibit 18,
18 that -- that's the official letterhead as of 2018 for the
19 department; is that right?

20 MR. THOMPSON: Form.

21 THE WITNESS: I believe so.

22 BY MR. LIPPS:

23 Q. That's the format you used when you were working on providing
24 informal guidance, was it not? You'd put it on the
25 letterhead for the department?

1 MR. THOMPSON: Form.

2 THE WITNESS: Yeah, you had to, right.

3 BY MR. LIPPS:

4 Q. Okay. And when -- that was formal guidance. What about
5 informal guidance? You used that letterhead, as well, when
6 you sent out informal guidance, did you not?

7 A. If it was a letter, yes. I mean, if I had issued informal
8 guidance as an e-mail, no.

9 Q. All right. Do you recall, as you sit here today, without
10 looking at some of the documents, whether you issued the
11 informal guidance on formal letterhead or simply by e-mail?

12 A. State again? In this particular case or just in general?

13 Q. In this particular case that we're going to talk about, do
14 you recall whether you simply sent an e-mail to
15 Mr. Pratschler or whether you sent the informal guidance on
16 the formal letterhead of the department?

17 A. I sent the letter to him on the letterhead. And then we had
18 continuing conversations after that, which were done mostly
19 through e-mail, I believe.

20 Q. All right. And do you recall that, at one point during your
21 conversations with Mr. Pratschler, that he provided you
22 actually with a mock-up of what the unitary business group
23 would look like with respect to tax and credits?

24 A. Yes.

25 Q. Okay. And you reviewed that in connection with your

1 providing him guidance?

2 A. Well, I only got that after I had sent him the letter.

3 Q. Right.

4 A. Yeah. So I had not reviewed that at the time I sent the
5 letter. That was new information.

6 Q. Okay. Did you ever issue any guidance related to that
7 spreadsheet, the mock-up of credits?

8 A. No, I don't believe so. So Mr. Pratschler had raised the
9 issues in that mock-up and, you know, some of which are at
10 issue here. And we were looking into that because it was
11 not -- what we were contemplating at the time, or the first
12 inquiry we got from Mr. Pratschler, and we never issued any
13 guidance on that.

14 Q. You certainly had communications with him in which you
15 indicated that the department was looking at it and he was
16 asking for some guidance, correct?

17 A. Correct.

18 Q. And you knew that one of the items that he was looking for
19 guidance on was related to the use of credits by unitary
20 business group members that didn't necessarily generate those
21 credits through their own activity; is that fair?

22 A. Correct.

23 Q. And on that particular issue, no formal or informal guidance
24 was issued by you; is that right?

25 A. Correct.

1 Q. Did you ever have a conversation with him about that issue in
2 which you communicated views on it?

3 A. I mean, I think I had expressed to him that we were looking
4 at it; that that -- we did not think that insurance companies
5 could share tax attributes that way. But we were trying to
6 do an analysis and, you know, get our approval from our
7 director and treasurer -- or deputy treasurer. And my
8 recollection is that we never got timely input from my
9 managers, and so nothing was ever issued.

10 Q. Formal or informal, say "yes" or "no" with respect to the
11 credits being utilized by the unitary business group as a
12 whole?

13 A. Correct.

14 Q. All right. Now, did I understand you to say that your
15 testimony is you did tell Mr. Pratschler that you did not
16 think credits could be used in that way by the group?

17 A. I can't --

18 (At 10:38 a.m., technical issues.)

19 (At 10:39 a.m., resumed and question read back by
20 the court reporter.)

21 BY MR. LIPPS:

22 Q. You'd have to answer that question again. I'm sorry.

23 A. Yeah. I don't -- I don't recall for sure. I mean, I believe
24 that Mr. Pratschler and I continued to talk on the phone and,
25 you know, exchange e-mails. I told him that we need to look

1 at that issue, that we didn't have an answer, or the least,
2 you know, we owed to him, you know, a review. And so we
3 undertook to do that. But we never responded to him for
4 internal reasons that I'm not entirely -- I can't entirely
5 understand.

6 Q. All right. So before the court reporter's transcription
7 froze up, I think you said that the words are substance --
8 and I don't want to put words in your mouth, if you're not
9 comfortable with it. But I thought you said that by virtue
10 of you undertaking the review, the answer was not a clear,
11 "Yes, you can do it that way." Was that your testimony?

12 A. I think that's clear, yes.

13 Q. And then I asked you -- and I don't know that we got an
14 answer. I asked you whether it was, likewise, not clear that
15 the answer was an automatic "no"?

16 A. I mean, I think you could characterize it that way, although
17 that's probably best answered by Mr. Pratschler, how he
18 understood our work on that.

19 Q. Well, but you didn't communicate to him, "No, you can't do
20 that; but we'll look at it." You didn't say those words or
21 substance to him, did you?

22 A. I don't recall. I mean, you know, we can look to the
23 e-mails. That's the best I could do, in terms of
24 recollection.

25 Q. Okay. All right. Why don't we look at a couple of those,

1 then. Let's turn to Exhibit 7, if we could. Do you have
2 that in front of you, sir?

3 A. I do.

4 Q. And if you go about halfway down the page, there is an e-mail
5 from Mr. Pratschler to yourself dated February 19, 2016, at
6 ten a.m. Do you see that?

7 A. Yes.

8 Q. And then he says, "Per our discussion." Do you see that as
9 the opening?

10 A. Yes.

11 Q. Do you recall that you had, before this e-mail came on
12 February 19th, a telephone or person-to-person conversation
13 with Mr. Pratschler about the issue?

14 A. Yes.

15 Q. What do you recall, specifically, if anything, about that
16 conversation?

17 A. So my -- I mean, five years later I don't remember verbatim
18 that conversation. My recollection is that Mr. Pratschler's
19 inquiry really started off as one of a compliance burden on
20 the part of his clients having to file separate returns, when
21 filing a combined return would be easier, and his arguments
22 for why they should be able to do that.

23 Q. And then what he did, is he sent you this e-mail with his
24 factual basis for the inquiry, as well as his analysis of
25 what the statutes would allow. Is that a fair description of

1 that February 19th e-mail?

2 A. Yeah. It was his, you know, reasoning for why they should be
3 able to file a combined return.

4 Q. And he -- he indicates that he's asking about affiliated
5 entities where they own greater than 80 percent. Do you see
6 that? Second sentence. "The entities are all affiliated,
7 owned greater than 80 percent, under Federal and Michigan
8 definitions." Do you see that?

9 A. I do.

10 Q. And when you got that e-mail, did you recognize, when he said
11 under "Michigan definitions," that he was referring to the
12 control group aspect of the unitary business group?

13 A. I mean, I don't know that I focused too much on that. He was
14 saying they were unitary. I was taking him at his word.

15 Q. Well, you did know, at least as of February 19th, 2016, that
16 in order to be a unitary business group there needed to be
17 some control?

18 A. Yes. You have to satisfy control and relationship test,
19 right.

20 Q. Right. And there's a couple relationship tests that also
21 need to be satisfied; is that fair?

22 A. Yes.

23 Q. And for purposes of your discussions and the informal
24 guidance with Mr. Pratschler, do I understand you to say you
25 didn't look into the specific unitary business group

1 question; you just assumed they were or were not allowed to
2 be a unitary business group under existing law, since it
3 involved insurance companies?

4 MR. THOMPSON: Form.

5 THE WITNESS: Yeah. I can answer what I thought
6 you said or you could rephrase it.

7 BY MR. LIPPS:

8 Q. Yeah. Let me rephrase it.

9 A. Okay. Thanks.

10 Q. You didn't have facts and weren't asked to look specifically
11 at whether his clients, these insurance companies, had the
12 right attributes to be -- to satisfy the control group test
13 or the relationship group test; is that fair?

14 A. That's correct. I didn't know who his clients were, and he
15 never gave me any of that information.

16 Q. But you were looking at the question, assuming those tests
17 were met, whether a group of insurance companies could be a
18 unitary business group and file a combined return; is that
19 fair?

20 A. Yeah. I mean, specifically I was looking at whether we would
21 allow them to file a combined return.

22 Q. And the information that he gave you were some cites to the
23 statute in three different bullets. Do you see that?

24 A. I do.

25 Q. And if we turn to Exhibit 8 --

- 1 A. Yes.
- 2 Q. -- that's your informal guidance that you provided to
- 3 Mr. Pratschler on this question, correct?
- 4 A. Correct.
- 5 Q. And this is a letter -- this is a true and accurate copy of a
- 6 letter you sent on May 13th, 2016, to him, addressing his
- 7 inquiry in the e-mail we've just looked at, correct?
- 8 A. It appears to be, yes.
- 9 Q. And in this paragraph you do indicate that this is just
- 10 informal guidance, as opposed to following the procedures for
- 11 a formal technical advice letter; is that fair?
- 12 A. Yes.
- 13 Q. Now, if you look at the first paragraph -- well, let me just
- 14 ask you this. This is a letter that you authored and sent to
- 15 Mr. Pratschler, correct?
- 16 A. I sent it. I signed it. I think I had assigned this, to
- 17 draft the initial letter, to Angela Matelski.
- 18 Q. And was Angela Matelski involved in the conversation that you
- 19 had with Mr. Pratschler back in -- before February 19th?
- 20 A. I don't think so.
- 21 Q. And when the February 19th e-mail came in, you provided it to
- 22 Angela Matelski?
- 23 A. Yeah. I would have given her that e-mail and sort of a
- 24 summary of the issue, as I understood it, and asked her to,
- 25 you know, draft a proposed response that I would have, you

1 know, reviewed and edited or signed.

2 Q. Now, when you sent this letter, you were sending it under
3 your signature as your response; is that fair?

4 A. Yes.

5 Q. And as we sit here today, you're not disavowing anything in
6 the letter that you sent, are you?

7 A. No.

8 Q. And you stand by the accuracy of what's being communicated in
9 it, fair?

10 A. I mean, generally, yes. I mean, I understand that this
11 letter is being held to, maybe, stand for things that was not
12 my intent at the time I wrote it. But I still think that --
13 or the time I signed it. I still think that, you know, it's
14 correct.

15 Q. Well, let me ask you it a slightly different way, because
16 we'll debate with your counsel over how the letter's used,
17 I'm sure.

18 But my question, more specifically, was, are there
19 any sentences or statements in here that you're now saying
20 were inaccurate at the time you provided this letter?

21 A. I don't think so.

22 Q. Okay. And in the third paragraph, you clearly say that
23 there's no dispute over, at least, three issues. And you put
24 them in bullet points. Do you see that?

25 A. Yes.

- 1 Q. And do you recognize that that's you responding to the
2 statutory sections that he had identified in his e-mail to
3 you on February 19?
- 4 A. Right. He was just quoting the statute. I was affirming
5 that he quoted correctly.
- 6 Q. Right. That the definition of taxpayer includes an insurance
7 company. There's not dispute over that, is there?
- 8 A. No.
- 9 Q. I mean, your letter makes it very clear that you, as the
10 administrator of the Bureau of Tax Policy, agrees that the
11 definition of taxpayer includes an insurance company; is that
12 fair?
- 13 A. That's what the statute says.
- 14 Q. All right. And then same thing; the definition of unitary
15 business group includes an insurance company, correct?
- 16 A. Correct.
- 17 Q. And that in the third bullet, the Section 691 may apply to an
18 insurance company, right?
- 19 A. Yes.
- 20 Q. Okay. And 691 is the section of the Michigan code that says:
21 "A unitary business group shall file a combined
22 return that includes each United States person that is
23 included in the unitary business group."
24 Is that your understanding of that statute?
- 25 A. I don't have it in front of me, but . . .

1 Q. I could probably show it to you. If there's a dispute --

2 A. If you're just quoting the statute, I'm not going to quibble
3 with you that it says that. But I just don't have it in
4 front of me to agree that it says that, because I'm just
5 listening to you. I mean, I'm happy to pull up the code book
6 and take a look.

7 Q. I probably have it as an exhibit, if we -- let me just . . .
8 I think it's Exhibit 17. Do you have that in front of you,
9 sir?

10 A. Yes.

11 Q. And the first sentence says:

12 "Except as otherwise provided under section 680(3),
13 a unitary business group shall file a combined return
14 that includes each United States person that is included
15 in the unitary business group."

16 Do you see that?

17 A. Yes.

18 Q. And would you agree or disagree that that's a reflection of
19 the Finnigan approach?

20 MR. THOMPSON: Form.

21 THE WITNESS: I'm not sure I can answer that. I
22 mean, Finnigan, to me, has always been an issue of
23 apportionment and inclusion in the group, even if you don't
24 have nexus. Not really relevant here.

25 BY MR. LIPPS:

1 Q. But Finnigan, if you're part of the unitary business group,
2 you don't need a nexus, right --

3 A. Well --

4 Q. -- as a general proposition?

5 A. I don't -- I don't -- I think I need to go refresh my
6 recollection of those cases before I could opine on that
7 right now.

8 MR. THOMPSON: Yeah. And just -- and if I may just
9 put a form and foundation, both objections, on that last
10 question.

11 MR. LIPPS: That's fine.

12 BY MR. LIPPS:

13 Q. You have heard of the Finnigan approach, have you not, in
14 your career as a tax professional?

15 A. Yes.

16 Q. And you've heard of the Joyce approach, have you not?

17 A. Yes.

18 Q. And have you heard Finnigan described as the single-entity
19 approach?

20 A. I don't recall.

21 Q. And what about entity-by-entity approach as the approach for
22 Joyce?

23 A. I don't recall.

24 Q. Have you ever heard of the Multistate Tax Commission?

25 A. Yes.

1 Q. Is that a body that you recognize and have, from time to
2 time, referred to publications from them?

3 A. On occasion, yes.

4 Q. All right. And would it surprise you that they have -- the
5 Multitax Commission has -- Multistate Tax Commission has
6 information available to the public about the Finnigan
7 approach and the Joyce approach?

8 A. No.

9 Q. And would you agree or disagree that, between the Joyce
10 approach and the Finnigan approach, Michigan has the Finnigan
11 approach?

12 MR. THOMPSON: Form. Foundation.

13 THE WITNESS: I apologize. I am not familiar
14 enough with those cases, off the top of my head, to recall
15 which is which. I know when we were drafting the NBT and it
16 covered over to the CIT, we chose one and went with it. I
17 just don't recall, you know, the names or the context of
18 those cases. So I'm going to be unhelpful here. My
19 apologies.

20 BY MR. LIPPS:

21 Q. Okay. Who, within -- I mean, you're the director of the
22 Bureau of Tax Policy. Who within the Department of Treasury
23 would be someone that would be able to advise me or others
24 whether Michigan took the Finnigan approach or the Joyce
25 approach?

1 A. I could do it, given prep or have -- anybody else on my staff
2 could do that as well. But you know, you have to recall that
3 we worked with the legislator on putting this into the NBT
4 back in 2007 and really haven't had a need or a cause to
5 refer to it as Finnigan or Joyce since. So it's just not,
6 sort of, this binary analysis that we do or think about. We
7 just follow our statute.

8 Q. Okay. Well, let me ask it just a slightly different way,
9 then. Under the Michigan corporate income tax, are all
10 members of a unitary business group to be included in the
11 combined return and treated as a single taxpayer?

12 MR. THOMPSON: Foundation.

13 THE WITNESS: No, not consistently. I mean we did
14 it by, you know, financials file their own. Standards file
15 their own. But we don't require standards and financials,
16 for example, to file a combined return together.

17 BY MR. LIPPS:

18 Q. So you would disagree with that statement: As a matter of
19 Michigan corporate income tax, that all members of the
20 unitary business group are to be included in a combined
21 return and treated as a single taxpayer?

22 A. Yeah. That's not how we administer it with respect to the
23 different tax bases.

24 Q. And would you agree that for unitary business group purposes,
25 the members of that unitary business group are treated as

1 part of that group, regardless of whether they have a nexus
2 in Michigan?

3 A. I mean, certainly for standards and financials, yes.

4 Q. Well, if we look at 691(1), doesn't it say, "Every entity in
5 the United States" -- "each United States person that's
6 included in the unitary business group"? Do you see that
7 reference?

8 A. Yeah. I'm -- yes, that's what the statute says, I agree.

9 Q. The statute doesn't say "with a nexus to Michigan." Can we
10 agree on that?

11 A. Correct.

12 Q. It says --

13 A. I mean, I actually think Finnigan and Joyce is actually dealt
14 with in a separate section of the code. But I think it's the
15 apportionment section, isn't it?

16 Q. I just am looking at 691(1), which is a reference that you
17 had, as well as Mr. Pratchler in their letter. So --

18 A. Yes.

19 Q. -- let me just make sure I understand. The unitary
20 business -- again, this is Exhibit 17.

21 "A unitary business group shall file a combined
22 return that includes each United States person that is
23 included in the unitary business group."

24 Do you see that?

25 A. Yes.

1 Q. It doesn't provide, to your knowledge, in that sentence that
2 it has to be a United States person with a nexus to Michigan.

3 A. Yes.

4 Q. Does not provide that, correct?

5 A. 691, it says what you said. It does not say anything about
6 nexus, as near as I can tell.

7 Q. All right. Now, if we go back to Exhibit 8, which is your
8 letter -- your informal guidance on the letterhead of the
9 department -- and go back up to the first paragraph where you
10 are reciting what you understand the question to be, you
11 said -- you propose that a group of affiliated insurance
12 companies may file a combined annual return, Form 4095. Do
13 you see that?

14 A. Yes.

15 Q. And if we go to the second page of Exhibit 8 --

16 A. Yes.

17 Q. -- you include the sentence that says:

18 " . . . an insurance company included in a unitary
19 business group may utilize the benefits, if any, of
20 inclusion in a unitary business group, even though the
21 insurance company is filing separately."

22 Do you see that?

23 A. Yes.

24 Q. And that was an accurate statement in your effort to answer
25 the question, correct?

1 A. I mean, I was trying to answer his broad question and sort of
2 acknowledge his statutory arguments, you know, providing a
3 sort of broad answer in return, but with an even bigger
4 caveat there. Because I wasn't aware, at the time I wrote
5 this letter, that there were any benefits to filing combined.

6 Q. Right. But you advised that, " . . . an insurance company
7 included in a unitary business group may utilize the
8 benefits, if any, of inclusion in a unitary business group,"
9 right?

10 A. Yeah. I wrote that sentence, right.

11 Q. And that statement was not an inaccurate statement, to your
12 understanding of the law and statutes and policies in
13 existence at the time, right?

14 A. Correct.

15 Q. And what I heard you say is, the benefits issue you hadn't
16 really looked at, specifically. You just knew that as a
17 member of a group they could utilize the benefits as a member
18 of the group.

19 A. Yeah, I mean I did not know that there were any benefits to
20 filing combined and certainly was not aware of the return
21 posture that Mr. Pratschler was contemplating, until after
22 this.

23 Q. Well, as a --

24 MR. THOMPSON: If I may, that last question
25 mischaracterizes the letter. And I'd just like to put that

1 on the record.

2 MR. LIPPS: I disagree as to whether it
3 mischaracterizes. But you've got it on the record.

4 BY MR. LIPPS:

5 Q. All right. On May 13 of 2006, you were aware that entities
6 obligated to file tax returns under the CIT could have
7 credits that would apply against revenues or premium taxes,
8 right? I mean, you were aware, conceptually, of that?

9 MR. THOMPSON: Form.

10 THE WITNESS: Are you referring to the credits in
11 Chapter 12 or you're referring to, like, certificate and
12 credits?

13 BY MR. LIPPS:

14 Q. Credits in Chapter 12.

15 A. Yeah. I was aware of those, yeah.

16 Q. And were you, at the time, aware of the Michigan Assigned
17 Claims Plan?

18 A. Yes. Well, actually, I don't know if I -- I mean, other
19 than, you know, the reference to that in the statute, I would
20 have been familiar with that.

21 Q. And you were aware that assessments under the Michigan
22 Assigned Claims Plan could be either used as credits or
23 included in the retaliatory tax calculations, right?

24 MR. THOMPSON: Form and a misstatement of the law.

25 THE WITNESS: Yeah. Certainly credits. I don't

1 think retaliatory. I think it's excluded as a burden,
2 but . . .

3 BY MR. LIPPS:

4 Q. Well, they could be excluded as a burden. Is that what
5 you're saying?

6 A. Right. I don't know. I always have to like -- I don't think
7 re -- I don't think that is a burden for purposes of the
8 retaliatory tax under the insurance code. But you know, we
9 can refer to the statute for that.

10 Q. Okay. Are you aware of the Michigan -- the Michigan
11 Insurance -- Automobile Insurance Placement Facility?

12 A. Yes.

13 Q. And what's your understanding of that?

14 A. Just that it's there. I recall after 2016 there were some
15 issues related with some, you know, credits associated with
16 that.

17 But no, I guess I don't really know exactly how it
18 works. But you know, in terms of, you know, its placement in
19 the statute and that you can get a credit for payments made
20 to it, with respect to, you know, calculating the liability
21 of an insurance company, I'm aware that it's there.

22 Q. Okay. And that could be -- certainly you would agree, that
23 would be a benefit that would be available to a taxpayer that
24 was an insurance company that had to pay those assessments,
25 right?

1 A. I mean, it's -- benefit or whatever; it's part of the
2 calculation of the base.

3 Q. Well, credit would be a benefit. Could you agree with me on
4 that?

5 A. It could be, sure.

6 Q. Okay. All right. Let's go back to your letter. And I want
7 to specifically focus on the sentence that we've been looking
8 at where you added, "Even though the insurance company is
9 filing separately." Do you see that?

10 A. Yes.

11 Q. And that phrase was included because you understood, at the
12 time you sent this letter out, that the department had not
13 developed or generated forms to accommodate a unitary
14 business group consisting of insurance companies making a
15 combined filing; is that fair?

16 MR. THOMPSON: Form.

17 THE WITNESS: Sorry. Say it again.

18 BY MR. LIPPS:

19 Q. Yeah. You included that phrase because you understood, at
20 the time you sent the letter, that the department had not
21 created forms that allowed a unitary business group
22 consisting of insurance companies to file a single combined
23 form?

24 A. Correct. I mean, that was Mr. Pratschler's question; can we
25 file a combined return.

1 Q. And you knew, at the time you sent this letter, there was no
2 form that had been generated for that at that moment,
3 correct?

4 A. Right.

5 Q. And to be a unitary business group with insurance companies,
6 without that prepared form, they would be filing
7 separately -- separate returns, even though they were a
8 unitary business group. You understood that at the time you
9 sent the letter, right?

10 A. Right.

11 Q. And you even offered to send the information over to the
12 appropriate group to see if they could generate a form; is
13 that right?

14 A. Yes.

15 Q. And did you do that?

16 A. Yeah. I mean, I talked to -- I would have referred that to
17 our forms team. But you know, that -- so after I sent this
18 letter, Mr. Pratschler contacted -- you know, followed up.
19 And then at that point I learned, you know, sort of the
20 details of why they wanted to file a combined return, which
21 was different than I understood.

22 So no, we never pursued those changes, because we
23 didn't think a combined return, to accomplish what he was
24 seeking to accomplish, was correct.

25 Q. And what -- before we get to my question on this letter, what

1 did you understand he was trying to accomplish, based on the
2 subsequent conversations?

3 A. You know, excess credit of one entity to be used to offset
4 the liability of another entity -- of another insurance
5 company within the unitary business group.

6 Q. Yeah. The unitary business group's a single taxpayer under
7 Michigan, correct?

8 MR. THOMPSON: Form.

9 THE WITNESS: That's the definition of taxpayer,
10 yes.

11 BY MR. LIPPS:

12 Q. Right.

13 A. The calculation of insurance company liability is different,
14 but . . .

15 Q. All right. So let me go back, then, to my question. And
16 we'll get -- we'll revisit this credits issue.

17 You said that you -- you told Mr. Pratschler, in
18 the last sentence of that first paragraph on page 2, "I will
19 forward your inquiry to the divisions charged with forms and
20 systems development." Do you see that?

21 A. I do.

22 Q. And it's your testimony that you, in fact, did do such --
23 make such a forwarding on that inquiry; is that right?

24 A. I don't know if I did.

25 Q. You just told him did and you didn't?

1 A. Well, the situation changed. You know, when Mr. Pratschler
2 and I were discussing this, I understood this to be an issue
3 of just making it easy to file for related insurance
4 companies. So I know when I wrote this letter, I had talked
5 to people on my staff that were on the forms team about, you
6 know, we should consider this for the next release.

7 But you know, after that there was continued
8 dialogue between me and Mr. Pratschler. And I understood
9 that what he was trying to accomplish with the combined
10 return was contrary to how we thought the statute worked.
11 And so, no, I was not going to ask the forms team to do
12 something that I didn't think was correct under our statute.

13 Q. Okay. So as you sit here today, is it your recollection that
14 you told him, in words or substance, that what he was
15 proposing was incorrect under the statute?

16 A. I don't recall. I mean, you know, we had the back and forth.
17 I mean, clearly he knew that we were willing to take a look
18 at it, and we were. We did. We did the analysis. But I
19 don't recall what -- you know, I don't recall exactly what
20 our phone conversations were.

21 Q. So is it fair to say that, while you may have had some
22 preliminary discussions with the forms people about including
23 a form in, as you say, the next release, that never advanced
24 very far?

25 A. That's correct.

1 Q. All right. And when you say "forms systems development," is
2 that a single group or is that two groups?

3 A. That's like 12 groups.

4 Q. Okay.

5 A. It's departmentwide.

6 Q. All right. Let's go to Exhibit 7. I'm sorry. Let's go to
7 Exhibit 9. Do you have that in front of you, sir?

8 A. Yeah.

9 Q. All right. And if you go to the second page, there's a June
10 6, 2016, e-mail from Mr. Pratschler to yourself at one p.m.
11 Do you see that?

12 A. Yes.

13 Q. All right. And he says:

14 "I greatly appreciate the informal guidance you
15 provided related to the ability of a unitary business
16 group of insurance companies to file a combined return
17 and/or utilize the attributes on a group basis."

18 Do you see that?

19 A. I do.

20 Q. Do you have any disagreement with that statement as to how he
21 characterized your advice?

22 A. I mean, that "and/or" phrase is not, at all, part of my
23 recollection.

24 Q. Well, you did say in your advice that they may utilize the
25 benefits, if any, of inclusion in a unitary business group.

1 You did say that, did you not?

2 A. That is what I said in the letter.

3 Q. And that's -- are you saying that what you put in your letter
4 where he says, "utilize the attributes on a group basis," is
5 different than what you put in your letter?

6 A. Yeah.

7 Q. What's the difference between "utilizing the benefits, if
8 any, of inclusion in a unitary business group" and "utilize
9 the attributes on a unitary group basis"?

10 A. At the time I write the letter, I didn't think there were any
11 benefits to filing on a unitary basis for an insurance
12 company. Hence the "if any," which, you know, I wasn't aware
13 that there were any benefits at the time, put a big caveat
14 there to make that clear.

15 You know, this particular question of utilizing
16 attributes of any particular company on a group basis was not
17 part of what I was reviewing at the time I wrote the letter.

18 Q. And by -- let's just -- I mean, let's be candid. As I
19 understand it, when you found out that the benefits included
20 these credits and the use of them on a groupwide basis, your
21 analysis changed. Is that what you're saying?

22 A. No.

23 MR. THOMPSON: I'd like to object. That assumes
24 testimony and facts not in evidence.

25 BY MR. LIPPS:

1 Q. That's not what you're saying, sir, right?

2 A. No.

3 Q. Are you disavowing that a unitary business group can utilize
4 the benefits of inclusion in a unitary business group among
5 the business group members?

6 A. For insurance companies, calculation is on a member-by-member
7 basis. And I think that's borne out by the statute. So to
8 the extent that you might be a unitary business group of
9 insurance companies, it has no relevance to calculating your
10 actual liability.

11 That's where Mr. Pratchler ended up going. That's
12 what he wanted to do. But in our initial conversations and
13 based on the information I had when I sent the letter, I did
14 not know that they were trying to -- seeking to use the
15 attributes of any particular company against the liability or
16 base of the other entities in that group.

17 Q. Well, you understood what he was proposing doing, was using
18 the benefits of the attributes of a member of the business
19 group on the business group's return?

20 A. After --

21 MR. THOMPSON: Objection.

22 THE WITNESS: After I sent that letter. That
23 information and Mr. Pratchler's intent to file on that basis
24 was not disclosed until after I had our initial conversations
25 and I had sent the original letter.

1 BY MR. LIPPS:

2 Q. All right. So if we go back to Exhibit 9, the second page,
3 we looked at the first sentence. The second sentence,
4 Mr. Pratschler says:

5 "One of my clients has prepared a statement which
6 it plans to approach to its separate Michigan Insurance
7 Premium Tax returns to provide the Department
8 information on the sharing of the attributes."

9 Do you see that?

10 A. Yes.

11 Q. And then he asked you to look at an attachment that he was
12 sending to see if there was sufficient detail to ensure the
13 returns are processed appropriately. Do you see that?

14 A. Yes.

15 Q. Okay. So he was -- you understood, when you received this,
16 that he was asking you whether this spreadsheet would provide
17 enough detail for those returns that were coming in a
18 separate form, because there was no combined form, that
19 information would be sufficiently detailed to allow for
20 processing, right?

21 MR. THOMPSON: Form.

22 THE WITNESS: I don't know. I mean is that --

23 BY MR. LIPPS:

24 Q. Well, I'm asking what you understood. And if I've misstated
25 it, then, certainly, you can correct it. But did you

1 understand he wanted you to look at the spreadsheet he was
2 attaching and let him know, as the administrator of the
3 Bureau of Tax Policy, whether there was sufficient detail for
4 the returns to get processed?

5 A. I don't know. I doubt that I interpreted it that way,
6 because my group has nothing to do with the processing of
7 returns. I expect that what I understood is whether we
8 agreed that his proposed return posture there was consistent
9 with our interpretation of the law.

10 Q. All right. And you responded to his e-mail eventually, did
11 you not?

12 A. Yes.

13 Q. He actually had to do a follow-up on the 14th, June 14th,
14 about eight days later and asking you whether you could
15 confirm receipt and if you have any input. Do you see that?

16 A. Yes.

17 Q. And then you responded back to him on June 22nd at 11:24 a.m.
18 and you apologized for the delay. Do you see that?

19 A. I do.

20 Q. And you said:

21 "We did receive your inquiry and are looking into
22 it. Specifically, we're researching the issue of
23 insurance credits being applied to other insurance
24 companies."

25 Do you see that?

1 A. Yes, I do.

2 Q. And then you say:

3 "I expect we'll have a response to you within two
4 to three weeks. Thank you."

5 You also copied Angela Matelski on this particular
6 e-mail, correct?

7 A. Correct.

8 Q. What was -- what was her role, if any, in dealing with this
9 follow-on inquiry from Mr. Pratschler?

10 A. I think she was doing, you know, the analysis, you know,
11 taking a look at his question, which was novel to us, and
12 trying to, you know, analyze that with our statute and our
13 forms.

14 Q. All right. Now, let's look quickly at Exhibit 10. Do you
15 recognize this as the attachment that Mr. Pratschler sent,
16 that he was asking you to provide some guidance on whether
17 this would be sufficient -- contain sufficient detail to have
18 the separate returns processed?

19 A. I mean, I don't remember it. But if this was attached to the
20 e-mail, I won't argue with it.

21 Q. All right. Well, it was produced by counsel. But I don't
22 know whether --

23 A. Okay.

24 Q. -- it was attached or not. So I'm assuming. But can you
25 tell me, are you -- you're not disputing that there was an

1 attachment that was sent that revealed --

2 A. No.

3 Q. -- to you what they intended to do with credits?

4 A. He absolutely sent me an attachment. I don't have any reason
5 to say this isn't it. I just -- like, I'm not looking at
6 this and, like, "Oh, God, I remember looking at this five
7 years ago." I don't remember that.

8 Q. Well, if you look at the -- after the five items, there's a
9 spreadsheet with seven companies that were part of this
10 unitary business group that he was asking about. Do you see
11 that?

12 A. I do.

13 Q. And they've got -- he's got the tax before credits for each
14 of those companies in this exemplar that he's sending. Do
15 you see that? Do you see that line that says line --

16 A. Was it line 25? Are you . . .

17 MR. THOMPSON: I think it's line 19.

18 BY MR. LIPPS:

19 Q. I think it's line 19, tax before credits.

20 A. Okay. Gotcha. Yeah, sorry. Yes.

21 Q. And then underneath it he's got credits, and he's got line
22 20c as Michigan Automobile Insurance Placement Facility. Do
23 you see that?

24 A. I do.

25 Q. And do you recognize that as amounts of assessments that the

1 various insurance companies would have paid to the MAIPF?

2 A. You know, I believe so.

3 Q. Okay. And if you go down a couple lines, it say, "Additional
4 credits utilized from other unitary entities." Do you see
5 that?

6 A. Yes.

7 Q. And it specifically relates to company 6 and 7. Do you see
8 that?

9 A. I do.

10 Q. And for each of those members of the unitary business group
11 there were certain credits associated with assessments to
12 another member that were proposed as credits against the tax,
13 even though they had not paid, individually, those
14 assessments. Do you recognize that?

15 A. Again, I see it.

16 MR. THOMPSON: Form.

17 BY MR. LIPPS:

18 Q. Well, that's the issue that you were looking it, is it not?

19 MR. THOMPSON: Same objection.

20 BY MR. LIPPS:

21 Q. Isn't what you see on this attachment 7, the very issue that
22 you said you were researching?

23 A. Yeah. We were taking a look at, you know, use of attributes
24 or credits of one entity against another, for insurance
25 companies.

1 Q. And these were entities that were a part of a unitary
2 business group, correct?

3 A. That was our assumption.

4 Q. All right. And Company 7's example, there were no
5 assessments to Michigan Automobile Insurance Placement
6 Facility, right? There were no assessments paid that
7 would -- individually, for that entity, if it were
8 individual? Have a credit. It was using attributes from
9 other members of the group. Can we agree on that?

10 MR. THOMPSON: Just to put a foundation objection.
11 Mr. Wilkinson didn't prepare this, so we're trying to get his
12 interpretation about what the author of this document
13 intended. I think that there's a foundation question. You
14 can ask the best understanding, if that's what you want to
15 do. But he didn't generate this, and he can't speak to the
16 author's intent.

17 MR. LIPPS: Yeah. And I've never asked him what
18 the author's intent was.

19 BY MR. LIPPS:

20 Q. I'm asking whether, when you look at this exhibit, Company 7
21 portrays a situation where tax credits that are being applied
22 are being applied not based on the individual company's
23 assessments, but rather credits from other members of the
24 unitary business group that were going to be applied against
25 that company's tax; is that right? Is that what your --

1 MR. THOMPSON: Same objection. Foundation.

2 THE WITNESS: I understand they have one entity
3 taking a credit that another company paid.

4 BY MR. LIPPS:

5 Q. Right. And you understood that all of these entities on this
6 chart were represented as being part of a unitary business
7 group?

8 A. That was the premise, yes.

9 Q. And what they were proposing was using attributes as members
10 of the group to apply against other members of the group's
11 tax?

12 MR. THOMPSON: Foundation.

13 BY MR. LIPPS:

14 Q. That's what you understood was being proposed, did you not,
15 sir?

16 A. I mean, yes. I mean, that's what Mr. Pratschler said in his
17 e-mail.

18 Q. And is it fair to say that you never directly responded to
19 him and said, "No, you can't do that"?

20 A. I think that's true.

21 Q. Is it also true that you never responded, at all, to where
22 you were and what conclusions were reached on the issue he
23 was proposing regarding use of attributes in the form of
24 credits by members of the group?

25 A. I did not, no.

1 Q. And you don't know of either the director of the bureau
2 responding to that question or the deputy --

3 A. I mean, I understood that the deputy had talked to
4 Mr. Pratschler. I don't know what that conversation was or
5 if it was about this, at all, so . . . But I certainly never
6 got back to Mr. Pratschler and said, "Yes, you can do this."

7 Q. Do you recall ever responding to him beyond this June 22nd,
8 2016, e-mail that we're looking at, where you said, "We did
9 receive your inquiry and are looking into it"?

10 A. On this issue, I don't recall.

11 Q. And Exhibit 11, if you look quickly at that, you'll see that
12 Mr. Pratschler sent you and Angela Matelski, as a CC, an
13 e-mail on July 20th asking for an update on the timing of
14 getting back to him on his inquiry. Do you see that?

15 A. I do.

16 Q. And you never responded to that, as you recall, correct,
17 either orally or by e-mail?

18 A. I mean, I talked to Mr. Pratschler frequently about other
19 issues. I don't know if this ever came up. But I mean, I
20 gave you all my e-mails, so it does not appear that I replied
21 to him.

22 Q. I don't have a surprise one to show you. There's no more
23 e-mail traffic that I'm seeing.

24 A. Yeah. Then it's -- that's because I didn't have a responsive
25 e-mail to this.

1 Q. And did you have a response to his request, that you never
2 provided to him? In other words, had you reached a
3 conclusion on what he was proposing?

4 A. Not at that time, no.

5 Q. Okay.

6 A. Yeah.

7 Q. And you understood, did you not, that Mr. Pratschler was
8 intending to proceed with the filing of a unitary business
9 group filing for these insurance companies along the lines of
10 what he was proposing?

11 A. I mean, I didn't know that. I mean, I knew he was looking
12 into this and considering taking this posture. But no, I
13 didn't know his plans for when or if he'd actually file or
14 how many clients he represented.

15 Q. Yeah. You wouldn't really know whether he filed or not,
16 because that wasn't within your purview, correct?

17 A. Correct.

18 Q. And if you go back to Exhibit 9, in that e-mail on the second
19 page, Mr. Pratschler says:

20 "As a result of that informal guidance" --
21 returning to your May 13th letter -- "one of my clients
22 has prepared a statement which it plans to attach to its
23 separate Michigan Insurance Premium Tax returns to
24 provide the Department information on the sharing of
25 attributes."

1 Do you see that?

2 A. I do.

3 Q. And is -- are you testifying that, when you read that
4 sentence, you understood this was just a hypothetical
5 exercise; or did you understand that tax returns were going
6 to be filed with that attachment?

7 A. I understood that he had a return posture that he wanted to
8 get our input on before he filed, which is fairly common
9 with, you know, practitioners in Treasury. We often get
10 questions about, "Hey, I'm thinking about doing X or Y. What
11 do you guys think?" And that's how I interpreted this.

12 He was looking at taking a return posture position
13 with respect to insurance companies and unitary business
14 groups and wanted our feedback on whether we would allow it
15 or not; what we thought about it. Told I'm look at it. Had
16 a difficult time getting our chain to sign off on anything.
17 And so we never got back to him.

18 Q. Was there a draft prepared for --

19 A. Yeah, draft recommendation.

20 Q. There was a draft recommendation?

21 A. Uh-huh.

22 Q. And that was prepared by Angela Matelski?

23 A. I don't -- I don't recall.

24 Q. You were --

25 A. She would have been involved, but she probably wasn't the

1 only one involved.

2 Q. You were involved, right?

3 A. I mean, I would have reviewed the work.

4 Q. And would you have been the one submitting it up the chain?

5 A. Yes.

6 Q. And you submitted it in the first instance to the director --

7 A. Yes.

8 Q. -- of the bureau? And was that recommendation approved and
9 then sent up to the deputy?

10 A. I believe so.

11 Q. All right. And the deputy never authorized its issuance?

12 A. Correct.

13 Q. And in that particular recommendation, was that going to come
14 out as a formal guidance? Or were you going to be allowed to
15 send the communication as an informal response?

16 A. That hadn't been broached yet.

17 Q. Why was the deputy involved in reviewing the recommendation,
18 if it wasn't going to come out as a formal statement?

19 A. It was a novel issue. I mean, we've handled insurance
20 companies on a separate return basis since the start of the
21 NBT. And Mr. Pratschler was sort of advancing an argument
22 that had never been made before, as near as I can tell.

23 It required looking into and making sure that what
24 we were doing was correct and some due diligence on our part.
25 And so we did it. And that -- you know, issues like that,

1 and we had a deputy at the time that was just very curious
2 about everything we did. And he was interested in this
3 issue.

4 Q. Did the deputy say, "Do not issue that guidance"?

5 MR. THOMPSON: I'm going to -- I'm going to
6 instruct the witness not to answer the rest of these
7 questions, based on the deliberative process. This is, as to
8 guidance, that was part of internal deliberations the
9 Treasury was never issued. And if you guys want that
10 information, you can go ahead and move to compel for it.

11 BY MR. LIPPS:

12 Q. All right. What was the recommendation?

13 MR. THOMPSON: Same instruction.

14 BY MR. LIPPS:

15 Q. Was the recommendation, to your knowledge, communicated
16 informally over telephone to Mr. Pratschler?

17 A. No.

18 Q. You know there was a conversation at one point between
19 Mr. Pratschler and the deputy; you just don't know whether
20 that this issue was part of that discussion?

21 A. Correct.

22 Q. You never received any information that would allow you to
23 determine whether Mr. Pratschler was advised of the guidance
24 for the recommendation, right?

25 A. True.

- 1 Q. Let me have you take a look at Exhibit 12, if you would.
2 Have you seen this document before, sir?
- 3 A. Yeah. I think -- are these CIT FAQs?
- 4 Q. Say that again.
- 5 A. Yeah. Are these CIT FAQs? I think so. Yes, I've seen this
6 before.
- 7 Q. And did you or your group have responsibility to generate
8 FAQs?
- 9 A. We may have. FAQs are generated by other areas of the
10 department as well.
- 11 Q. Well, where within the organizational chart are -- would FAQs
12 be generated, other than the Bureau of Tax Policy?
- 13 A. Could be -- I'm sorry. What was the org chart exhibit
14 number?
- 15 Q. Exhibit 2.
- 16 A. So FAQs could come from Revenue Services. So I mean, you
17 could have Tax Compliance that generates FAQs. You could
18 have Tax Admission Services Bureau, which used to be referred
19 to as Returns Processing. They could generate FAQs. Tech
20 Services could generate FAQs. I mean, I believe that policy
21 was involved in these. But I can't say that we did all of
22 them.
- 23 Q. And how many times does a question have to be asked to be an
24 FAQ?
- 25 A. I mean, there's no set number.

- 1 Q. Who keeps track of it, because obviously "frequently asked
2 question" would mean it's more than once. Is there somebody
3 that has the tally sheet, or are they really just questions
4 that the department decides that are of sufficient interest
5 that they will generate a question and do a response?
- 6 A. Could be both. These are CIT FAQs. So back when the NBT was
7 implemented, we were just buried with questions. And so I
8 think with the CIT, we rolled a lot of those over.
- 9 Q. All right. Well, let's take a look at question 9, which
10 deals with unitary group of insurance companies and filing a
11 combined CIT return. Do you see that?
- 12 A. Correct.
- 13 Q. I'm not able to determine -- maybe it's just my copy; maybe
14 it's I don't understand. But is there any way we can
15 determine when that frequently asked question was generated
16 and posted?
- 17 A. I don't know if we could or not.
- 18 Q. And do you know, as you sit here today, whether you had
19 direct involvement in preparing the answer to the question,
20 "Does a unitary group of insurance companies have to file a
21 combined CIT return"?
- 22 A. I can't say for certain.
- 23 Q. Do you know whether this frequently asked question was
24 generated before or after your exchanges with Mr. Pratschler?
- 25 A. Well, I mean, I presume it was before. I mean, my

1 expectation would be the FAQs were probably issued shortly
2 after the CIT was enacted, which would have been back in
3 2012, right?

4 Q. All right. So --

5 A. Whether it was like early '12 or early '13, I don't know for
6 sure.

7 Q. But you're certainly aware of the frequently-asked-questions
8 document that existed at the time you were having
9 conversations with Mr. Pratchler, correct?

10 A. Yes.

11 Q. And those are -- frequently asked questions reflect a formal
12 position by the department; is that fair?

13 A. Yeah. I mean, there are -- I mean, I think we have some
14 message out there that says they're not binding. But yeah,
15 that's our understanding of the statute that we try to
16 provide taxpayers.

17 Q. And when you provided the guidance, the informal guidance to
18 Mr. Pratchler in your May 13th letter, you would not be
19 intending to in any way conflict with that existing
20 frequently asked question, would you?

21 A. Wouldn't have been trying to, no.

22 Q. And to your knowledge, you were not conflicting with it when
23 you were giving him the advice, were you?

24 A. No.

25 Q. You recognize that there's a difference between "required to

1 file a unified return" and "electing to file a unified
2 return," right?

3 A. Yes.

4 Q. And that's -- that's up to the taxpayer, that's their
5 election, right?

6 A. I mean, for those entities that, yeah, can elect and
7 calculate on that basis, yes.

8 Q. Yeah. That's the assumption of the question. It has to be
9 somebody that could do --

10 A. Yes. Right.

11 Q. -- a unitary business return. And the department doesn't
12 have to consent to that, right, whether they are eligible and
13 they elect?

14 A. Are we talking about the affiliated group election? I
15 thought we were on FAQ 9.

16 Q. Yeah, we are. If there's a unitary business group that files
17 a return --

18 A. Yeah.

19 Q. -- they don't have to get the department's consent to file as
20 a unitary business group before they do, do they?

21 A. Well, I think -- I mean, just to be clear, there's -- in 691
22 there's really two methods. One is, if you're a unitary
23 business group that's -- you know, has to file a combined
24 return, you have to.

25 But you also have the option, even if you're not

1 unitary, to file a combined return in certain circumstances.
2 And I guess that's what I was confused about. I don't think
3 you're talking about that one. That's the election. I think
4 that's sub-2.

5 Q. Right. So --

6 A. You're not talking about that.

7 Q. -- the frequently asked question is:

8 "Thus, even if an authorized insurance company is
9 unitary with another authorized insurance company under
10 611(6), this will have no effect in calculating the tax.
11 A combined return will not be necessary."

12 Your advice wasn't conflicting with that, was it?

13 A. I mean, we've never permitted combined returns for insurance
14 companies. Still don't.

15 Q. So then, you are now saying that your guidance to him was
16 incorrect; that an insurance company included in a unitary
17 business group may utilize benefits, if any, of inclusion in
18 a unitary business group. You're saying they can't file a
19 unitary business group return. Is that what you're saying
20 now?

21 MR. THOMPSON: That mischaracterizes the testimony
22 and also mischaracterizes the letter.

23 THE WITNESS: I think in the letter, you go down to
24 the -- like, later I tell him you can't file a combined
25 return.

1 BY MR. LIPPS:

2 Q. Because --

3 A. That was the answer to his question.

4 Q. Because the form was not generated yet by the department,
5 right?

6 A. No. Because we didn't think it was allowed anyway. We
7 didn't think that was how you calculated a return. We didn't
8 think there was any benefit to filing a unitary business
9 group return.

10 Q. All right. So are you disavowing your statement:

11 " . . . the Department is authorized to prescribe
12 forms and has not developed its forms and systems in a
13 way that would accommodate the combined filing you
14 request"?

15 A. No, that's true. But you also have -- you also have to
16 remember that, at the time of those initial conversations
17 with Mr. Pratschler and the understanding I had when we
18 issued that letter, is he was really just looking to file an
19 easier return, like one return that would cover all the
20 entities, not a, you know, true combined return where tax
21 attributes are shared amongst the members. That was not part
22 of our conversation at the start. It was not the information
23 I had when I wrote that letter.

24 Q. But you did say unitary business groups can utilize the
25 benefits, if any, among the group members.

- 1 A. There are no benefits to be shared amongst the unitary
2 business group in our interpretation and administration of
3 the insurance tax.
- 4 Q. All right. You never, in words or substance, advised
5 Mr. Pratschler that, by filing separate 4905s for the members
6 of the unitary business group, including insurance companies,
7 with the schedule he was proposing, was contrary to law?
- 8 A. I think if I'm Mr. Pratschler, and I'm as experienced as he
9 is, and I ask a question and -- to Treasury, and Treasury
10 says, "Hold up. We need to look at that," I would not take
11 that as a yes. So I think in --
- 12 Q. My question was --
- 13 A. -- substance, I think he had every reason to be very cautious
14 about proceeding with that and probably expected the denial.
- 15 Q. You're saying he expected a denial?
- 16 A. Well, I think when you ask that question and Treasury says,
17 "We need to look at it," if you don't get a "yes," I think
18 you should be cautious and you should be cautious in
19 proceeding. I mean, you shouldn't proceed on the basis that
20 you assume no answer is a "yes."
- 21 Q. All right. So you understood what was being proposed. Did
22 you send any directives to any of the other groups saying,
23 "We better be prepared to deny these returns"?
- 24 A. No.
- 25 Q. And you are aware, are you not, that the returns filed by the

- 1 petitioner here were actually reviewed and refunds were
2 issued, based on the utilization of the benefit, similar to
3 what is described in the spreadsheet Mr. Pratschler sent you?
- 4 A. I'm not.
- 5 Q. You're not aware of that?
- 6 A. I mean, I don't know who the taxpayer Mr. Pratschler was
7 representing.
- 8 Q. All right. So let me go back to the question I was asking.
9 Did you ever, in words or substance, at any time communicate
10 to Mr. Pratschler, "You better not do this; it's contrary to
11 Michigan law and/or policy"?
- 12 A. No.
- 13 Q. Now, do you have any involvement in any capacity with actions
14 that my client has filed in the court of claims cases? I
15 don't want to ask you specifically about them. I'm just
16 trying to figure out if you had any involvement with respect
17 to the court of claims.
- 18 A. I think I need a better -- could you rephrase that?
- 19 Q. Well, you did see discovery responses in discovery that was
20 served related to some proceedings in the tax tribunal,
21 right?
- 22 A. I -- I don't remember. What posture -- what case are we here
23 for? Nationwide?
- 24 Q. You're here for Nationwide in the --
- 25 A. Okay.

1 Q. -- tax tribunal.

2 A. And this is the tax tribunal. Okay.

3 Q. All right.

4 MR. THOMPSON: And just to clarify, for the record,
5 there are multiple pending actions at the moment, so -- you
6 know.

7 MR. LIPPS: Yeah. And I'm just -- I'm just trying
8 to figure out if he's got any involvement or familiarity with
9 those petitions that were filed in the court of claims, as
10 opposed to the tax tribunal.

11 THE WITNESS: I mean, if they were filed in the
12 court of claims against Treasury, it would have come through
13 my e-mail at some point. I don't recall it right now,
14 but . . .

15 BY MR. LIPPS:

16 Q. All right. Do you know somebody by the name Daniel Houlf?

17 A. Yes, I think so. H-o-u-l-f?

18 Q. H-o-u-f, I believe.

19 A. H-o-u-f, right, with one of the autos or formerly with one of
20 the autos?

21 MR. ROBERTS: It's H-o-u-l-f. It's Dan Houlf.
22 Yes, he was formerly with --

23 THE WITNESS: Okay. I had that right, then.

24 MR. ROBERTS: Yeah.

25 THE WITNESS: I met him before.

1 BY MR. LIPPS:

2 Q. And do you have any impression of him?

3 MR. THOMPSON: Relevance.

4 THE WITNESS: He seems like a very nice guy.

5 BY MR. LIPPS:

6 Q. Seem like a knowledgeable person?

7 MR. THOMPSON: Relevance.

8 BY MR. LIPPS:

9 Q. Is he knowledgeable on tax matters? That's what you would be
10 talking with him about.

11 A. Yeah, with respect to, you know, issues involving automobile
12 manufacturers. I think we've chatted with him before.

13 Q. Okay. Have you chatted with him about unitary business
14 groups?

15 A. I don't recall.

16 Q. Chatted with him about whether Michigan's Finnigan or Joyce?

17 A. Certainly don't recall that.

18 Q. Okay. You did not have any direct involvement with the
19 informal conference that Nationwide had in the proceedings
20 filed in the tax tribunal; is that right?

21 A. That's true.

22 Q. With respect to the interrogatory answers that were provided
23 by the department, Mr. Binke verified them. Did you provide
24 him any specific information, that you recall, to assist him
25 in being in a position to verify those interrogatories?

1 A. No. Other than, you know, some of the request to produce
2 that related to that letter, I had to go back and, you know,
3 do my document review to make sure we produced the responsive
4 documents.

5 Q. Okay.

6 A. So I would have sent those to Mr. Binke.

7 Q. So you certainly did review your records to make sure you
8 produced those. Do you recall providing him any answers to
9 specific questions? Like he said, "They're asking about
10 this; can you give me information that I need to answer
11 that?"

12 A. No. I did not help him author the interrogatories.

13 MR. LIPPS: All right. Why don't we take about a
14 five-minute break here. I'd like to confer with Mr. Roberts.
15 And if that's okay with you, we may be either at the end or
16 near the end.

17 (At 11:49 a.m., recess.)

18 (At 12:04 p.m., resumed.)

19 BY MR. LIPPS:

20 Q. Mr. Wilkinson, I want to just quickly look at Exhibit 8
21 again, which is the letter that you sent on May 13th of 2016.

22 A. Yes.

23 Q. And we covered on the first page the things that you said
24 there's no dispute over. But I don't think we covered on
25 page 2 a bullet that you put up there. If you could turn to

1 that. It says, "Two or more insurance companies may be
2 unitary with one another and may constitute a unitary group."
3 Do you see that?

4 A. Yes.

5 Q. And that's something you're not disputing. You didn't
6 dispute it then, and you're certainly not disputing it today,
7 correct?

8 A. Correct.

9 Q. All right. And then on the very last line, you do invite
10 him, if he has some questions, to call you. Do you recall
11 whether he called you? We certainly looked at e-mails. But
12 did he call you to discuss it, as you recall?

13 A. You know, I -- I apologize. I can't say for certain. I feel
14 like I talked to Mr. Pratschler fairly frequently back then.
15 But I don't recall specifically whether -- I can't say for
16 certain.

17 Q. All right. When you talked to Mr. Pratschler, it was on a
18 whole host of tax issues; it wasn't just about this unitary
19 business group with insurance companies, right?

20 A. Mr. Pratschler was very prominent in the IBM litigation.

21 Q. All right. Well, he was also, to your knowledge, a pretty
22 knowledgeable state and local tax professional, was he not?

23 A. Yeah. I've always enjoyed working with Mr. Pratschler.

24 Q. And he was somebody that seemed to be conversant, from your
25 perspective, on the Michigan corporate income tax?

1 A. Yes. I agree.

2 MR. LIPPS: All right. I don't think I have
3 anything further, sir. And I appreciate your time today and
4 your willingness to accommodate all of our schedules. Thank
5 you for that.

6 THE WITNESS: Thank you for having me.

7 MR. THOMPSON: I just have one question. And at
8 first I'd like to echo Mr. Lipps' gratitude. Thank you,
9 Mr. Wilkinson for your time and assistance today.

10 EXAMINATION

11 BY MR. THOMPSON:

12 Q. Just one follow-up question, does your letter, which is
13 Exhibit 8 to your deposition, contemplate MAIPF credit
14 sharing?

15 A. It did not.

16 MR. THOMPSON: That's all I have.

17 MR. LIPPS: And let me just quickly follow up on
18 that.

19 REEXAMINATION

20 BY MR. LIPPS:

21 Q. Would you agree or disagree that MAIPF credit is a potential
22 benefit for a taxpayer?

23 MR. THOMPSON: Form.

24 THE WITNESS: Yeah. I mean, it's -- it reduces
25 their liability for an insurance company, yes.

1 BY MR. LIPPS:

2 Q. Which would fall within the nomenclature of a benefit to a
3 taxpayer, correct?

4 A. It could be a benefit. But you're trying to tie it to the
5 word I used in the letter. It's just not what I was
6 contemplating at the time I wrote the letter.

7 Q. Right. But you did use the word "benefits" in the letter,
8 right?

9 A. I agree, I used the word "benefit" in the letter.

10 MR. LIPPS: And that's it. I have nothing further.

11 MR. THOMPSON: Nothing further. Thank you very
12 much.

13 (At 12:07 p.m., deposition concluded.)
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1 STATE OF MICHIGAN)
2 COUNTY OF OTTAWA) SS

3
4
5 I certify that this transcript, consisting of 75
6 pages, is a complete, true, and correct record of the
7 testimony of LANCE WILKINSON held in the case on Thursday,
8 July 22, 2021.

9
10 I also certify that prior to taking this deposition
11 LANCE WILKINSON was duly sworn to tell the truth.

12
13
14
15 

16 Dated: 07/24/2021

17 Terri L. Zimmerman, CSR-2882
18 Certified Shorthand Reporter
19 O'Brien & Bails
141 East Michigan Avenue - Ste 206
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My commission expires: 2-12-2027

Exhibits	14th 50:13	25 52:16	52:4	11:18 13:14
Exhibit 2 3:9 6:20 19:3 61:15	17 33:8 37:20	4	accommodat e 42:13 66:13 73:4	17:7,14 19:20 32:10 50:2
Exhibit 7 3:10 27:1 46:6	18 5:12 20:12 21:19 22:17	4095 38:12	accomplish 43:23,24 44:1 45:9	Admission 61:18
Exhibit 8 3:11 29:25 38:7,15 71:20 73:13	19 27:5 32:3 52:17,19	430 4:17	accountant 10:8	advance 16:3,13
Exhibit 9 3:12 46:7 49:2 57:18	19th 27:12 28:1,15 30:19, 21	4905s 67:5	accounting 10:24	advanced 45:23
Exhibit 10 3:13 51:14	2	6	accuracy 31:8	advancing 59:21
Exhibit 11 3:13 56:11	2 6:20 19:3 44:18 61:15 71:25	6 46:10 53:7	accurate 13:14 30:5 38:24	advice 12:11 13:20 30:11 46:21,24 63:23 65:12
Exhibit 12 3:14 61:1	2006 6:2,5,10 40:5	611(5) 22:6	acknowledge 39:2	advise 35:23
Exhibit 17 3:16 33:8 37:20	2007 36:4	611(6) 65:10	actions 68:13 69:5	advised 39:6 60:23 67:4
Exhibit 18 3:16 20:12 21:19 22:17	2011 6:1,5,11	680(3) 33:12	activity 24:21	Affairs 9:5
1	2012 63:3	691 32:17,20 38:5 64:21	actual 7:15 48:10	affiliated 28:4,6 38:11 64:14
10 51:14	2013 20:18	691(1) 22:6 37:4,16	added 42:8	affirming 32:4
10:03 4:1	2013-1 20:25	7	additional 14:3 16:6 53:3	AG 11:11
10:38 25:18	2016 8:20,25 9:3,21 10:3,6, 10 11:2,18 12:5,12,14,21 14:5,10,24 16:1 27:5 28:15 30:6 41:14 46:10 56:8 71:21	7 27:1 46:6 53:7,21 54:20	address 4:16, 17	agree 33:4,18 35:9 36:24 37:8,10 41:22 42:3 54:9 73:1,21 74:9
10:39 25:19	2018 20:15 22:13,18	7's 54:4	addressing 30:6	agreed 50:8
11 10:6 56:11	2018-12 19:25 20:22 21:19, 20	8	administer 36:22	agreement 4:14
11:24 50:17	2019 5:15	8 29:25 38:7, 15 71:20 73:13	administerin g 4:4	agrees 32:10
11:49 71:17	2021 4:1	80 28:5,7	administratio n 67:2	AGS 9:7 17:10
12 16:22 40:11,14 46:3 61:1 63:5	20c 52:22	9	administrativ e 6:12 7:15 10:7,19,22 19:17,22,24 20:8,11 21:8	ahead 60:10
12:04 71:18	20th 56:13	A	administrator 5:18,20,22,24 8:12,24 9:3,4, 18,25 10:2	Allegan 4:17
12:07 74:13	22 4:1	a.m. 4:1 25:18,19 27:6 50:17 71:17	ability 46:15	allowed 29:1 42:21 59:14 66:6
13 40:5 63:5	22nd 50:17 56:7	absolutely		amount 13:22
13th 30:6 57:21 63:18 71:21	23 20:15			amounts 52:25
				analysis

12:25 14:1 25:6 27:24 36:6 45:18 47:21 51:10	approved 20:15 59:8	58:6	62:6 63:2 68:8 71:2 72:14	broached 59:16
analyst 10:16 19:1	approving 18:17 19:21	attention 6:19	base 42:2 48:16	broad 39:1,3
analysts 10:9	April 8:17	attorney 11:13,14	based 44:1 48:13 54:22 60:7 68:2	Bryan 20:7
analyze 9:6 13:19 51:12	areas 9:2 61:9	attributes 25:5 29:12 46:17 47:4,9, 16 48:15,18 49:8 53:23 54:8 55:9,23 57:25 66:21	bases 36:23	bucket 10:17
and/or 9:14 46:17,22 68:11	argue 51:20	auditor 19:1	basis 27:24 46:17 47:4,9, 11,16,20 48:7, 23 59:20 64:7 67:19	bullet 31:24 32:17 71:25
Angela 10:11, 15,25 11:6 30:17,18,22 51:5 56:12 58:22	argument 59:21	author 54:12 71:12	behalf 4:5,7	bulletin 19:24 20:4,11 21:8 22:1
Angela's 11:2	arguments 27:21 39:2	author's 54:16,18	benefit 41:23 42:1,3 66:8 68:2 73:22 74:2,4,9	Bulletins 19:17,22
annual 38:12	aspect 28:12	authored 30:14	benefits 38:19 39:5,8, 15,17,19 46:25 47:7,11, 13,19 48:4,18 65:17 66:25 67:1 74:7	bullets 29:23
answers 16:4 70:22 71:8	assessment 18:4,8	authorized 59:11 65:8,9 66:11	bigger 39:3	burden 13:2 27:19 41:1,4,7
apologies 35:19	assessments 40:21 41:24 52:25 53:11, 14 54:5,6,23	automatic 26:15	binary 36:6	bureau 4:22 5:15,25 6:7,25 7:14 8:19 12:20 19:9 32:10 35:22 50:3 56:1 59:8 61:12,18
apologize 35:13 72:13	assign 17:9	automobile 41:11 52:22 54:5 70:11	binding 63:14	bureaus 7:21 19:12
apologized 50:18	assigned 11:10 30:16 40:16,22	autos 69:19, 20	Binke 17:15 70:23 71:6	buried 62:7
appears 20:18 30:8	assist 17:10 70:24	aware 17:12 39:4,20 40:5, 8,15,16,21 41:10,21 47:12 63:7 67:25 68:5	Birchmeier 7:17	business 4:16,17 14:24 15:12 19:25 21:9 23:22 24:20 25:11 28:12,16,25 29:2,18 32:15, 21,23 33:13, 15 34:1 36:10, 20,24,25 37:6, 20,21,23 38:19,20 39:7, 8 42:14,21 43:5,8 44:5,6 46:15,25 47:8 48:3,4,5,8,18, 19 52:10 53:10 54:2,24 55:6 57:8 58:13 64:11, 16,20,23 65:17,18,19 66:8,24 67:2,6 70:13 72:19
applied 50:23 54:21,22,24	assistance 73:9	B	Blough 8:10, 12	
apply 32:17 40:7 55:10	assume 67:20	Bacigal 10:11,13,15	blurred 7:10	
appointed 5:10	assumed 29:1	back 10:13 12:12 14:19 25:19 30:19 36:4 38:7,9 42:6 44:15 45:16 49:2 50:17 56:6,14 57:18 58:17	body 35:1	
apportionme nt 33:23 37:15	assumes 47:23		book 33:5	
approach 33:19 34:13, 16,19,21 35:7, 10,11,24,25 49:6	assuming 29:16 51:24		borne 48:7	
appropriately 49:13	assumption 54:3 64:8		box 19:4,13 22:2	
approval 25:6	attach 57:22		boxes 19:3,4	
	attached 51:19,24		break 71:14	
	attaching 50:2		briefly 6:19	
	attachment 49:11 51:15 52:1,4 53:21			

C	characterize 26:16	code 32:20 33:5 37:14 41:8	company 32:7,11,15,18 38:18,21 39:6 41:21,24 42:8 44:5,13 47:12, 16 48:15 53:7 54:4,20 55:3 65:8,9,16 73:25	consulted 21:17
calculate 64:7	characterized 46:21	collaborative 7:20	company's 54:22,25	consulting 21:8
calculated 66:7	charge 7:17 18:25	collaborativel y 7:8	compel 60:10	contact 17:11
calculating 41:20 48:9 65:10	charged 44:19	combined 15:13 22:3,13 27:21 28:3 29:18,21 32:21 33:13 36:11,16,20 37:21 38:12 39:5,20 42:15, 22,25 43:20, 23 45:9 46:16 49:18 62:11, 21 64:23 65:1, 11,13,24 66:13,20	compliance 27:19 61:17	contacted 43:18
calculation 42:2 44:13 48:6	chart 6:20 8:17,19 19:7 55:6 61:11,13	comfortable 26:9	conclusion 57:3	contemplate 73:13
calculations 40:23	chatted 70:12,13,16	Commission 34:24 35:5	conclusions 55:22	contemplatin g 24:11 39:21 74:6
call 8:7 72:10, 12	chief 4:24 5:6, 9 13:9	common 58:8	conducted 4:3	content 12:3
called 4:10 7:5,17,23 72:11	chose 35:16	communicate 26:19 68:9	confer 71:14	context 35:17
candid 47:18	circumstance s 65:1	communicate d 25:2 31:8 60:15	conference 70:19	continue 16:5
capacity 17:4 68:13	CIT 16:18,19 22:3,12 35:16 40:6 61:3,5 62:6,8,11,21 63:2	communicati on 59:15	confirm 50:15	continued 25:24 45:7
career 4:25 5:7 34:14	cites 22:6 29:22	communicati ons 14:20 24:14	conflict 63:19	continuing 23:18
case 17:9 18:9,10 23:12, 13 68:22	civil 5:13	companies 9:15 14:25 15:12 25:4 29:3,11,17 38:12 42:14, 22 43:5 45:4 46:16 48:6,9 50:24 52:9,14 53:1,25 57:9 58:13 59:20 62:10,20 65:14 67:6 72:1,19	conflicting 63:22 65:12	contract 5:10
cases 11:11, 13 34:6 35:14, 18 68:14	claims 9:8 11:13 40:17, 22 68:14,17 69:9,12	communicati ons 14:20 24:14	confer 71:14	contrary 45:10 67:7 68:10
cautious 67:13,18	clarify 69:4	communicati ons 14:20 24:14	conference 70:19	control 19:25 28:12,17,18 29:12
caveat 39:4 47:13	classification wise 5:11	communicati ons 14:20 24:14	confirm 50:15	conversant 72:24
center 8:7	classified 5:13	communicati ons 14:20 24:14	conflict 63:19	conversation 25:1 27:12,16, 18 30:18 56:4 60:18 66:22
certificate 40:11	Clay 18:24	communicati ons 14:20 24:14	confused 10:5 65:2	conversation s 23:18,21 44:2 45:20 48:12,24 63:9 66:16
chain 58:16 59:4	clear 26:10, 12,14 32:9 47:14 64:21	communicati ons 14:20 24:14	connection 21:7,9 23:25	copied 17:12 51:5
changed 10:14 18:25 45:1 47:21	client 15:16, 19 68:14	communicati ons 14:20 24:14	consent 64:12,19	copy 30:5 62:13
Chapter 16:22 40:11, 14	clients 27:20 29:11,14 49:5 57:14,21	communicati ons 14:20 24:14	consistent 18:13 50:8	Cornelius 18:24
			consistently 36:13	corners 13:17
			consisting 42:14,22	
			constitute 72:2	

corporate 36:9,19 72:25	25 41:15 44:16 47:20 50:23 52:3,13, 19,21 53:4,11, 12,24 54:21, 23 55:24	denial 67:14, 15	details 43:20	discuss 72:12
correct 6:15 7:3 8:25 20:19 24:16,17,22, 25 25:13 29:14 30:3,4, 7,15 31:14 32:15,16 37:11 38:4,25 39:14 42:24 43:3,24 44:7 45:12,25 49:25 51:6,7 54:2 56:16 57:16,17 59:12,24 60:21 62:12 63:9 72:7,8 74:3	curious 60:1 current 17:14 customers 9:10 cut 13:17	deny 67:23 department 4:19 5:8 6:2, 21 7:24 8:2 9:7,12 15:17, 20 16:10 17:11 21:21 22:15,19,25 23:16 24:15 35:22 38:9 42:12,20 49:7 57:24 61:10 62:4 63:12 64:11 66:4,11 70:23	determine 60:23 62:13, 15 developed 42:13 66:12 development 44:20 46:1 dialogue 45:8 difference 7:12 8:19 12:22 13:21 47:7 63:25 differences 12:7 difficult 58:16 diligence 59:24 direct 6:19 17:18 62:19 70:18 directives 67:22 directly 19:11 55:18 director 4:22 5:12,14,19,21 12:16,18 13:8 19:20 25:7 35:21 56:1 59:6 disagree 33:18 35:9 36:18 40:2 73:21 disagreement 46:20 disavowing 31:5 48:3 66:10 disclose 13:3 disclosed 48:24 discovery 15:16,20 17:1 68:19	discussing 45:2 discussion 27:8 60:20 discussions 28:23 45:22 dispute 31:23 32:7 33:1 71:24 72:6 disputing 51:25 72:5,6 division 5:18 7:4,24 8:1,12, 14 9:4 11:9 17:7,10 divisions 7:1 9:11 10:5 44:19 document 54:12 61:2 63:8 71:3 documents 15:21 16:6 23:10 71:4 doubt 50:5 draft 9:4,6 11:18,23 30:17,25 58:18,19,20 drafting 7:16 11:21 20:3,21 35:15 due 59:24 duties 11:7
correctly 32:5	D	department's 64:19 Departmental 7:13 departments 17:10 departmentwide 46:5 depending 12:17 deposition 4:3,13 15:3 16:3,13 73:13 74:13 deputy 4:24 5:6,9 8:5 12:13,14 13:9, 11,12 19:8,11, 14 25:7 56:2,3 59:9,11,17 60:1,4,19 describe 9:2 description 27:25 design 7:6 designed 7:19 detail 49:12, 17 50:3 51:17 detailed 49:19		
corresponde nce 16:7	Dan 69:21 Daniel 69:16 Darron 7:17 dated 27:5 David 4:7 days 50:14 deal 9:15 dealing 51:8 deals 19:25 62:10 dealt 14:13 37:13 debate 31:16 decides 62:4 defending 17:4 definition 32:6,11,14 44:9 definitions 28:8,11 degree 6:17 degrees 10:22,23 delay 50:18 deliberations 60:8 deliberative 60:7			
counsel 31:16 51:21				
couple 26:25 28:20 53:3				
court 4:2 25:20 26:6 68:14,17 69:9, 12				
cover 66:19				
covered 35:16 71:23, 24				
CPA 10:21,24, 25 11:1				
create 7:7				
created 42:21				
creating 7:2,6				
credit 41:19 42:3 44:3 54:8 55:3 73:13,21				
credits 23:23 24:7,19,21 25:11,16 40:7, 10,12,14,22,				
				E
				e-mail 14:19 23:8,11,14,19 27:4,11,23 28:1,10 30:7, 21,23 32:2 46:10 50:10 51:6,20 55:17 56:8,13,17,23, 25 57:18

69:13	EXAMINATIO		figure 68:16	follow-up
e-mails 16:9	N 4:11 73:10	F	69:8	50:13 73:12
25:25 26:23	excess 44:3	Facility 41:11	file 15:13 22:3,	forget 7:16
56:20 72:11	exchange	52:22 54:6	13 27:20 28:3	form 5:1 7:6
early 63:5	15:11 25:25	fact 44:22	29:18,21	12:12 22:20
easier 27:21	exchanged	facts 13:2	32:21 33:13	23:1 29:4
66:19	15:25	14:1 29:10	36:14,16	33:20 34:9
easy 45:3	exchanges	47:24	37:21 38:12	35:12 38:12
echo 73:8	62:24	factual 27:24	40:6 42:22,25	40:9,24 42:16,
edited 31:1	excluded	fair 9:16 12:24	43:20 45:3	23 43:2,6,12
effect 65:10	41:1,4	13:12,20,21	46:16 48:23	44:8 45:23
effort 7:20	exemplar	14:20 15:17	57:13 62:20	49:18,21
13:14 14:2	52:14	16:1,10 17:23	64:1,19,23	53:16 55:23
38:24	exercise 58:5	18:2,3 21:24	65:1,18,24	66:4 73:23
elect 64:6,13	exhibit 6:20	24:21 27:25	66:18	formal 11:22,
electing 64:1	19:3 20:12,23	28:21 29:13,	filed 17:2,13,	24 12:5,9,10,
election 64:5,	21:2,3,19	19 30:11 31:3,	19,20 18:6,7	23 13:1,10
14 65:3	22:17 27:1	9 32:12 42:15	57:15 58:6,8	14:15 23:4,11,
eligible 64:12	29:25 33:7,8	45:21 55:18	67:25 68:14	16 24:23
employed	37:20 38:7,15	63:12	69:9,11 70:20	25:10 30:11
4:19	46:6,7 49:2	fairly 58:8	files 64:16	59:14,18
enacted 63:2	51:14 54:20	72:14	filing 6:25	63:11
end 7:11 13:6,	56:11 57:18	fall 10:17 19:5,	27:21 38:21	formally
7 71:15,16	61:1,13,15	11 74:2	39:5,20 42:9,	14:14
ended 48:11	71:20 73:13	familiar 19:24	15 43:6 47:11	format 22:23
enjoyed	existed 63:8	22:8 35:13	57:8,9 62:10	forms 6:24
72:23	existence	40:20	66:8,13 67:5	7:2,4,7,9,16,
ensure 49:12	22:14 39:13	familiarity	filings 9:15	19 42:13,21
entities 28:5,	existing 29:2	14:12 16:24	Financial	43:17 44:19
6 40:5 48:16	63:19	69:8	7:14	45:5,11,22
53:4 54:1 55:5	expect 22:16	familiarize	financials	46:1 51:13
64:6 66:20	50:7 51:3	16:5,6	36:14,15 37:3	66:12
entity 37:4	expectation	FAQ 61:24	fine 34:11	forward 44:19
44:3,4 53:24	63:1	64:15	Finnigan	forwarding
54:7 55:2	expected	FAQS 61:3,5,	33:19,22 34:1,	44:23
entity-by-	67:14,15	8,9,11,16,17,	13,18 35:6,10,	found 47:19
entity 34:21	experienced	19,20 62:6	24 36:5 37:13	foundation
Eschelbach	67:8	63:1	70:16	34:9 35:12
5:21 12:16	expressed	February	five-minute	36:12 54:10,
eventually	25:3	14:23 27:5,12	71:14	13 55:1,12
50:10	extent 48:8	28:1,15 30:19,	focus 42:7	frame 14:24
evidence	external 9:10,	21 32:3	focused	frequent-flier
47:24	14 11:25 12:8	Federal 28:7	28:13	14:7
		feedback	follow 36:7	frequently
		58:14	73:17	14:17 56:18
		feel 72:13	follow-on	62:1,15,23
			51:9	63:11,20 65:7
				72:14

frequently-asked-questions 63:7	9:24 15:15 19:18,25 20:6 23:22 24:20 25:11,16 28:12,16,25 29:2,12,13,17, 18 32:15,21, 23 33:13,15, 23 34:1 36:10, 20,24,25 37:1, 6,21,23 38:11, 19,20 39:7,8, 17,18 42:14, 21 43:5,8,12 44:5 46:2,16, 17,25 47:4,8, 9,16 48:3,4,5, 8,16,19 50:6 52:10 53:10 54:2,9,24 55:7,10,24 57:9 61:7 62:10,20 64:14,16,20, 23 65:17,18, 19 66:9,25 67:2,6 72:2,19	23 63:17 65:15 Guilfoyle 4:24 Gursky 12:14, 15 guy 70:4 guys 58:11 60:9	I IBM 72:20 identified 13:8 32:2 implemented 62:7 impression 70:2 inaccurate 31:20 39:11 include 38:17 included 32:23 33:14 36:10,20 37:6, 23 38:18 39:7 40:23 42:11, 19 47:19 65:16 includes 32:6,11,15,22 33:14 37:22 including 5:9 45:22 67:6 inclusion 33:23 38:20 39:8 46:25 47:8 48:4 65:17 income 36:9, 19 72:25 incorrect 45:15 65:16 individual 18:20 54:8,22 individually 53:13 54:7 informal 11:21 12:1,4, 8,16,23 13:13, 18 14:1 22:24 23:5,6,7,11,15 24:23 25:10 28:23 30:2,10 38:8 46:14 57:20 59:15 63:17 70:19	informally 14:14 60:16 information 13:3,22 14:3 15:21,22 16:25 17:3 24:5 29:15,22 35:6 43:11 48:13,23 49:8, 19 57:24 60:10,22 66:22 70:24 71:10 initial 15:13 30:17 48:12, 24 66:16 input 25:8 50:15 58:8 inquiries 9:9 11:25 inquiry 14:22 21:7 24:12 27:19,24 30:7 44:19,23 50:21 51:9 56:9,14 instance 59:6 instruct 60:6 instruction 60:13 insurance 14:25 15:12 16:20,21 25:4 29:3,11,17 32:6,11,15,18 38:11,18,21 39:6 41:8,11, 21,24 42:8,14, 22 43:5 44:4, 13 45:3 46:16 47:11 48:6,9 49:6 50:23 52:22 53:1,24 54:5 57:9,23 58:13 59:19 62:10,20 65:8, 9,13,16 67:3,6 72:1,19 73:25 intended 52:3 54:13
G gathering 15:22 gave 29:15,22 56:20 general 23:12 34:4 generally 17:12 22:10 31:10 generate 24:20 43:12 54:15 61:7,19, 20 62:5 generated 42:13 43:2 61:9,12 62:15, 24 66:4 generates 61:17 give 71:10 giving 63:23 Glenn 8:4 God 52:6 Gotcha 52:20 gratitude 73:8 greater 28:5,7 greatly 46:14 Greg 12:14,15 groundwork 13:5 group 7:13	group's 44:6 48:19 55:10 groups 9:18, 23 10:2 14:24 15:12 21:9 46:2,3 58:14 66:24 67:22 70:14 groupwide 47:20 guess 14:23 41:17 65:2 guidance 9:5 11:19,21,22, 23,24 12:1,4, 5,8,9,10,17,24 13:1,10,13,15, 18,19,20 14:2, 14,16 22:24 23:4,5,6,8,11, 15 24:1,6,13, 16,19,23 28:24 30:2,10 38:8 46:14 51:16 57:20 59:14 60:4,8,	H H-O-U-F 69:18,19 H-O-U-L-F 69:17,21 halfway 27:4 handle 8:6,7 11:12 handled 18:13 59:19 handles 7:15 8:9 happy 33:5 head 35:14 heard 34:13, 16,18,24 39:15 Hearings 8:12,14 9:24 held 5:14 31:11 Hey 58:10 higher 13:1 highest 4:25 5:7,13 hold 4:21 5:24 67:10 host 72:18 Houlf 69:16, 21 hypothetical 58:4		

intending 57:8 63:19	21 55:22 56:10 59:19 60:3,4,20	Lance 4:9,17	15 73:25	47:14 71:3,7
intent 31:12 48:23 54:16, 18	issued 18:2,4 20:18 23:7,10 24:12,24 25:9 60:9 63:1 66:18 68:2	Lansing 4:18	likewise 26:14	makes 32:9
interest 62:4		law 6:12,17 10:7,19,22,23 18:14 20:8 29:2 39:12 40:24 50:9 67:7 68:11	lines 53:3 57:9	making 13:14 18:13 42:14 45:3 59:23
interested 60:2	issues 8:6 14:13 16:15 24:9 25:18 31:23 41:15 56:19 59:25 70:11 72:18	lawsuit 17:2,5 18:5,7	Lipps 4:5,12 5:4 11:16 22:22 23:3 25:21 29:7 33:25 34:11, 12 35:20 36:17 40:2,4, 13 41:3 42:18 44:11 47:25 49:1,23 52:18 53:17,20 54:17,19 55:4, 13 60:11,14 66:1 69:7,15 70:1,5,8 71:13,19 73:2, 17,20 74:1,10	managers 25:9
internal 9:10, 11 12:20 26:4 60:8		lawsuits 17:6, 13		manufacturer s 70:12
interpretation 18:14 50:9 54:12 67:2	items 24:18 52:8	lawyer 6:15 10:20		marked 20:12
interpreted 50:5 58:11	J	learned 43:19		married 10:13
interrogatori es 15:10 70:25 71:12	Jeff 4:5,24	leave 22:17		Matelski 10:15 30:17, 18,22 51:5 56:12 58:22
interrogatory 70:22	Joyce 34:16, 22 35:7,9,24 36:5 37:13 70:16	legislation 9:6		material 13:25 16:12
invite 72:9		Legislative 9:5	Lipps' 73:8	materials 15:24
involved 11:12 13:8,9 15:15,16,21 17:4 18:8,16, 21 19:21 20:3 29:3 30:18 58:25 59:1,2, 17 61:21	July 4:1 56:13	legislator 36:3	listening 33:5	matter 17:20 36:18
involvement 17:18 18:12 20:21 62:19 68:13,16 69:8 70:18	June 46:9 50:13,17 56:7	letter 16:9 21:13,14 23:7, 17 24:2,5 30:5,6,11,14, 17 31:2,6,11, 20 32:9 37:17 38:8 39:5,25 42:6,12,20 43:1,9,18,25 45:4 47:2,3,5, 10,17 48:13, 22,25 57:21 63:18 65:22, 23 66:18,23 71:2,21 73:12 74:5,6,7,9	literally 12:11	matters 9:7,8 70:9
involving 70:11	K	letter's 31:16	litigating 16:20	member 39:17 48:18 53:12
issuance 12:9 59:11	kind 7:10 13:4 19:3	letterhead 16:10 22:18, 25 23:5,11,16, 17 38:8	litigation 9:7 16:25 18:11 72:20	member-by- member 48:6
issue 11:11 12:17 13:19 16:20 18:9 19:18 24:6,10, 23 25:1 26:1 27:13 30:24 33:22 39:15 44:16 45:2 50:22 53:18,	knew 17:2 24:18 39:16 43:1 45:17 57:11	level 5:12,13	local 72:22	members 24:20 36:10, 19,25 48:5 53:10 54:9,23 55:9,10,24 66:21,25 67:5
	knowledge 7:1 8:2 11:3 18:5 38:1 60:15 63:22 72:21	liability 41:20 44:4,13 48:10,	location 4:2	memory 16:15
	knowledgeab le 70:6,9 72:22		looked 15:3,8 16:7,12,16,20 30:7 39:16 49:3 72:11	message 63:14
	Kurtz 20:7	letters 12:11	lost 19:3	met 29:17 69:25
	L		lot 8:9 62:8	methods 64:22
	laid 13:5		M	Michigan 4:18 6:17 9:8 22:14 28:7,11 32:20 35:10,
			made 41:19 59:22	
			MAIPF 53:1 73:13,21	
			make 14:2 37:19 44:23	

24 36:9,19 37:2,9 38:2 40:16,21 41:10 44:7 49:6 52:22 54:5 57:23 68:11 72:25	nice 70:4 nomenclatur e 74:2 notice 4:14 number 61:14,25	original 48:25 owed 26:2 owned 28:7	18:21 petitions 69:9 phone 25:24 45:20 phrase 42:11, 19 46:22 placement 41:11,18 52:22 54:5 Plan 40:17,22 plans 49:6 57:13,22 playing 12:21 point 12:23 17:3 23:20 43:19 60:18 69:13 points 31:24 policies 39:12 policy 4:22 5:15,18,25 6:8 7:1,8,21 8:20 9:4 11:8 12:20 17:7,9 18:12 20:6 21:20 22:15 32:10 35:22 50:3 61:12,20 68:11 political 5:5 portrays 54:21 position 4:21 5:6,12,14,17, 24 6:1 11:1 58:12 63:12 70:25 positions 5:13 6:5,7,10 10:16 18:25 posted 62:16 posture 39:21 50:8 57:12 58:7,12 68:22 potential	73:21 practitioner 14:7,9 practitioners 58:9 Pratcshler 14:6,22 15:11, 25 16:8 21:8 23:15,21 24:8, 12 25:15,24 26:17 27:5,13 28:24 30:3,15, 19 37:17 39:21 43:18 44:17 45:1,8 46:10 48:11 49:4 51:9,15 55:16 56:4,6, 12,18 57:7,19 59:21 60:16, 19,23 62:24 63:9,18 66:17 67:5,8 68:3,6, 10 72:14,17, 20,23 Pratcshler's 27:18 42:24 48:23 predecessor 20:22 preliminary 45:22 premise 55:8 premium 40:7 49:7 57:23 prep 36:1 preparation 6:24 7:2 prepare 15:6 54:11 prepared 43:6 49:5 57:22 58:18, 22 67:23 preparing 21:24 62:19 prescribe
Michigan's 70:16 Mike 5:21 12:16,17 mischaracter izes 39:25 40:3 65:21,22 misstated 49:24 misstatement 40:24 mock-up 23:22 24:7,9 moment 20:13 43:2 69:5 mouth 26:8 move 60:10 multiple 69:5 Multistate 34:24 35:5 Multitax 35:5	O oath 4:4 object 47:23 objection 4:4, 6,8 11:4 48:21 53:19 54:10 55:1 objections 34:9 obligated 40:6 occasion 35:3 offered 43:11 office 5:7 7:4, 13 9:5 officer 4:25 official 21:20 22:18 offset 44:3 opening 27:9 opine 34:6 opposed 30:10 69:10 option 64:25 orally 56:17 order 15:6 28:16 org 19:7 61:13 organization 8:19,21 organization al 6:20 8:17 61:11	P p.m. 46:10 71:18 74:13 paid 53:1,13 54:6 55:3 paragraph 22:1 30:9,13 31:22 38:9 44:18 Pardon 20:24 part 7:14 27:20 34:1 37:1 42:1 46:22 47:17 52:9 54:1 55:6 59:24 60:8,20 66:21 pay 41:24 payments 41:19 pending 4:14 69:5 people 8:21 9:19 10:4 45:5,22 percent 28:5, 7 permitted 65:13 person 7:17 17:9 32:22 33:14 37:5,22 38:2 70:6 person-to- person 27:12 perspective 12:22 72:25 petitioner 4:5 68:1 petitioners 4:10 17:19		
N names 35:17 Nationwide 68:23,24 70:19 NBT 35:15 36:3 59:21 62:6 necessarily 12:3 24:20 needed 11:12 28:16 nexus 33:24 34:2 37:1,9 38:2,6				

66:11	67:21		recall 14:15, 22 15:6,11 16:13,17 20:10 21:11, 16 22:11 23:9, 14,20 25:23 26:22 27:11, 15 34:20,23 35:14,17 36:2 41:14 45:16, 19 56:7,10,16 58:23 69:13 70:15,17,24 71:8 72:10,12, 15	reference 37:7,16 40:19
presume 62:25	proposing 45:15 48:17 55:9,23 57:3, 10 67:7	Q	question 5:2 25:19,22 29:1, 16 30:3 31:18 34:10 38:10, 25 39:1,24 42:24 43:25 44:15 47:15 51:11 54:13 56:2 61:23 62:2,5,9,15, 19,23 63:20 64:8 65:7 66:3 67:9,12,16 68:8 73:7,12	referred 35:2 43:16 61:18
pretty 20:7 72:21	proposition 34:4		questions 8:6 9:9 58:10 60:7 62:3,7 63:11 71:9 72:10	referring 11:24 20:25 28:11 40:10, 11
Price 14:10	provide 13:2, 19 16:25 38:1, 4 49:7,16 51:16 57:24 63:16 70:23		quibble 33:2	reflect 63:11
prior 5:17 22:15,16	provided 16:4 23:21 30:2,21 31:20 33:12 46:15 57:2 63:17 70:22		quickly 51:14 56:11 71:20 73:17	reflection 33:18
procedures 30:10	providing 13:15 22:23 24:1 39:2 71:8		quoted 32:5	refresh 15:1 16:15 34:5
proceed 57:8 67:19	public 35:6		quoting 32:4 33:2	refreshing 15:2
proceeding 4:14 67:14,19	publication 7:16	R		refund 8:9
proceedings 68:20 70:19	publications 35:2	RAB 20:25 21:17,19 22:16	recognition 28:10 32:1 35:1 51:15 52:25 53:14 63:25	refunds 18:1, 17 68:1
process 12:2, 4,22 60:7	publish 7:8	raised 24:8	recollection 15:1,2 25:8 26:24 27:18 34:6 45:13 46:23	Regina 8:10, 12
processed 49:13 50:4 51:18	published 12:10,11 13:1, 10,18	reached 55:22 57:2	recommendation 58:19,20 59:8,13,17 60:12,15,24	related 14:24 18:11 24:6,19 41:15 45:3 46:15 68:20 71:2
processing 8:7 18:1 49:20 50:6 61:19	pull 33:5	reaching 12:23	record 40:1,3 69:4	relates 8:19 53:7
produce 15:9 71:1	purposes 28:23 36:24 41:7	read 19:16 21:3 25:19 58:3	records 71:7	relationship 20:1 28:18,20 29:13
produced 51:21 71:3,8	pursued 43:22	reason 52:4 67:13	redacted 12:12	release 45:6, 23
production 15:10	purview 57:16	reasoning 28:2	reduces 73:24	relevance 11:5 48:9 70:3,7
professional 34:14 72:22	put 11:4 22:24 26:8 31:23 34:9 39:25 47:3,5,13 54:10 71:25	reasons 26:4	REEXAMINATION 73:19	relevant 33:24
professional s 9:14	putting 36:3		refer 8:7 36:5 41:9	rely 21:23
prominent 72:20				remember 10:14 11:19 21:6,7,17 27:17 51:19 52:6,7 66:16 68:22
pronounced 10:12				remotely 4:3, 4
pronouncing 10:11				
propose 38:11				
proposed 30:25 50:8 53:12 55:14				

repeated 22:16	70:11,22	returning 57:21	scope 11:8 12:25 17:23	sharing 49:8 57:24 73:14
rephrase 29:6,8 68:18	respond 9:9	returns 8:6 17:19,25 18:9, 13,15,16,21 21:24 27:20 40:6 43:7 49:7,13,17 50:4,7 51:18 57:23 58:5 61:19 65:13 67:23,25	section 16:21 32:17,20 33:12 37:14, 15	sheet 62:3
replacing 20:18	responded 26:3 50:10,17 55:18,21 56:16	revealed 52:1	sections 22:8 32:2	shortly 63:1
replied 56:20	responding 12:4 15:16 32:1 56:2,7	Revenue 19:8,14,17,22, 24 61:16	seek 14:13	show 33:1 56:22
report 4:23 5:7 8:3,4 9:24 10:2 19:8,14	response 15:9 17:1 30:25 31:3 51:3 57:1 59:15 62:5	revenues 40:7	seeking 43:24 48:14	shows 20:15
reported 5:22 10:4,7,8,15	responses 11:24 68:19	review 13:6,7 17:18 26:2,10 71:3,7	send 43:11 59:15 67:22	sign 58:16
reporter 4:2 25:20	responsibilities 11:2,18	reviewed 18:15 19:2 23:25 24:4 31:1 59:3 68:1	sending 14:19 31:2 49:12 52:14	signature 31:3
reporter's 26:6	responsibility 9:2 11:8 17:23 61:7	revisiting 18:17,21 19:21 20:22 21:24 47:17 59:17	sense 13:4	signed 30:16 31:1,13
reporting 8:15 9:19 10:6,10	responsible 7:5	Roberts 69:21,24 71:14	sentence 22:2,12 28:6 33:11 38:1,17 39:10 42:7 44:18 49:3 58:4	similar 68:2
reports 8:13 17:16 18:24 19:11	responsive 56:24 71:3	role 12:20 17:8 51:8	sentences 31:19	single 22:2,12 36:11,21 42:22 44:6 46:2
represent 9:7	rest 60:6	rolled 62:8	separate 19:9 27:20 37:14 43:7 49:6,18 51:18 57:23 59:20 67:5	single-entity 34:18
representative 7:9,22	result 57:20	role 12:20 17:8 51:8	separately 38:21 42:9 43:7	sir 6:22 21:16 27:2 33:9 46:7 48:1 55:15 61:2 73:3
represented 55:6 57:14	resumed 25:19 71:18	role 12:20 17:8 51:8	served 15:17, 20 17:6 68:20	sit 8:3 21:16 23:9 31:5 45:13 62:18
representing 68:7	retaliatory 40:23 41:1,8	rolled 62:8	service 5:13	situation 45:1 54:21
request 14:2 15:10,13 57:1 66:14 71:1	return 15:13 19:2 22:3,13 27:21 28:3 29:18,21 32:22 33:13 36:11,16,21 37:22 38:12 39:3,20 42:25 43:20,23 45:10 46:16 48:19 50:8 58:7,12 59:20 62:11,21 64:1, 2,11,17,24 65:1,11,19,25 66:7,9,19,20	S	services 7:14,15,24 8:1,8,11,16 18:12,16,20, 24 19:1,4,8,14 61:16,18,20	slightly 31:15 36:8
requested 14:15 15:9	required 11:1 59:23 63:25	satisfied 28:21	set 61:25	small 9:8 11:13
requests 8:9	researching 50:22 53:22	satisfy 28:18 29:12	share 25:5	sort 7:7,20 8:4,5 13:2 30:23 36:6 39:1,3 43:19 59:21
require 36:15	respect 6:24 12:2 13:13 23:23 25:10 36:22 41:20 58:13 68:16	schedule 67:7	shared 66:21 67:1	speak 54:15
required 11:1 59:23 63:25		schedules 73:4		specialist 6:12 10:8,18, 19,20,24
researching 50:22 53:22				specialists 10:7,17,22

20:8	37:8,9 40:19	55:3 57:12	61:19	Thursday 4:1
specialized	41:9,19 45:10,	58:12	technical	tie 74:4
19:10	12,15 48:7	talk 14:18	7:23 8:1,6,8,	time 5:19
specific	51:12 63:15	23:13 25:24	11,16 9:9	13:22 14:10,
16:19 28:25	statutes	talked 14:9,16	11:11 13:18	13,24 15:24,
70:24 71:9	16:17 27:25	43:16 45:4	25:18 30:11	25 16:4 17:20
specifically	39:12	56:3,18 72:14,	telephone	24:4,11 31:12,
27:15 29:10,	statutory	17	14:19 27:12	13,20 35:1,2
20 31:18	22:8 32:2 39:2	talking 64:14	60:16	39:4,13 40:16
39:16 42:7	Stewart 17:15	65:3,6 70:10	ten 27:6	42:12,20 43:1,
50:22 53:7	structure	tally 62:3	terms 8:21,23	8 47:10,13,17
68:15 72:15	8:23	tax 4:22 5:15,	26:23 41:18	57:4 58:16
spot 8:4	stuff 13:4	18,25 6:7,24,	test 19:25	60:1 63:8
spreadsheet	sub-2 65:4	25 7:2,8,21	28:18 29:12,	66:16 68:9
24:7 49:16	submitted	8:20 9:4,8,14,	13	73:3,9 74:6
50:1 52:9 68:3	59:6	15 11:8 12:20	testifying	timely 25:8
staff 36:1 45:5	submitting	14:13 17:7,9	58:3	times 9:6 14:9
stakeholder	59:4	18:12 23:23	testimony	61:23
12:8	subsequent	25:5 32:10	15:15 25:15	timing 56:13
stakeholders	44:2	34:14,24 35:5,	26:11 44:22	Timothy 14:6
11:25	substance	22 36:9,19,23	47:24 65:21	today 15:7
stand 31:8,11	26:7,21 45:14	40:6,23 41:8	tests 20:1	16:5 23:9 31:5
standards	67:4,13 68:9	49:7 50:3	28:20 29:16	45:13 62:18
36:14,15 37:3	substantial	52:13,19	thing 32:14	72:6 73:3,9
start 4:15 9:23	8:18	53:12 54:21,	things 11:15	today's 15:3
59:20 66:22	sufficient	25 55:11	15:3 31:11	16:3,12,13
started 18:9	49:12 50:3	57:23 58:5	71:23	told 25:25
27:19	51:17 62:4	61:12,17,18	thinking	44:17,25
state 4:15	sufficiently	65:10 66:20	58:10	45:14 58:15
6:25 23:12	49:19	67:3 68:20	Thompson	top 35:14
72:22	summary	69:1,2,10	4:7 5:1 11:4	track 62:1
statement	30:24	70:9,20 72:18,	22:20 23:1	traffic 56:23
21:20 22:13,	summer	22,25	29:4 33:20	transcription
15 36:18	14:23	taxes 6:25	34:8 35:12	26:6
38:24 39:11	surprise 35:4	40:7	36:12 39:24	treasurer
46:20 49:5	56:22	taxpayer	40:9,24 42:16	4:24 5:5,6,10
57:22 59:18	SWORN 4:10	13:2,3,5,23	44:8 47:23	12:13,14 13:9,
66:10	systems	22:3,12 32:6,	48:21 49:21	11,12 19:8,14
statements	44:20 46:1	11 36:11,21	52:17 53:16,	25:7
31:19	66:12	41:23 44:6,9	19 54:10 55:1,	treasurers
States 32:22		64:4 68:6	12 60:5,13	5:9 8:5
33:14 37:5,22	T	73:22 74:3	65:21 69:4	Treasury 4:7,
38:2		taxpayers	70:3,7 73:7,	19,25 5:12
statute 16:14,	taking 28:14	21:23 63:16	11,16,23	6:2,21 7:24
16,21 29:23	51:11 53:23	team 20:9,10	74:11	9:12 17:6
32:4,13,24		43:17 45:5,11	thought	21:21 35:22
33:2 36:7		teams 7:9,22	15:19 26:9	58:9 60:9
		tech 12:11	29:5 45:10	
		18:12,16,20,	58:15 64:15	
		24 19:1,4		

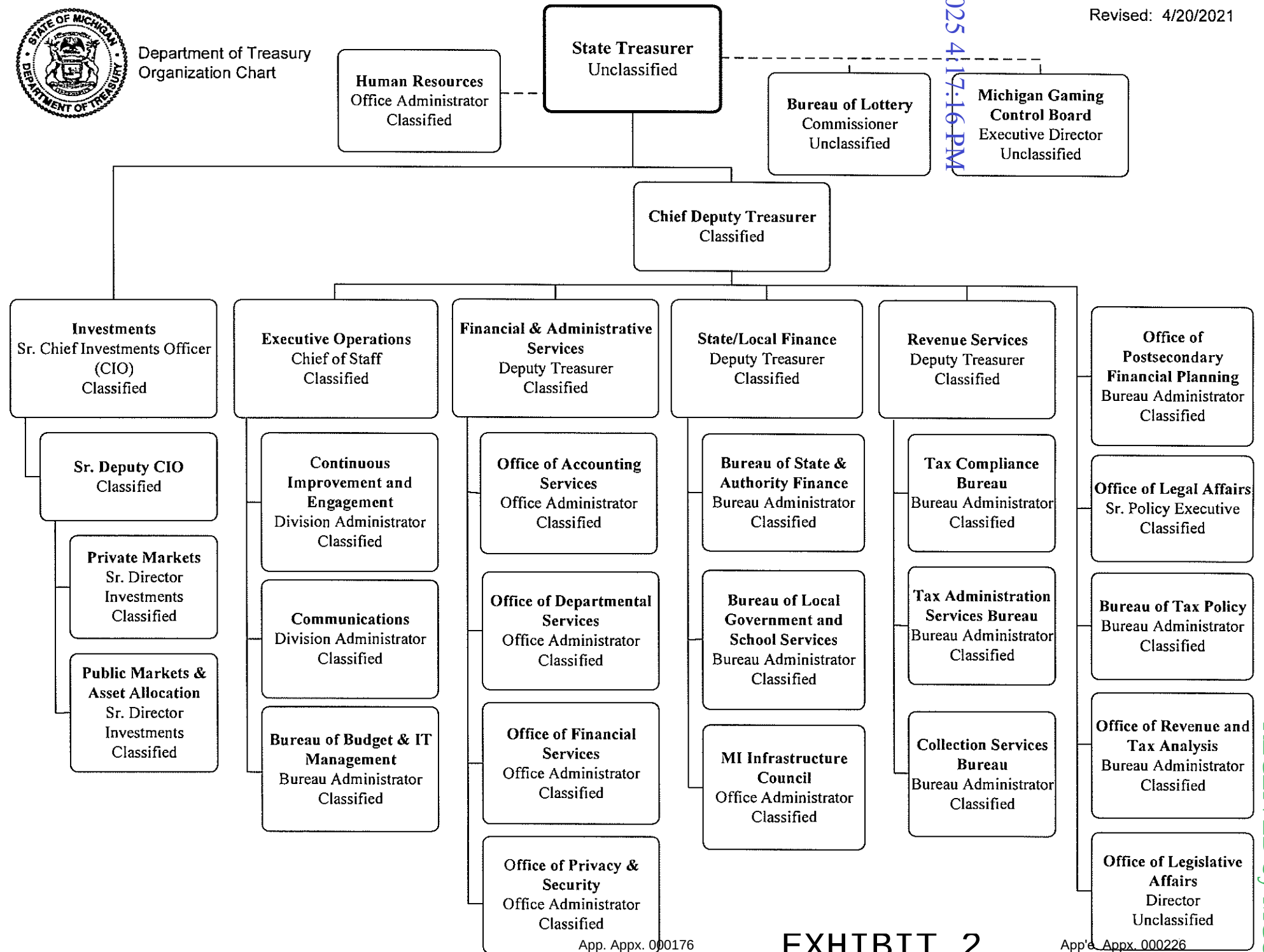
67:9,16 69:12 treated 36:11, 21,25 tribunal 9:8 11:15 68:20 69:1,2,10 70:20 true 30:5 55:20,21 60:25 66:15, 20 70:21 turn 27:1 29:25 71:25 typically 7:21 11:10 14:3	undertook 26:3 undisclosed 13:23 unhelpful 35:18 unified 64:1 unit 7:24 8:8 19:10 unitary 14:24 15:12 19:25 21:9 23:22 24:19 25:11 28:12,14,16, 25 29:2,18 32:14,21,23 33:13,15 34:1 36:10,20,24, 25 37:6,19,21, 23 38:18,20 39:7,8 42:13, 21 43:5,8 44:5,6 46:15, 25 47:8,9,11 48:3,4,8 52:10 53:4,10 54:1, 24 55:6 57:8 58:13 62:10, 20 64:11,16, 20,22 65:1,9, 16,18,19 66:8, 24 67:1,6 70:13 72:2,18 United 32:22 33:14 37:5,22 38:2 University 6:17 update 56:13 upfront 13:4 utilization 68:2 utilize 38:19 39:7,17 46:17, 24 47:4,8 48:3 65:17 66:24 utilized 25:11 53:4	utilizing 47:7, 15 V verbatim 27:17 verified 70:23 verify 70:25 versus 12:4,8 13:18 vet 13:23 views 25:2 virtue 26:9 W wanted 43:20 48:12 50:1 58:7,14 Waterhouse 14:10 weeks 51:4 weird 8:4 West 4:17 White 8:5 Wilkinson 4:9,13,17 15:14 54:11 71:20 73:9 willingness 73:4 winter 14:23 withdraw 6:6 word 28:14 74:5,7,9 words 26:7,8, 20 45:14 57:2 67:4 68:9 work 9:5,6 11:10 13:4,5 21:9 26:18 59:3 worked 20:8	36:3 45:10 working 22:23 72:23 works 41:18 write 47:10 writing 19:21 wrote 31:12 39:4,10 45:4 47:17 66:23 74:6 Y year 8:18 10:14 years 5:24 22:15 27:17 52:7



Department of Treasury
Organization Chart

Revised: 4/20/2021

4/20/2025 4:17:16 PM



App. Appx. 000176

EXHIBIT 2

App. Appx. 000226

RECEIVED by MCOA 4

Call, Justin (AG)

From: timothy.s.pratcshler@us.pwc.com
Sent: Monday, February 29, 2016 9:14 AM
To: Wilkinson, Lance R. (Treasury)
Subject: Re: CIT Insurance Premiums Tax - Combined Filing

Follow Up Flag: Follow up
Flag Status: Completed

Lance,

I wanted to follow up on my email below and see if you have had the opportunity to consider it in detail. If you could let me know, I would greatly appreciate it. If you have any questions or would like to discuss, please let me know.

Thanks!

Tim Pratechler

PwC | Principal - State & Local Tax
Office: (313) 394-6508 | Mobile: (248) 302-8226 | Fax: (813) 281-6131
Email: timothy.s.pratcshler@us.pwc.com
PricewaterhouseCoopers LLP
One Detroit Center, 500 Woodward Avenue, Detroit, Michigan 48226
<http://www.pwc.com/us>

Thoughts don't need paper to take shape.

From: Timothy S Pratechler/US/TLS/PwC
To: WilkinsonL@michigan.gov
Date: 02/19/2016 10:00 AM
Subject: CIT Insurance Premiums Tax - Combined Filing

Lance,

Per our discussion, the situation involves multiple insurance companies that currently file separate Michigan premiums tax returns using MI Form 4905. The entities are all affiliated (owned greater than 80%) under federal and Michigan definitions. The entities would like to file as a unitary business group on one MI Form 4905 that includes all related premiums tax filers. Filing as a unitary business group appears to be acceptable (if not required) based on the following statutory code sections:

- MCL 206.611(5) - 'taxpayer means ... an insurance company or unitary business group ...'.
- MCL 206.611(6) - 'unitary business group means a group of United States persons that are ... insurance companies ...'.
- MCL 206.691(1) - 'except as otherwise provided under section 680(3), a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group ...'.

In addition to the above code sections, filing as a unitary group is appropriate as there are no provisions indicating that insurance companies do not constitute a unitary group for purposes of the insurance tax and should not file combined. In fact, section 206.691(1) requires it. However, as the Supreme Court stated in *Malpass*, the taxpayer would have the ability to file either way - on a separate entity basis or on a combined basis. Even though *Malpass* was an individual income tax case, the analysis is similar in this context.

Secondarily and equally authoritative as the above, MCL Section 206.611(6) provides that a 'Unitary business group includes an affiliated group that makes the election to be treated, and to file, as a unitary business group under MCL Sec. 206.691(2). MCL Sec. 206.691(2) provides for the election and again, there's no mention of it not applying to an insurance company group. Furthermore, MCL Sec. 206.691(2) provides that the election may be done without the consent of the department. Based on these statutes, again, an insurance company group of affiliated companies can elect to file a unitary combined return in Michigan for purposes of the premiums tax once the election is made. If necessary, our client would make the election to file a combined return.

From a practical perspective, the filing of a single return would alleviate having to file multiple forms. As the forms are not currently set up to allow for a combined filing, our client proposes to simply prepare an attachment to Form 4905 that calculates the tax, listing each entity's activity and eliminating any intercompany activity; those calculations would be combined and those combined results would be entered on Form 4905.

Thank you for your consideration. Please let me know if you agree with the position described above, have any questions, or would like to discuss.

Tim Prateshler

PwC | Principal - State & Local Tax
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One Detroit Center, 500 Woodward Avenue, Detroit, Michigan 48226
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Thoughts don't need paper to take shape.

The content of this email is limited to the matters specifically addressed herein and is not intended to address other potential tax consequences or the potential application of tax penalties to this or any other matter.

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STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

RICK SNYDER
GOVERNOR

NICK A. KHOURI
STATE TREASURER

May 13, 2016

Mr. Timothy Pratschler
Principal – State and Local Tax
PriceWaterhouseCoopers LLP
One Detroit Center
500 Woodward Avenue
Detroit, Michigan 48226

Re: Corporate Income Tax, Combined Filing by Insurance Companies

Dear Mr. Pratschler:

Thank you for your email dated February 19, 2016 (enclosed), in which you proposed that a group of affiliated insurance companies may file a combined annual return (Form 4095). In your email, you also explain your view that combined filing by unitary insurance companies is permitted, if not required.

Revenue Administrative Bulletin (RAB) 1989-34 describes the procedures for issuing technical advice letters as position statements of the Michigan Department of Treasury (“Department”). Since a technical advice letter is binding on the Department as to the specific taxpayer, a request for a technical advice letter must specifically identify the taxpayer. Your request does not meet this requirement. Accordingly, please consider this letter an informal response.

The statute’s requirement to include a unitary insurance company in a unitary business group is a separate issue from the question of whether two or more unitary insurance companies are required or permitted to file a combined return to pay the premiums tax under Chapter 12¹. Accordingly, there is no dispute over the following issues:

- The definition of “taxpayer” in section 611² includes an insurance company.
- The definition of “unitary business group” in section 611³ includes an insurance company.
- The affiliated group election in section 691⁴, by way of definition of “affiliated group” in section 603⁵, may apply to an insurance company. The affiliated group election is an election to “have all of the persons that are included in the affiliated group to be treated as a unitary business group.”

¹ MCL 206.635-643.

² MCL 206.611(5).

³ MCL 206.607(6).

⁴ MCL 206.691(2).

⁵ MCL 206.603(1).

EXHIBIT 8

Mr. Timothy Prateshler
May 13, 2016
Page 2

- Two or more insurance companies may be unitary with one another and may constitute a unitary group.⁶

Therefore, an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group, even though the insurance company is filing separately. However, the Department is authorized to prescribe forms⁷ and has not developed its forms and systems in way that would accommodate the combined filing you request. To my knowledge, the Department has not yet received such a request, but we will take it into consideration for future years and releases. I will forward your inquiry to the divisions charged with forms and systems development.

If you have any questions regarding this letter, please feel free to contact me at 517-373-9600.

Sincerely,



Lance R. Wilkinson
Administrator, Tax Policy Division

Enclosure

⁶ An insurance company may also be unitary with a C corporation, an entity taxed as a C corporation, or a financial institution, and those persons may comprise a unitary business group.

⁷ MCL 206.693(3).

Call, Justin (AG)

From: timothy.s.pratcshler@us.pwc.com
Sent: Wednesday, June 22, 2016 11:30 AM
To: Wilkinson, Lance R. (Treasury); ""@INTL.michigan.gov
Cc: Matelski, Angela (TREASURY)
Subject: RE: CIT Insurance Premiums Tax - Combined Filing
Attachments: Michigan Department of Treasury - Combined Premiums Tax Returns 5.13.16.pdf

Lance,

Thanks so much for your email. I've attached the informal guidance you previously provided related to unitary groups of insurance companies for your reference given your current research of use of insurance credits by other insurance members of a UBG. Hopefully that assists you in expediting your response. If you have any questions or would like to discuss, please do not hesitate to reach out to me.

Thanks!

Tim Pratchshler

PwC | Principal - State & Local Tax
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PricewaterhouseCoopers LLP
One Detroit Center, 500 Woodward Avenue, Detroit, Michigan 48226
<http://www.pwc.com/us>

Thoughts don't need paper to take shape.

From: "Wilkinson, Lance R. (Treasury)" <WilkinsonL@michigan.gov>
To: Timothy S Pratchshler/US/TLS/PwC@Americas-US
Cc: "Bacigal, Angela (TREASURY)" <BacigalA@michigan.gov>
Date: 06/22/2016 11:24 AM
Subject: RE: CIT Insurance Premiums Tax - Combined Filing

Mr. Pratchshler-

Sorry for the delay in responding to you. We did receive your inquiry and are looking into it. Specifically, we're researching the issue of insurance credits being applied to other insurance companies. I expect we'll have a response to you within 2-3 weeks. Thank you.

-Lance

From: timothy.s.pratcshler@us.pwc.com [<mailto:timothy.s.pratcshler@us.pwc.com>]
Sent: Tuesday, June 14, 2016 8:29 AM
To: Wilkinson, Lance R. (Treasury) <WilkinsonL@michigan.gov>
Subject: Fw: CIT Insurance Premiums Tax - Combined Filing

EXHIBIT 9

Lance,

I wanted to follow up on my email below from last week. Could you confirm receipt and let me know if you have any input?
Thanks so much in advance!

Tim Pratschler

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----- Forwarded by Timothy S Pratschler/US/TLS/PwC on 06/14/2016 08:28 AM -----

From: Timothy S Pratschler/US/TLS/PwC
To: WjkinsonL@michigan.gov
Date: 06/06/2016 01:00 PM
Subject: Fw: CIT Insurance Premiums Tax - Combined Filing

Lance,

I greatly appreciate the informal guidance you provided related to the ability of a unitary business group of insurance companies to file a combined return and/or utilize the attributes on a group basis. As a result of that informal guidance, one of my clients has prepared a statement which it plans to attach to its separate Michigan Insurance Premium Tax returns to provide the Department information on the sharing of attributes. However, before submission of those returns I am hoping you, or someone from the Department, may be able to take a look at the attached and let me know if it has sufficient detail to ensure the returns are processed appropriately.

Please let me know if you have any questions or would like to discuss.

Thanks!

Tim Pratschler

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----- Forwarded by Timothy S Pratschler/US/TLS/PwC on 06/06/2016 11:35 AM -----

From: Timothy S Pratschler/US/TLS/PwC
To: WjkinsonL@michigan.gov
Date: 02/19/2016 10:00 AM
Subject: CIT Insurance Premiums Tax - Combined Filing

Lance,

Per our discussion, the situation involves multiple insurance companies that currently file separate Michigan premiums tax returns using MI Form 4905. The entities are all affiliated (owned greater than 80%) under federal and Michigan definitions. The entities would like to file as a unitary business group on one MI Form 4905 that includes all related premiums tax filers. Filing as a unitary business group appears to be acceptable (if not required) based on the following statutory code sections:

- MCL 206.611(5) - 'taxpayer means ... an insurance company or unitary business group ...'.
- MCL 206.611(6) - 'unitary business group means a group of United States persons that are ... insurance companies ...
- MCL 206.691(1) - 'except as otherwise provided under section 680(3), a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group ...'

In addition to the above code sections, filing as a unitary group is appropriate as there are no provisions indicating that insurance companies do not constitute a unitary group for purposes of the insurance tax and should not file combined. In fact, section 206.691(1) requires it. However, as the Supreme Court stated in *Malpass*, the taxpayer would have the ability to file either way - on a separate entity basis or on a combined basis. Even though *Malpass* was an individual income tax case, the analysis is similar in this context.

Secondarily and equally authoritative as the above, MCL Section 206.611(6) provides that a 'Unitary business group includes an affiliated group that makes the election to be treated, and to file, as a unitary business group under MCL Sec. 206.691(2). MCL Sec. 206.691(2) provides for the election and again, there's no mention of it not applying to an insurance company group. Furthermore, MCL Sec. 206.691(2) provides that the election may be done without the consent of the department. Based on these statutes, again, an insurance company group of affiliated companies can elect to file a unitary combined return in Michigan for purposes of the premiums tax once the election is made. If necessary, our client would make the election to file a combined return.

From a practical perspective, the filing of a single return would alleviate having to file multiple forms. As the forms are not currently set up to allow for a combined filing, our client proposes to simply prepare an attachment to Form 4905 that calculates the tax, listing each entity's activity and eliminating any intercompany activity; those calculations would be combined and those combined results would be entered on Form 4905.

Thank you for your consideration. Please let me know if you agree with the position described above, have any questions, or would like to discuss.

Tim Prateshler

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SAMPLE STATEMENT FOR REVIEW

STATEMENT ATTACHED TO AND MADE PART OF
FORM 4905
2015 INSURANCE COMPANY ANNUAL RETURN FOR
CORPORATE INCOME AND RETALIATORY TAXES
UNITARY BUSINESS GROUP FILING

- 1 MCL 206.611(5) states in relevant part that, "'Taxpayer' means a corporation, insurance company, financial institution, or unitary business group...." Further, MCL 206.611(6), a "'Unitary business group' means a group of United States persons that are corporations, insurance companies, or financial institutions...." Additionally, MCL 206.691(1) states "Except as otherwise provided under section 680(3), a unitary business group shall file a combined return...." As a result of these sections of the Michigan Corporate Income Tax Act, two more more insurance companies may be unitary with one another and constitute a unitary business group.
- 2 As a result of the statutory authority outlined in paragraph 1 above, the Taxpayer has analyzed its business activities and determined that it and its related insurance company affiliates constitute a unitary business group as defined by MCL 206.611(6) as each affiliated insurance company meets both the control (80% or greater owned) and relationship tests. Pursuant to MCL 206.691(1), a unitary business group typically files a combined return the Department is authorized to prescribe forms for insurance companies to report their tax due under the Corporate Income Tax.
- 3 While the Department's forms do not afford a unitary group of insurance companies the opportunity to file a combined return, members of a unitary business group of insurance companies may utilize benefits of the inclusion in a unitary business group even though the Department's forms prescribe a separate filing.
- 4 Certain members of the Taxpayer's in the unitary business group have excess premium tax credits available and two members of the in the unitary business group of insurance companies, Company 6 and Company 7 can utilize the credits to offset their premium tax liability.
- 5 The schedule below provides details, by each member of the unitary business group of insurance companies, of the credits available, credits utilized and the excess credits available for utilization by other members of the unitary business group. *(Amounts below do not represent actual amounts and are included for illustrative purposes.)*

	Company 1 XX-XXXXXX	Company 2 XX-XXXXXX	Company 3 XX-XXXXXX	Company 4 XX-XXXXXX	Company 5 XX-XXXXXX	Company 6 XX-XXXXXX	Company 7 XX-XXXXXX	Total
Line 19. Tax before credits	500,000	9,500,000	5,000,000	-	4,000,000	2,000,000	60,000	21,060,000
Credits								
Line 20a. Workers Compensations Placement Facility	-	-	-	-	-	-	-	-
Line 20c. Michigan Automobile Insurance Placement Facility	2,000,000	16,500,000	11,500,000	-	5,000,000	1,500,000	-	36,500,000
Line 22b Michigan Examination Fee @ 50%	10,000	100,000	85,000	-	40,000	20,000	-	255,000
Total credits available	2,010,000	16,600,000	11,585,000	-	5,040,000	1,520,000	-	36,755,000
Total credits utilized before unitary calculation (Line 21 plus 22b)	500,000	9,500,000	5,000,000	-	4,000,000	1,520,000	-	20,520,000
Additional credits utilized from other unitary entities	-	-	-	-	-	480,000	60,000	540,000
Line 25. Total Michigan Tax	-	-	-	-	-	-	-	-
Line 47. Total payments	200,000	3,500,000	1,800,000	-	1,670,000	900,000	65,000	8,135,000
Line 53. Overpayment	200,000	3,500,000	1,800,000	-	1,670,000	900,000	65,000	8,135,000
Line 55. Refund	200,000	30	1,800,000	-	1,670,000	900,000	65,000	8,135,000
Total credits available to offset other unitary entities	1,510,000	7,100,000	6,585,000	-	1,040,000	-	-	16,235,000
Less credit utilized by Company 6	(480,000)							(480,000)
Less credit utilized by Company 7	(60,000)							(60,000)
Total credits not utilized	970,000	7,100,000	6,585,000	-	1,040,000	-	-	15,695,000

EXHIBIT 10

Call, Justin (AG)

From: timothy.s.pratcshler@us.pwc.com
Sent: Wednesday, July 20, 2016 10:44 AM
To: Wilkinson, Lance R. (Treasury); ""@INTL.michigan.gov
Cc: Matelski, Angela (TREASURY)
Subject: RE: CIT Insurance Premiums Tax - Combined Filing

Hi Lance,

I wanted to follow up on this. If you could provide an update on timing, I would greatly appreciate it.

Thanks!

Tim Pratchshler

PwC | Principal - State & Local Tax
Office: (313) 394-6508 | Mobile: (248) 302-8226 | Fax: (813) 281-6131
Email: timothy.s.pratcshler@us.pwc.com
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From: "Wilkinson, Lance R. (Treasury)" <WilkinsonL@michigan.gov>
To: Timothy S Pratchshler/US/TLS/PwC@Americas-US
Cc: "Bacigal, Angela (TREASURY)" <BacigalA@michigan.gov>
Date: 06/22/2016 11:24 AM
Subject: RE: CIT Insurance Premiums Tax - Combined Filing

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Date: 02/19/2016 10:00 AM
Subject: CIT Insurance Premiums Tax - Combined Filing

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Thank you for your consideration. Please let me know if you agree with the position described above, have any questions, or would like to discuss.

Tim Pratchler

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INSURANCE COMPANIES/FINANCIAL INSTITUTIONS

Insurance Companies/Financial Institutions 1. Are mortgage companies financial institutions under the Corporate Income Tax?

ANSWER:

Possibly. MCL 206.651(f) defines a financial institution as:

(i) A bank holding company, a national bank, a state chartered bank, a state chartered savings bank, a federally chartered savings association, or a federally chartered farm credit system institution.

(ii) Any entity, other than an entity subject to the tax imposed under chapter 12, who is directly or indirectly owned by an entity described in subparagraph (i) and is a member of the unitary business group.

(iii) A unitary business group of entities described in subparagraph (i) or (ii), or both.

Thus, even though a mortgage company is not expressly defined as a financial institution, it will be considered a financial institution if it is owned directly or indirectly by a financial institution and is a member of the unitary business group of which the parent financial institution is also a member.

Insurance Companies/Financial Institutions 2. Does the \$100 liability threshold apply to insurance companies and financial institutions?

ANSWER:

Yes. Section 685 of 2011 PA 38 provides for a filing threshold and a liability threshold, stating:

a taxpayer, other than a taxpayer subject to the tax imposed under chapter 12 or 13, whose apportioned or allocated gross receipts are less than \$350,000.00 does not need to file a return or pay the tax imposed under this part... A taxpayer whose tax liability under this part is less than or equal to \$100.00 does not need to file a return or pay the tax imposed under this part.

This section clearly excludes insurance companies and financial institutions from the \$350,000 filing threshold but does not similarly limit the liability threshold. Therefore, an insurance company or financial institution with an annual liability of \$100 or less is not required to file a CIT annual return or pay the tax.

Insurance Companies/Financial Institutions 3. Do nonresident financial institutions located outside Michigan whose only activity in Michigan consists of an ownership interest in loans secured in whole or in part by real property located in Michigan have nexus under the CIT?

ANSWER:

A nonresident financial institution located outside Michigan whose only activity in Michigan consists of an ownership interest in loans secured in whole or in part by mortgages on real property located in Michigan will not have physical presence nexus under the CIT. However, nexus is determined by evaluating all facts and circumstances. To the extent that the nonresident financial institution, or its employee, agent, or independent contractor acting in a representative capacity, has physical presence in Michigan for more than one day, nexus is

established. Additionally, nexus exists if the nonresident financial institution actively solicits sales in Michigan and has Michigan gross receipts of \$350,000 or more, or if the taxpayer has an ownership interest or a beneficial interest in a flow-through entity, directly, or indirectly through 1 or more other flow-through entities, that has substantial nexus in this state. MCL 206.621.

Insurance Companies/Financial Institutions 4. The CIT franchise tax provides financial institutions with a tax base deduction for "the average daily book value of United States obligations and Michigan obligations." MCL 206.655(1). Does "average daily book value" include the premiums and discounts for U.S. obligations?

ANSWER:

Yes, where the premiums and discounts are reflected in the book value of the U.S. obligations.

The CIT defines United States obligations as:

all obligations of the United States exempt from taxation under 31 USC 3124(a) or exempt under the United States constitution or any federal statute, including the obligations of any instrumentality or agency of the United States that are exempt from state or local taxation under the United States constitution or any statute of the United States. MCL 206.651(s).

Michigan obligation is defined as:

a bond, note, or other obligation issued by a governmental unit described in section 3 of the shared credit rating act, 1985 PA 227, MCL 141.1053. MCL 206.651(k).

"Average daily book value" is not a defined term in the CIT or the Federal IRC. "Book value" is commonly understood to be the value at which an asset is carried on the taxpayer's balance sheet. Black's Law Dictionary, 8th ed. Thus, in order to reach the average daily book value of U.S. obligations a financial institution will calculate the daily value of the obligation as it appears on the institution's balance sheet and average this value over the days in the financial institution's tax year. If the book value of the U.S. obligation is affected by premiums and discounts on the institution's balance sheet then these amounts will also be included in the computation of average daily book value for purpose of the tax base calculation.

Insurance Companies/Financial Institutions 5. Financial Institutions are required to calculate the net capital tax base using a five year look-back period to find the average of net equity and certain deductions. Should a CIT taxpayer look to years under the MBT in order to calculate the 5 year period?

ANSWER:

Yes. MCL 206.655 requires a financial institution to compute its net capital tax base "by adding the financial institution's net capital as of the close of the current tax year and preceding 4 tax years and dividing the resulting sum by 5." This look-back period will require taxpayers to use data from MBT years for the first 4 tax years under the CIT.

Insurance Companies/Financial Institutions 6. (Rescinded beginning with tax year 2017) Financial Institutions must calculate the net capital tax base five year look-back period to find the average of net equity and certain deductions. The CIT provides guidance in the case of a

merger or acquisition of a financial institution for future tax years only. How does a financial institution that has combined with another financial institution by acquisition calculate the five year averaging period for the year prior to an acquisition?

ANSWER:

The net capital of each of the combined entities should be included separately in the tax base look back period for years prior to the acquisition. The sum of these separate calculations should then be combined to reach net capital of the surviving financial institution entity. Net capital from the look back period for both the surviving and acquired entities should be included in the calculation of the tax base.

Insurance Companies/Financial Institutions 7. Financial Institutions pay tax under the CIT on net capital. Computation of this tax base requires a financial institution to average the past five years of net equity with certain deductions. How does a unitary business group of financial institutions perform this calculation for entity members that have not been a part of the UBG for five years but became members of the group sometime within the five year look-back period?

ANSWER:

The term "financial institution" includes a unitary business group of financial institutions. MCL 206.651(f). A financial institution must compute the current tax year tax base by taking a five year average of net capital. MCL 206.655(2). For a UBG of financial institutions each member entity of the group must compute net capital, using the five year average, individually. The group then sums the results of the entities' calculations to reach net capital for the group. Once a member entity is considered a part of a UBG of financial institutions, it must compute its individual net equity in accordance with this requirement. This means that an entity that was newly added to the UBG will compute its net capital by using the average of five years of net capital and then adding this result to the results of the other member entities of the group. A shorter look-back period may apply if the new UBG member has not itself been in existence for five years. MCL 206.655(2).

Insurance Companies/Financial Institutions 8. How must a foreign insurer file for purposes of the retaliatory tax when the insurer's state of incorporation requires unitary filing?

ANSWER:

A foreign insurer must calculate its burden for purposes of the Michigan retaliatory tax according to the laws of its state of incorporation. If the insurer's state of incorporation requires filing on a unitary basis, the insurer should compute its retaliatory tax burden using this method.

The retaliatory tax is calculated by first computing the burden to the foreign insurer doing business in Michigan and then computing the burden that would be imposed upon a hypothetical Michigan insurer as if it was performing the identical business activity in the foreign state. When making this calculation it should be assumed that the hypothetical Michigan insurer would calculate its liability in the same manner required of the foreign insurer.

Insurance Companies/Financial Institutions 9. Does a unitary group of insurance companies have to file a combined CIT return?

ANSWER:

No. Insurance companies are not specifically excluded from the definition of a unitary business group, found at MCL 206.611(6), and thus may constitute a unitary business group. In practice, however, there is no practical effect of this possibility. The tax on authorized insurance

companies is equal to 1.25% of gross direct premiums written on property or risk located or residing in Michigan. MCL 206.635(2). Because the tax is only on property or risk located in Michigan there will be no traditional apportionment for insurance companies. Thus, even if an authorized insurance company is unitary with another authorized insurance company under MCL 206.611(6), this will have no effect in calculating the tax. A combined return will not be necessary.

Insurance Companies/Financial Institutions 10. Under the CIT "insurance company" is defined as an "authorized insurer" at MCL 206.605(5). What is the meaning of "authorized insurer"? If an insurance company is not an "authorized insurer" how is it taxed under the CIT? If a non-nexus insurance member of a unitary business group is not an "authorized insurer" how is this member treated?

ANSWER:

An authorized insurer is an insurer as defined by the insurance code of 1956, 1956 PA 218, MCL 500.106, as "any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds organization, fraternal benefit society, and any other legal entity, engaged or attempting to engage in the business of making insurance or surety contracts," which is authorized according to the insurance code at section 108. "Authorized" means "an insurer duly authorized, by a subsisting certificate of authority issued by the [insurance] commissioner, to transact insurance in this state." Thus, an insurance company under the CIT is an insurer as defined and authorized by the insurance code.

If an insurance entity does not meet these requirements, that entity is taxed as a standard taxpayer under the CIT. Likewise, a non-nexus insurance member of a unitary business group which is not an "authorized insurer" will be treated as a standard taxpayer and its corporate income and sales will determine the liability of the group.

The direction of MCL 206.691, that any corporate income and sales attributable to the insurance company be eliminated from the UBG return, is not applicable because the unauthorized insurance company is not "subject to the tax under chapter 12."

Michigan Compiled Laws Annotated
Chapter 206. Income Tax Act of 1967
Income Tax Act of 1967 (Refs & Annos)
Part 2. Corporate Income Tax (Refs & Annos)
Chapter 16. Certified Credit Election, Payment, Filing and Administration (Refs & Annos)

M.C.L.A. 206.691

206.691. Filing of combined return by unitary business group;
election by affiliated group to file as unitary business group

Effective: February 25, 2014
Currentness

Sec. 691. (1) Except as otherwise provided under section 680(3),¹ a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group. Each United States person included in a unitary business group or included in a combined return shall be treated as a single person, and all transactions between those persons included in the unitary business group shall be eliminated from the corporate income tax base, the apportionment formulas, and for purposes of determining exemptions, credits, and the filing threshold under this part. If a United States person included in a unitary business group or included in a combined return is subject to the tax under chapter 12 or 13,² any corporate income attributable to that person shall be eliminated from the corporate income tax base and any sales attributable to that person shall be eliminated from the apportionment formula under this part.

(2) A person that is part of an affiliated group may elect without the consent of the department to have all of the persons that are included in that affiliated group to be treated as a unitary business group. A taxpayer that elects to file as a unitary business group pursuant to this subsection shall compute its tax under this part in accordance with all other provisions of this part that apply to a unitary business group. The taxpayer shall make the election under this subsection on a form or in a format as prescribed by the department that is to be filed in a timely manner with the taxpayer's annual return. Each person included in the affiliated group is deemed to have agreed to be bound by the election made under this subsection and any renewal of that election and to have waived any objection to its inclusion in the affiliated group and treatment as a unitary business group. Each person that subsequently enters the affiliated group after the tax year for which the election is made is deemed to have consented to the application of and is bound by the election and to have waived any objection to its inclusion in the affiliated group and treatment as a unitary business group. An election made pursuant to this subsection is irrevocable and binding for and applicable to the tax year for which it is made and for the next 9 tax years. The election shall remain in effect for the time period in which the ownership requirements under this section are met irrespective of whether a federal consolidated group to which the unitary business group belongs discontinues the filing of a federal consolidated return or whether the common parent changes due to a reverse acquisition or acquisition by a related person. Upon the expiration of the election after it has been in effect for 10 tax years, an election may be renewed for another 10 tax years, without the consent of the department; provided however, that in the case of a nonrenewal a new election under this subsection is not permitted in any of the immediately following 3 tax years. The renewal shall be made on a form or in a format as prescribed by the department that is to be filed in a timely manner with the taxpayer's annual return after the completion of a 10-year period for which an election under this subsection was in place.

Credits

P.A.1967, No. 281, § 691, added by P.A.2011, No. 38, Eff. Jan. 1, 2012. Amended by P.A.2012, No. 70, Imd. Eff. March 29, 2012; P.A.2013, No. 266, Imd. Eff. Dec. 30, 2013; P.A.2014, No. 14, Imd. Eff. Feb. 25, 2014.

Editors' Notes

APPLICATION

<P.A.2014, No. 14, is effective for tax years that begin after December 31, 2013.>

Footnotes

1 M.C.L.A. § 206.680.

2 M.C.L.A. § 206.635 et seq. or 206.651 et seq.

M. C. L. A. 206.691, MI ST 206.691

The statutes are current through P.A.2021, No. 6, of the 2021 Regular Session, 101st Legislature. Some statute sections may be more current; see credits for details.

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REVENUE ADMINISTRATIVE BULLETIN 2018-12

Approved: May 23, 2018

CORPORATE INCOME TAX
UNITARY BUSINESS GROUP CONTROL TEST AND RELATIONSHIP TESTS

(This RAB replaces RAB 2013-1)

Pursuant to MCL 205.6a, a taxpayer may rely on a Revenue Administrative Bulletin issued by the Department of Treasury after September 30, 2006, and shall not be penalized for that reliance until the bulletin is revoked in writing. However, reliance by the taxpayer is limited to issues addressed in the bulletin for tax periods up to the effective date of an amendment to the law upon which the bulletin is based or for tax periods up to the date of a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired that overrules or modifies the law upon which the bulletin is based.

RAB 2018-12. Under the Corporate Income Tax ("CIT"), a unitary business group ("UBG") is two or more qualifying United States persons that satisfy both a *control test* and one of two alternate *relationship tests*, or an affiliated group that has properly elected to be treated as a UBG.¹ A UBG is a single taxpayer under the CIT and must file a combined return.² Foreign persons and foreign operating entities cannot be included in a UBG.³

This Revenue Administrative Bulletin ("RAB") describes the *control test* and the two alternative *relationship tests* described in MCL 206.611(6). If a group of entities satisfies the control test as described in the statute, and if that same group also satisfies one of two relationship tests described in this RAB, that group of entities will constitute a UBG.

ISSUES

- I. How is a UBG defined under the CIT?
- II. What is the control test under the CIT?
- III. What are controlled groups of entities?

¹ MCL 206.611(6), 206.691(2).

² MCL 206.611(5), 206.691(1).

³ *In re Estate of Wheeler*, 297 Mich App 411 (2012), held that for purposes of Part 1 of the Income Tax Act, there is no water's edge limitation on apportionment of business income. This holding is not applicable to the CIT, which expressly prohibits a foreign operating entity from being a member of a UBG. See MCL 206.611(6) and 206.607(3).

- IV. How do voting agreements affect the control test?
- V. How is control determined for nonstock nonprofit organizations?
- VI. What is "indirect" ownership?
- VII. What are the relationship tests under the CIT?
- VIII. What special considerations exist in applying the relationship tests?
- IX. What factors should be weighed in determining whether either relationship test is met?

CONCLUSIONS

I. UNITARY BUSINESS GROUP DEFINED

Under the CIT, a UBG is defined as:

a group of United States persons that are corporations, insurance companies, or financial institutions, other than a foreign operating entity, 1 of which owns or controls, directly or indirectly, more than 50% of the ownership interest with voting rights or ownership interests that confer comparable rights to voting rights of the other members, and that has business activities or operations which result in a flow of value between or among members included in the unitary business group or has business activities or operations that are integrated with, are dependent upon, or contribute to each other.⁴

A corporation is a person that is required or has elected to file as a C corporation as defined under section 1361(a)(2) and section 7701(a)(3) of the Internal Revenue Code. A corporation does not include an insurance company or a financial institution.⁵ A group must meet both a control test and one of two alternative relationship tests before that group will be a UBG. Alternatively, Public Act 266 of 2013 amended the CIT to permit affiliated groups to make an election to be treated as a UBG for tax years beginning after December 31, 2012. This RAB does not address UBGs formed pursuant to that election.

II. CONTROL TEST DEFINED

The control test is satisfied when one person owns or controls, directly or indirectly, more than 50% of the ownership interests with voting or comparable rights of the other person or persons.

⁴ MCL 206.611(6).

⁵ MCL 206.605(1).

A person owns or controls more than 50% of the ownership interests with voting rights or ownership interests that confer comparable rights to voting rights of another person if that person owns or controls, directly or indirectly, (1) more than 50% of the total combined voting power of all ownership interests with voting (or comparable) rights **or** (2) more than 50% of the total value of all ownership interests with voting (or comparable) rights. "Ownership interest with voting rights" includes all classes of stock in a corporation entitled to vote that possess the power to elect the members of the board of directors of the corporation. "Ownership interests that confer comparable rights to voting rights" include instruments, contracts, agreements, or other authority demonstrating an ownership interest in an entity that confers power in the owner to vote in the selection of the management of that entity.

Example 1. Corporation A owns 5 shares of class A stock and 10 shares of class B stock in Corporation X. Corporation B owns 40 shares of class B stock in Corporation X. Corporation C owns 50 shares of preferred stock in Corporation X. Corporation X has no other outstanding stock in any class. Each class A share has 10 votes per share of stock owned. The class B shares have 1 vote per share of stock. The preferred shares have no voting rights. Corporation A owns 60% of the total voting rights of Corporation X and satisfies the control test.

III. CONTROLLED GROUPS OF ENTITIES

A person owns or controls more than 50% of the ownership interests with voting rights or ownership interests that confer comparable rights to voting rights of another person if that person owns or controls (1) more than 50% of the total combined voting power of all ownership interests with voting (or comparable) rights **or** (2) more than 50% of the total value of all ownership interests with voting (or comparable) rights. Entities that satisfy the CIT control test constitute "controlled groups of entities." A controlled group of entities is described below.

(A) Parent-Subsidiary Controlled Group of Entities. A parent-subsidiary controlled group of entities satisfies the control test. A parent-subsidiary controlled group of entities means any group of one or more chains of entities connected through ownership with a common parent if (1) the common parent directly or indirectly owns more than 50% of the ownership interests with voting or comparable rights of at least one other entity, and (2) more than 50% of the ownership interests with voting or comparable rights of each entity other than the common parent is owned directly or indirectly by one or more of the other entities.

Example 2. Corporation A owns 51% of Corporation B, which owns 51% of Corporation C, which owns 51% of Corporation D. The common parent owns more than 50% of the stock in at least one other entity (Corporation B), and more than 50% of the stock of each entity other than the common parent is owned by at least one other entity in the chain. Corporations A,

B, C, and D are part of a parent-subsidary controlled group of entities and satisfy the control test for UBGs.

Example 3. Same facts as Example 2, except that Corporation C is a foreign person. Corporations A, B, and D are part of a parent-subsidary controlled group of persons and satisfy the control test for UBGs. Corporation C, as an intervening foreign person, is still used to determine ownership and control, but is excluded from the UBG because it is not a United States person as required under MCL 206.611.

Example 4. Corporation A owns 51% of Corporation B, which owns 51% of Partnership 1. Partnership 1 owns 51% of Corporation C. Corporations A, B, and C are part of a parent-subsidary controlled group of persons and satisfy the control test for UBGs. Partnership 1 is still used to determine ownership and control even if it is excluded from the UBG.

(B) Excluded Ownership Interests. For purposes of determining ownership or control under the control test, the Michigan Department of Treasury (the "Department") will apply IRC 1563(c) to exclude certain ownership interests from determination of ownership and control.

Example 5. Corporation X owns 50% of Corporation Y. The remainder of Corporation Y is owned by an individual who is also a principal stockholder under IRC 1563(c) of Corporation X. Corporation Y owns 51% of Corporation Z. Because the individual is a principal stockholder of Corporation X, his or her ownership interest in Corporation Y is treated as an excluded ownership interest under IRC 1563(c) as applied to the CIT. For purposes of the control test for UBGs, Corporation X controls 100% of Corporation Y and 51% of Corporation Z.

(C) Controlled Group of Entities Without Common Control. In certain circumstances where a controlled group of entities are not in fact under the control of a member of the controlled group or under common control of any person, the controlled group may fail to satisfy control standards for unitary businesses generally described by U.S. Supreme Court precedent. In most of these cases, the controlled group of entities in question would fail the relationship test under MCL 206.611(6). However, if it is determined – despite satisfying the control test as described in this RAB and the relationship test under MCL 206.611(6) – that the members of the controlled group of entities are not under common control of a person (including a member of the purported controlled group) or group of related persons, then that controlled group of entities will not satisfy the control test for purposes of MCL 206.611(6). One or more persons within the purported controlled group may nonetheless comprise one or more controlled groups of entities or may be required to file separate returns.

IV. VOTING AGREEMENTS

For purposes of this RAB, in determining whether the ownership interests owned by a person possess voting (or comparable) rights, the Department presumes the following, subject to rebuttal by the taxpayer:

- (1) Unless noted otherwise below, ownership interests will be considered as possessing the voting rights accorded to such interests by statute, organizational documents filed with the state, by-laws, certificates, agreements, or other authority.
- (2) If there is any agreement that an owner will not vote his or her interests in an entity, the formal voting rights possessed by his or her interests will be disregarded in determining the percentage of ownership interests with voting rights owned by the other owners of the entity.
- (3) If there is any agreement that an owner will vote his or her ownership interests in the manner specified by another owner of the entity, the ownership interests with voting rights owned by the first owner will be considered to be owned by the other owner.
- (4) If an owner transfers voting power by proxy, voting trust, agreement, or similar device, and that transfer is revocable by the transferor, then the transferor shall be considered to be the owner of any ownership interest with voting rights otherwise transferred.

However, if there is any evidence of an implied or oral agreement or concerted action between or among owners or other persons, the Department will examine all of the facts and circumstances in determining whether the ownership interests owned by a person or persons possess voting (or comparable) rights.

V. NONSTOCK NONPROFIT ORGANIZATIONS

For entities without stock or other forms of ownership interests, such as nonstock nonprofit organizations, a parent entity controls more than 50% of the ownership interests with voting or comparable rights if more than 50% of the directors or trustees of that organization are either representatives of or controlled by the parent organization.

VI. INDIRECT OWNERSHIP

Under MCL 206.611, ownership and control includes indirect ownership and control. In *LaBelle Management, Inc, v Michigan Dep't of Treasury*, the Michigan Court of Appeals defined indirect ownership to mean ownership through an intermediary, as is the case in a parent-subsidary chain of relationships.⁶ The control element cannot be met by

⁶ *LaBelle Management, Inc, v Michigan Dep't of Treasury*, 315 Mich App 23, 37 (2016).

constructive ownership or ownership through attribution whether it be entity attribution or family attribution. By the court's definition, where the ownership or control element of a group of entities is based solely on attribution of ownership between sibling entities, a UBG does not exist as to those entities.

VII. THE TWO ALTERNATIVE RELATIONSHIP TESTS

The definition of a UBG, in addition to satisfying the control test, requires that the group of persons have business activities or operations that:

- (1) result in a flow of value between or among persons in the group; **OR**
- (2) are integrated with, are dependent upon, or contribute to each other.

A taxpayer need only meet one of the two alternative tests to satisfy the relationship test. Affiliated groups making an election to be treated as a UBG under MCL 206.691(2) need not satisfy a relationship test.

(A) Flow of Value Test. The United States Supreme Court described a unitary business as a functionally integrated enterprise whose parts are mutually interdependent such that there is a flow of value between them.⁷ There must exist "some sharing or exchange of value not capable of precise identification or measurement-beyond the mere flow of funds arising out of a passive investment. . . ."⁸ In determining whether a flow of value exists, a relevant question in the inquiry is whether contributions to income resulted from "functional integration," "centralization of management," and "economies of scale."⁹ No one fact determines whether functional integration, centralization of management or economies of scale exist. Rather, the statutory test requires that the totality of facts and circumstances surrounding the business activities and operations be weighed and examined for cumulative effect.

(1) Functional Integration. Functional integration refers to transfers between, or pooling among, business activities that significantly affect the operations of the entities. This may include, but is not restricted to, the transfer or pooling of products or services, shared technical information, marketing information, purchasing, distribution systems and intangibles such as patents, trademarks, service marks, copyrights, trade secrets, know-how, formulas, or processes. There is no requirement that a specific type of functional integration exist.

Both horizontal integration and vertical integration may use types of functional integration. Horizontal integration is typified by entities that are engaged in similar business activities or processes, such as two fertilizer plants, or a chain of retail stores. These entities may be functionally integrated when, for example, they share common marketing, purchasing or distribution systems. Vertical integration applies when various

⁷ *Container Corp of Am v Franchise Bd*, 463 US 159 at 178-179 (1983).

⁸ *Id.* at 166.

⁹ *Id.* at 179.

entities each engage in a different step in a structurally coordinated enterprise. An example of vertical integration is a group of entities where one entity mines ore, that raw ore is supplied to another entity that smelts and refines the ore, and a third entity fabricates the refined ore into consumer goods. It is irrelevant that the various steps in the process are operated substantially independent of each other. When the component parts are closely connected to each other, the relationship is functionally integrated and inseparable. When there is functional integration that renders a separation of the different operations unnecessary or impossible, the relationship test is satisfied.

(2) **Centralized Management.** Centralized management entails involvement and oversight by management in the operational decisions of the entities. Directors, officers and other management personnel making decisions that affect the business activities of the entities and that operate to benefit the operations of the group of entities as a whole indicate a centralized management. Centralized management may flow down from parent to subsidiary, up from subsidiary to parent, from one subsidiary to another, or in any combination. The mere decentralization of day-to-day management responsibility and accountability will not preclude a finding that a centralized management exists. When an integrated executive force appears to exist that has control over major policy decisions, this factor is evidence that centralized management exists. Whether centralized management actually exists will be determined by the facts and circumstances of each case. The focus is on the role of management of an entity or entities in the affairs of its affiliates, whether the management process is grounded in its own operational expertise and whether the process is applied to the other entities.¹⁰ For example, the business “guidelines” established by a parent for its subsidiaries, the “consensus” by which a parent’s management process was involved in the subsidiaries’ business decisions, and the oversight and other assistance provided by a parent to its subsidiaries all point to centralized management.

(3) **Economies of Scale.** “Economies of scale” is a phrase that refers to a relationship between business activities that results in a significant decrease in the cost of operations or administrative functions for the entities due to an increase in operational size. Economies of scale may result from the presence of functional integration or centralized management. For example, the decision to pool advertising may indicate functional integration and also indicate that a centralized management decision was made resulting in economies of scale. There is no clear delineation between functional integration, centralized management, and economies of scale. One factor may evidence the satisfaction of one or more of the flow of value standards.

(B) **Contribution/Dependency Test.** The alternate “contribution/dependency” relationship test asks whether business activities are integrated with, are dependent upon or contribute to each other. Business activities that are dependent upon or that contribute to the income or value of the whole demonstrate operations that are engaged in a unitary business.¹¹ The focus is on whether one entity’s business activity is dependent on the business activity of another entity or whether the activity of one entity

¹⁰ *Id.* at 180 n 19.

¹¹ *Edison California Stores v McColgan*, 30 Cal 2d 472; 183 P2d 16 (1947).

contributes to the activity or operations of another entity. This occurs under many of the same circumstances as the flow of value test. Where the facts indicate that business activities are conducted and managed under one centralized system, there is evidence that the entities are dependent upon each other or that they contribute to each other such that the elements of a UBG are present.

VIII. SPECIAL APPLICATION CONSIDERATIONS

(A) Application of Links in a Chain within a Group. It is not necessary for all entities to have a direct relationship connection with every other entity for a unitary group to exist. It is sufficient if the relationship is indirect. So long as each person in a controlled group has a flow of value, or contributes to, or is integrated with at least one other person within the controlled group, the entire group will have a unitary relationship. All that need be established is that an entity forms an inseparable part of a UBG's business wherever conducted. For example, Corporations X, Y, and Z have an indirect relationship in that Corporation X is a raw material supplier to Corporations Y and Z that are wholly owned subsidiaries of Corporation X. Corporation X produces oil, Corporation Y is a fertilizer manufacturer, and Corporation Z produces tires. Corporation X sells petroleum products to the two subsidiaries for use in their respective manufacturing processes. This relationship allows Corporation X to better estimate production needs and provides a diversified market for its oil production. Corporations Y and Z have no common officers, sales, administrative functions, or technologies that are shared or pooled between them. Corporation X is unitary with Corporation Y and Corporation Z when the facts and circumstances surrounding the relationship between Corporation X and each subsidiary demonstrate a flow of value or contribution and dependency when considered alone. Under the "links in the chain" unitary application, the intangible flows of value within the group serve to link the entities together as if they were a single entity. The fact that there is no direct flow of value or dependency between the two subsidiaries, Corporations Y and Z, does not preclude the entities from being part of the unitary group. All three corporations are a single UBG.

(B) Instant Unity: Establishment of a Unitary Relationship. Whether the unitary relationship can arise "instantly" depends on the surrounding facts and circumstances. Instant unity refers to the situation where a new entity is acquired or formed by another entity and the new entity establishes a unitary relationship the instant the entity is formed or the stock or assets are acquired. A unitary relationship may take time to develop when an entity acquires another. This may be so even if the entities are in the same business and are complementary. Many times, the integration of the acquired entity will occur over a period of time and it will continue to operate independently. Such autonomous operation may require a longer period of time for the unitary relationship to develop. In contrast, the acquisition of an entity where there was a pre-existing relationship may support a finding of an instant unitary relationship. For example, if the purchaser had a minority interest and had a presence on the board of directors, or had indirectly influenced operations, or the acquired entity was a supplier of inventory or buyer of products from the purchaser, those facts would be important considerations in determining whether an instant unitary relationship exists.

On the other hand, when a new entity is formed, there may be a financial infusion of capital, the transfer of personnel, transfer of intangibles and knowledge, pooling of expertise, pooled marketing and shared use of established policies, procedures and administrative plans. These factors would tend to support a conclusion that an "instant" unitary relationship exists.

The same relationship tests set out in statute are used for determining if an acquired or newly formed entity is included in the unitary group. There are no legal tests separate from the two standard unitary relationship tests set forth in the statute that are used for determining if instant unity exists. Also, rules governing federal consolidated groups for federal purposes are not dispositive as to whether a UBG is formed for CIT purposes. When a federal consolidated group acquires another entity and it becomes part of the federal consolidated group without further election, the acquired entity may not automatically be included in the UBG for CIT purposes. The acquired or newly formed entity must still meet the control test and either of the two relationship tests to be included in the CIT UBG. There is no specific time requirement that dictates when a person becomes a member of a UBG. Whenever both the control test and one of the two relationship tests are met, that person must file as a member of the UBG, and it remains a member of that group so long as the control test and one of the two relationship tests continue to be met.

As the control test is the more objective of the two unitary group tests, it will often be addressed first. When the control test is met, taxpayers should be prepared to provide explanations of the review conducted to determine that the entities did not meet the relationship test and that they should file separately. If a taxpayer makes a determination that one of the two relationship tests has been met, or has not been met, it must also be able to provide facts and circumstances that support the finding. The taxpayer's determination, however, may be rebutted by the Department based on the actual facts. If the facts cannot support a finding that one of the two relationship tests has been met for a controlled entity, the taxpayer must indicate the excluded entity on the Department's form,¹² and state the reason why the entity is not part of the UBG even though the control test is met.

IX. FACTORS DEMONSTRATING A FLOW OF VALUE OR DEPENDENCY

The following factors may support a finding that functional integration, centralization of management, or economies of scale exist. These factors can also support a finding that the entities are dependent upon, or contribute to the business activities of each other. The following factors are not intended to be all-inclusive; they are intended to provide examples of factors that can support a finding that a UBG exists. Further, the factors discussed are not intended to provide a hierarchy of importance; rather, each factor must be weighed in light of the totality of the facts and circumstances.

¹² Form 4896, Michigan Corporate Income Tax Unitary Business Group Affiliates Excluded from the Return of a Standard Taxpayer; Form 4910, Part 3, Michigan Corporate Income Tax Unitary Business Group Combined Filing Schedule for Financial Institutions.

Evidence of functional integration may be provided by the following factors:

1. Intercompany sales, exchanges, or transfers of intangibles, services or products between business entities. Sales at fair market value will not prevent a finding of functional integration because intercompany sales can represent a steady market for a seller or source of products for a buyer. The amount of the intercompany sales as a percentage of total sales and the nature of the items sold will reflect the significance of this factor in establishing functional integration. Sales among horizontally or vertically integrated entities are an indication of functional integration.
2. Transfers of technical information, know-how, trade secrets, research and development or other intangibles that are significant to the operations or activities of the entities.
3. The sharing and use of any administration, accounting, payroll, inventory control or distribution systems that are controlled through a common network.
4. Purchases of substantial quantities of goods, services or intangibles significant to the entities' sales or operations, particularly if the purchases result in cost savings.
5. Common marketing that results in mutual advantage. Common marketing is found when the business entities' products are sold to a common customer, the entities use a common trade name or identification, or the entities identify themselves as members of the same enterprise. Common advertising can exist whether it is obtained through an external or internal advertising provider.
6. Common intercompany financing. This may include the pledging of credit or guarantee by one entity for the benefit of another if the financing serves an operational purpose. An example might be the pledging of credit to secure another member's loan that will be used to expand its manufacturing capabilities. Lending for passive investment purposes does not by itself provide evidence of functional integration. The financing practices must contribute to the operational integration of the entities.

Evidence of centralized management exists when common officers or management participate in decision-making for the various entities. Management may share knowledge or expertise among the entities. When an integrated executive force appears to exist that has control over major policy decisions, this factor is evidence that centralized management exists, but is not conclusive. Common officers, directors or management alone does not provide evidence of centralized management. Whether centralized management exists depends on the actual facts and circumstances and whether the control impacts the overall operational strategy of the entities.

Economies of scale may be evidenced by:

1. Centralized purchasing designed to achieve savings through volume, timing of purchases or interchangeability of parts.
2. Centralized administrative functions such as legal services, accounting, payroll, human resources, and employee benefit administration. An entity that achieves cost savings through affiliation with other entities, which it otherwise would not be able to obtain on its own due to size, market, or financial resources.

The fact that a particular factor may provide evidence of functional integration does not mean that it cannot also provide evidence of economies of scale or centralized management, and vice versa.

Under the alternate "contribution/dependency" relationship test, businesses are "integrated with, are dependent upon, or contribute to each other" under many of the same circumstances that establish flow of value. However, this alternate relationship test is also commonly satisfied when one entity contributes to the financing of operations of another or when intercompany transactions exist, including operational financing. Intercompany financing and loan guarantees may evidence dependency or contribution. Intercompany sales are indicative of market dependency and the contribution of a market source by one entity to another. Contribution or dependency can also exist through executive policymaking, personnel training, research and other functions.

Other indicators that a unitary business exists include business activities in the same line of business or business activities that are different processes in a vertically integrated business. Examples might include a chain of clothing stores or vertically integrated business activities that include the exploration, extraction and processing of natural resources.

Examples. The following examples are not intended to be conclusive as to whether a unitary business exists, but rather provide examples of factors that could support a finding that a UBG exists. When reviewing the facts and circumstances, the factors identified need to demonstrate a significant interrelationship among the related entities such that the entities are considered to be a single unitary group.

Example 6. Corporation A, taxpayer, is one of a nationwide group of six wholly-owned subsidiaries of P Corporation. The group is involved in the manufacturing, assembly, installation, sale, and resale of widgets. Similar manufacturing processes are used by all the entities and process improvements are implemented at all the operations. P Corporation, Corporation A, and another wholly owned subsidiary conduct advertising operations for the entire corporate group. Advertising is conducted through the publication of a catalog and price lists. The catalog reveals that each member of the group merchandises virtually identical products.

P Corporation is principally owned by three individuals. All of P Corporation's directors are also directors of at least one of the subsidiaries, and two of P Corporation's directors are directors of all the subsidiaries. In addition, P Corporation's officers are also officers for several of the subsidiaries. Each entity operates autonomously in day-to-day operations. All entities follow common practices and policies established by management.

Corporation A acquires approximately an equal amount of its inventory from P Corporation and five other vendors. P Corporation purchases less than one percent of its merchandise from Corporation A. P Corporation, however, purchases from its subsidiaries the majority of the items it later sells. Borrowing and financing are arranged by P Corporation for its subsidiaries' cash flow needs. P Corporation signed letters of credit on behalf of three of its subsidiaries for the purchase of depreciable assets. P Corporation also occasionally finances direct purchases of materials used by its subsidiaries. Corporation A has a loan with P Corporation for \$100,000. P Corporation occasionally makes volume discount purchases on behalf of the subsidiaries. The subsidiaries immediately repay P Corporation for the sums advanced for these purchases.

Under this fact pattern, it appears that a sufficient degree of mutual dependency and contribution exists to conclude that a unitary business exists. The subsidiaries are wholly owned by the Parent. While the entities operate autonomously on a daily basis, an integrated executive force appears to exist that controls major policy decisions, demonstrating centralized management. Further, the entities operate similar businesses, use similar manufacturing processes and share know-how among the members of the group. The sharing of know-how and use of similar processes that are significant to the entities' operations indicate functional integration. The decision to implement a common marketing plan through the use of one catalog for identical products results in mutual advantage by reducing marketing costs and achieves economies of scale. This also demonstrates functional integration of the entities, as does the lending of money for operational purposes, the purchasing structure and the financing arrangements for materials used by the subsidiaries that were entered into by the parent.

The substantial flow of products between the entities also demonstrates a dependency upon each other for mutual economic well-being. The subsidiaries provide the parent with a steady source of inventory and, in return, are assured of a market for their products. These factors also indicate that an integrated enterprise exists.

Example 7. Parent, Corporation A, owns 51 percent of Corporation B. Presume Corporations A and B are unitary. Corporation B owns 100

percent of Corporation C. Corporation A manufactures and sells household products. Corporation B manufactures vitamin products and diet supplements. Corporation C is engaged in the business of molding and manufacturing custom-designed plastic parts and products. Several individuals serve as common officers or directors of Corporations B and C. Five of Corporation C's six directors are concurrently officers of Corporation B, including the executive vice president, secretary, and controller.

The board of directors of Corporation C is responsible for the establishment of its company policy. At the same time, the board determines the annual budget for the corporation and makes major decisions impacting the financial resources of the company. In order to keep Corporation B apprised of its current financial condition, Corporation C is required to submit financial reports to Corporation B on a monthly basis. Corporation B is able to further monitor Corporation C's cash flow through its controller who was appointed to Corporation C's board of directors. Last year, Corporation C had a substantial loss. An integrated executive committee comprised of Corporation B and C's management was formed to develop, coordinate, and direct all of Corporation C's administrative, manufacturing, and sales functions. The executive committee also made recommendations on the acquisition of new molding equipment.

In its day-to-day operations, Corporation C functions as an autonomous business. Its employees conduct all of the plastic molding and manufacturing activities. Corporation C does not share facilities or exchange technical information with either Corporation A or B. There are no transfers of personnel between Corporation C and the two parent companies. Nor does Corporation C participate or engage in the centralized purchasing of supplies or in the mutual solicitation of orders. Corporation C directs its own advertising, promotion, and sales campaigns. Accounting, banking, insurance, legal counsel, personnel, administration, employee benefit plans, and research are also independently handled by Corporation C.

Corporation C did not receive any loans from Corporation A. Previously, Corporation B had made loans to Corporation C. Corporation C paid these loans in full with interest by the end of the year. Corporation B charged Corporation C for the costs of providing payroll and financial services. This intercompany charge was discontinued when Corporation C found a vendor to provide the services at a lower cost. Corporation C's tax returns are prepared by the accountants for the parent entities.

Corporation C makes intercompany sales of plastic vitamin bottles to Corporation B and sells other specialized goods used as promotional gifts by both Corporations A and B. The combined intercompany sales

represent about a quarter of Corporation C's total sales. Of this amount, the majority of the sales are to Corporation B. In the immediately preceding year, total intercompany sales amounted to 5 percent of total sales.

From this fact pattern, it appears that a unitary relationship exists between Corporations A, B and C. It is not necessary to find a direct unitary relationship between Corporation C's operations and the operations of Corporation A. It is sufficient if the unitary relationship is indirect. If Corporation C has been engaged in a single unitary business with either Corporation A or B, then Corporation C's operations are unitary with the operations of Corporations A and B.¹³

The existence of an integrated executive force at the top level of management is an indication of centralized management. Five of Corporation C's six directors are concurrently officers of Corporation B, including the executive vice president, secretary, and controller. Although not involved in the day-to-day operations of Corporation C's plastic molding business, Corporation B appears to exercise executive control of Corporation C. The parent company did more than just offer financial guidance with its executives serving in the top management positions of Corporation C. All six directors on Corporation C's board were currently, or had previously been, officers or directors of the parent corporations. The secretary and controller were identical for Corporations B and C. The presence of Corporation B's officers on Corporation C's executive staff and board is relevant to show that it is subject to the implicit control of Corporation B, so as to render the two corporations an integrated enterprise. The ability of the board to set policy for Corporation C demonstrates executive control by Corporation B at the highest level. The creation of the executive committee and the decisions it made regarding acquisitions, sales and administrative policies further indicate an integrated business.

Not only does Corporation B's controller monitor the subsidiary's financial condition, but Corporation C is also required to submit monthly reports and assented to the preparation of its annual tax returns. The executive committee is consulted on the acquisition of new equipment. These facts indicate that the integration of executive members and the centralization of management between Corporation C and its parent have unitary significance. The practice of lending money for operations further indicates functional integration of the entities.

In addition, the substantial flow of products from Corporation C to both parent companies demonstrates that the companies contributed to or were dependent upon each other for their mutual economic well-being. The

¹³ See *Appeals of Monsanto, Co*, Cal St Bd of Equal, 70-SBE-038, Nov 6, 1970.

increase in total sales volume from one year to the next was substantial in the context of Corporation C's total sales figure. The increase in sales between the entities indicates a decision to provide a market for C's products. Further, the increase in sales could be attributed to the decisions of the executive committee comprised of Corporation B and C's management that was formed to develop, coordinate, and direct all of Corporation C's administrative, manufacturing, and sales functions. The fact that these sales might be a small portion of all purchases made by the parent corporations, or that the product flow is one-way or made at market or arms-length prices, does not negate the fact that the intercompany sales are advantageous to Corporation C in that it has a ready and willing buyer for a substantial amount of its production. Intercompany sales allow Corporation C to benefit from the economics of a larger scale operation while guaranteeing the parent corporations have an available source of customized products.

Based on some or all of these factors, Corporation C's business appears to be dependent on and contributes to the activities of both parent corporations to a significant degree. This relationship forms a functionally integrated enterprise between the three companies.

The relationship tests are subjective and all factors present must be reviewed and weighed. Whether a unitary relationship exists will be based on the totality of the facts and circumstances.

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 13

**STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL**

NATIONWIDE AGRIBUSINESS
INSURANCE COMPANY AND
NATIONWIDE MUTUAL INSURANCE
COMPANY,

Petitioners,

V.

DEPARTMENT OF TREASURY,

Respondent.

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CONSOLIDATED CASES

MOAHR Docket No. 21-000036-TT; 21-
000039-TT; 21-000607; 21-000611-TT

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Administrative Law Judge

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AFFIDAVIT OF KYLE SHANER

I, Kyle Shaner, being first duly sworn according to law, depose and state:

1. I am over eighteen years of age and have personal knowledge of the matters described in this affidavit.
2. I graduated from the Ohio State University in Columbus, Ohio, with a Bachelor of Science degree in Business Administration in 2008. I graduated from the Ohio State University in Columbus, Ohio with a Master's degree in Accounting in 2009.
3. I currently serve as a Manager, Financial Reporting with a focus on Premium Tax for Nationwide Mutual Insurance Company ("Nationwide Mutual").
4. I have served in the role as Manager, Financial Reporting for Nationwide Mutual since May of 2021.
5. Beginning in 2015 and prior to becoming Manager, Financial Reporting in May of 2021, I worked for Nationwide Mutual and served in Premium Tax Senior Analyst and Specialist roles.
6. Based on my work in premium tax at Nationwide Mutual, I am generally familiar with Nationwide Mutual's business activities; its corporate structure and ownership of subsidiary entities, its operations; its accounting, books, and records; its financial reporting; and its state premium tax filings in Michigan and in some other states.
7. Nationwide Mutual is the parent and owns, directly or indirectly, more than 50% of the following subsidiaries:
 - a. Allied Insurance Company of America,
 - b. Allied Property & Casualty Insurance Company,
 - c. AMCO Insurance Company,
 - d. Crestbrook Insurance Company,

- e. Depositors Insurance Company,
- f. Freedom Specialty Insurance Company,
- g. Harleysville Insurance Company,
- h. Harleysville Insurance Company of New Jersey,
- i. Harleysville Lake States Insurance Company,
- j. Harleysville Life Insurance Company,
- k. Harleysville Preferred Insurance Company,
- l. Harleysville Worcester Insurance Company,
- m. National Casualty Company,
- n. Nationwide Agribusiness Insurance Company,
- o. Nationwide General Insurance Company,
- p. Nationwide Insurance Company of America,
- q. Nationwide Life & Annuity Insurance Company,
- r. Nationwide Life Insurance Company,
- s. Nationwide Property & Casualty Insurance Company,
- t. Scottsdale Indemnity Company,
- u. Titan Indemnity Company, and
- v. Titan Insurance Company.

I will refer to Nationwide Mutual and these subsidiaries together as the “Nationwide Group.”

8. Prior to filing on a unitary basis, each of the members of the Nationwide Group initially filed a separate Michigan Premiums/Retaliatory Tax Return, Form 4905 for each of the tax years 2014 and 2015 calculating the tax liability on an individual company basis; in accordance with these returns, the Nationwide Group paid Michigan taxes of \$4,511,258 in total for the two tax years.

9. The Nationwide Group subsequently filed amended tax returns as a unitary business group in the manner approved by the May 13, 2016 letter from Lance Wilkinson, then Administrator, Tax Policy Division, to Timothy Pratschler (the “Wilkinson Letter”); the amended tax returns were filed on or about November 13, 2018 (the “Amended Returns”).

10. A Schedule was attached to each of the amended returns to show that premiums taxes and tax attributes were being calculated and applied at the unitary business group level (the “Schedule”).

11. Because there was no form available to file a combined tax return, the Schedule computed the tax liability of the unitary business group and then allocated taxes and tax attributes to separate tax forms in a manner that could be interpreted as though tax attributes were being shared among the members of the group.

12. The Schedule was designed to aggregate the taxable premiums, credits, and other tax attributes from each component member of the Nationwide Group, and to apply the Nationwide Group's tax credits against the same group's aggregate Michigan corporate income tax (*i.e.*, premiums tax) liability.

13. The Schedule was also designed to calculate the Nationwide Group's Michigan tax liability, after credits, in a manner that is consistent with other unitary business group combined filings.

14. The cover page of the Schedule that was attached to each Amended Return included at the top the following statements (depending on the tax year at issue):

STATEMENT ATTACHED TO AND MADE PART OF FORM 4906
AMENDED 2014 INSURANCE COMPANY ANNUAL RETURN FOR
CORPORATE INCOME AND RETALIATORY TAXES UNITARY
CALCULATION OF NATIONWIDE GROUP OF COMPANIES.

STATEMENT ATTACHED TO AND MADE PART OF FORM 4906
AMENDED 2015 INSURANCE COMPANY ANNUAL RETURN FOR
CORPORATE INCOME AND RETALIATORY TAXES UNITARY
CALCULATION OF NATIONWIDE GROUP OF COMPANIES.

15. The cover page of the Schedule that was attached to each Amended Return also stated:

Certain companies in the Nationwide unitary business group have excess premium tax credits available on line 20a and can utilize the benefits of the excess credits by transfer to offset premium tax liability of other unitary companies. Also, certain companies have amounts on line 38 which may also be transferred to other companies as needed to reduce or eliminate the retaliatory tax on a unitary basis.

16. A true and accurate copy of the Schedule attached to the Amended Returns for 2014 is attached as Exhibit A to this Affidavit.

17. A true and accurate copy of the Schedule attached to the Amended Returns for 2015 is attached as Exhibit B to this Affidavit.

18. To reaffirm that the Amended Returns were being filed in connection with a unitary business group tax return, a copy of the Wilkinson Letter, which advised that a unitary business group of insurance companies could qualify and file as a unitary business group in Michigan, was attached to each Amended Return.

19. The Department accepted the Amended Returns. In response to the filing of the Amended Returns by the Nationwide Group, the Department processed the Amended Returns and issued refunds of \$3,296,949 to the Nationwide Group for the 2014 and 2015 tax years.

20. The Department did not issue all of the refunds claimed by the Nationwide Group for the 2014 and 2015 tax years.

21. The Department subsequently issued a variety of tax assessments, notices of adjustment, and related communications seeking to recover the refunds paid to the Nationwide Group.

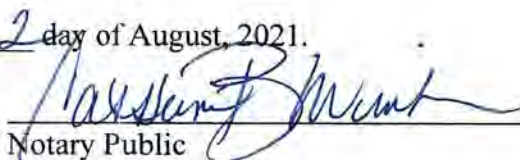
22. Nationwide Mutual and the other members of the Nationwide Group filed appeals to contest the multiple assessments and notices received from the Department.

FURTHER AFFIANT SAYETH NAUGHT.



Kyle Shaner

Sworn to and subscribed before me on this 2 day of August, 2021.



Notary Public



Catherine B. Winston
Notary Public, State of Ohio
My Commission Expires 07-07-2026

EXHIBIT A

RECEIVED by MCA 4/26/2023 1:26:40 PM

4/20/2025 4:17:16 PM

STATEMENT ATTACHED TO AND MADE PART OF
Form 4906
AMENDED 2014 INSURANCE COMPANY ANNUAL RETURN FOR
CORPORATE INCOME AND RETALIATORY TAXES
UNITARY CALCULATION of
Nationwide Group of Companies

Pursuant to the letter from the Michigan Department of Treasury dated May 13, 2016, copy attached, and MCL Sections 206.611 and 206.607, the Nationwide group of companies are all insurance companies that are part of a unitary business group. The NAIC group code of the Nationwide group is 0140.

As indicated in the May 13, 2016 letter, "therefore, an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group, even though the company is filing separately".

Certain companies in the Nationwide unitary business group have excess premium tax credits available on line 20a and can utilize the benefits of the excess credits by transfer to offset the premium tax liability of other unitary companies. Also, certain companies have amounts on line 38 which also may be transferred to other companies as needed to reduce or eliminate the retaliatory tax on a unitary basis.

Schedules are attached to provide details for each insurance company of the line 20c credits available, the credits utilized by each company on the amended returns, and the excess credits transferred to another company to utilize the benefits of a unitary filing.

Other insurance groups have previously filed either original returns on Form 4905 or amended returns on Form 4906 utilizing the benefits of their excess premium tax credits to offset the premium tax liability of other unitary insurance companies. An example is the 2014 amended and original 2015-2016 returns of Auto Club Insurance Association, Fremont Insurance Company, and Auto Club Life Insurance Company which utilized such unitary filing benefits for excess credits of \$1,243,997.

Nationwide
2014

Credits/Unitary Filing - Michigan Refund Report

Federal ID#	St Dom	Company Name	Tax Before Credits	Latest Return Credits	Tax Due After Credits	Addtl Credits Line 20c	Tax Due After Addtl Credits	Savings before Retal Tax	Dom St Taxes, Fees and Assmnts	Latest Return MI Taxes, Fees and	Latest Return Retal Tax	Latest Return Total Tax Due	New Addtl Assmnts Line 38B	New Retal Tax	New Total Tax Due	Refund
04-1989660	PA	Harleysville Worcester Ins Co	16,738	21,369	0	0	0	0	27,575	2,711	24,864	24,864	24,864	0	0	24,864
23-1580983	PA	Harleysville Life Ins Co	44,696	1,952	42,744	42,744	0	42,744	72,329	46,333	25,996	68,740		0	0	68,740
23-2253669	NJ	Harleysville Ins Co of NJ	0	125	0	0	0	0	100	275	0	0		0	0	0
23-2384978	PA	Harleysville Pref. Ins Co	50,830	23,655	27,175	27,175	0	27,175	82,182	53,691	28,491	55,666	55,666	0	0	55,666
27-0114983	OH	Allied Ins Co Of America	0	125	0	0	0	0	600	275	325	325		0	0	325
31-0970750	OH	Nationwide P&C Ins Co	152,276	12,778	139,498	139,498	0	139,498	202,988	155,905	47,083	186,581	186,581	0	0	186,581
31-1000740	OH	Nationwide Life & Ann Ins Co	550,374	28,508	521,866	521,866	0	521,866	614,520	556,417	58,103	579,969		0	0	579,969
31-1117969	OH	Scottsdale Indemnity Co	34,972	6,303	28,669	28,669	0	28,669	39,979	30,380	9,599	38,268	38,268	0	0	38,268
31-4156830	OH	Nationwide Life Ins Co	375,572	56,708	318,864	318,864	0	318,864	412,853	350,925	61,928	380,792		0	0	380,792
31-4177100	OH	Nationwide Mutual Ins Co	69,859	36,446	33,413	33,413	0	33,413	86,462	54,635	31,827	65,240	65,240	0	0	65,240
31-4425763	OH	Nationwide General Ins Co	0	125	0	0	0	0	600	275	325	325		0	0	325
38-0865250	WI	National Casualty Co	240,449	147,457	92,992	92,992	0	92,992	50,893	272,586	0	92,992	-128,701	0	0	92,992
38-3198542	MI	Harleysville Lake States Ins	341,595	442,871	0	0	0	0	0	0	0	0		0	0	0
41-0417250	PA	Harleysville Ins Co	104,270	42,265	62,005	62,005	0	62,005	167,614	115,860	51,754	113,759	113,759	0	0	113,759
42-1015537	IA	Nationwide Agribus. Ins Co	101,174	26,108	75,066	75,066	0	75,066	80,581	121,633	0	75,066	34,014	0	0	75,066
42-1201931	IA	Allied P&C Ins Co	303,354	662,912	0	-302,456	0	0	245,397	120,465	124,932	124,932	124,932	0	0	124,932
42-1207150	IA	Depositors Ins Co	242,550	38,663	203,887	203,887	0	203,887	195,799	259,302	0	203,887	140,384	0	0	203,887
42-6054959	IA	AMCO Ins Co	610,761	1,010,371	0	0	0	0	494,394	1,155,445	0	0	-661,051	0	0	0
68-0066866	OH	Crestbrook Ins Co	0	125	0	0	0	0	600	275	325	325		0	0	325
74-2286759	TX	Titan Indemnity Co	464,513	695,236	0	0	0	0	616,893	1,298,084	0	0	-681,191	0	0	0
75-6013587	OH	Freedom Specialty Ins Co	33,085	384	32,701	32,701	0	32,701	37,405	33,494	3,911	36,612		0	0	36,612
86-0619597	MI	Titan Ins Co	140,819	1,417,243	0	-1,276,424	0	0	0	933,164	0	0	-379,853	0	0	0
95-2130882	WI	Nationwide Ins Co of America	0	125	0	0	0	0	200	275	0	0		0	0	0
Total for 2014			3,877,887	4,671,854	1,578,880	0	0	1,578,880	3,429,964	5,562,405	469,463	2,048,343	-1,067,088	0	0	2,048,343

Nationwide
Attachment to Line 38B

Unitary Filing - Transfer of Line 38B Other Assessments / Michigan ACP

Statement attached to and made part of

FORM 4906 - 2014 INSURANCE COMPANY AMENDED RETURN FOR CORPORATE INCOME AND RETALIATORY TAXES

Tax Year	Federal ID#	Company Name	Dom St	26A. Dom St Tax	27B. Michigan Tax	Dom St Fees and Assessmnts	MI Fees and Assessmnts Excluding Line 38	Latest Return Line-38B Other Assessmnts	Corrected Line-38B Other Assessmnts	Transfer Other Assessmnts	38B. Other Assessmnts Used	39A..	39B.	40B. Retal Amount	41B. Tax Liability
												Dom St Tot Taxes, Fees, and Assessmnts	MI Tot Taxes, Fees, and Assessmnts		
2014	23-2253669	Harleysville Ins Co of NJ	NJ		0		275				0	100	275	0	0
2014	38-3198542	Harleysville Lake States Ins	MI		0		0				0	0	0	0	0
2014	95-2130882	Nationwide Ins Co of America	WI		0		275				0	200	275	0	0
2014 From	42-6054959	AMCO Ins Co	IA	494,294	0	100	38,201	1,117,244	1,117,244	-661,051	456,193	494,394	494,394	0	0
2014 From	38-0865250	National Casualty Co	WI	8,063	0	42,830	7,320	172,274	172,274	-128,701	43,573	50,893	50,893	0	0
2014 From	74-2286759	Titan Indemnity Co	TX	594,576	0	22,317	11,293	1,286,791	1,286,791	-681,191	605,600	616,893	616,893	0	0
2014 From	86-0619597	Titan Ins Co	MI		0		25	933,139	933,139	-379,853	553,286	0	553,311	0	0
2014 To	27-0114983	Allied Ins Co Of America	OH	250	0	350	275			325	325	600	600	0	0
2014 To	42-1201931	Allied P&C Ins Co	IA	245,297	0	100	13,262	107,203	107,203	124,932	232,135	245,397	245,397	0	0
2014 To	68-0066866	Crestbrook Ins Co	OH	250	0	350	275			325	325	600	600	0	0
2014 To	42-1207150	Depositors Ins Co	IA	195,699	0	100	7,454	47,961	47,961	140,384	188,345	195,799	195,799	0	0
2014 To	75-6013587	Freedom Specialty Ins Co	OH	37,055	0	350	793			36,612	36,612	37,405	37,405	0	0
2014 To	41-0417250	Harleysville Ins Co	PA	166,764	0	850	11,062	42,793	42,793	113,759	156,552	167,614	167,614	0	0
2014 To	23-1580983	Harleysville Life Ins Co	PA	71,479	0	850	3,589			68,740	68,740	72,329	72,329	0	0
2014 To	23-2384978	Harleysville Pref. Ins Co	PA	81,332	0	850	7,210	19,306	19,306	55,666	74,972	82,182	82,182	0	0
2014 To	04-1989660	Harleysville Worcester Ins Co	PA	26,725	0	850	1,091	1,620	1,620	24,864	26,484	27,575	27,575	0	0
2014 To	42-1015537	Nationwide Agribus. Ins Co	IA	80,481	0	100	12,768	33,799	33,799	34,014	67,813	80,581	80,581	0	0
2014 To	31-4425763	Nationwide General Ins Co	OH	250	0	350	275			325	325	600	600	0	0
2014 To	31-1000740	Nationwide Life & Ann Ins Co	OH	614,170	0	350	34,551			579,969	579,969	614,520	614,520	0	0
2014 To	31-4156830	Nationwide Life Ins Co	OH	412,503	0	350	32,061			380,792	380,792	412,853	412,853	0	0
2014 To	31-4177100	Nationwide Mutual Ins Co	OH	78,652	0	7,810	4,111	17,111	17,111	65,240	82,351	86,462	86,462	0	0
2014 To	31-0970750	Nationwide P&C Ins Co	OH	171,732	0	31,256	4,165	12,242	12,242	186,581	198,823	202,988	202,988	0	0
2014 To	31-1117969	Scottsdale Indemnity Co	OH	39,169	0	810	862	849	849	38,268	39,117	39,979	39,979	0	0
Total				3,318,741	0	110,923	191,193	3,792,332	3,792,332	0	3,792,332	3,429,964	3,983,525	0	0

Nationwide
Attachment to Line 20C
Unitary Filing - Transfer of Line 20c MAIPF

Statement attached to and made part of

FORM 4906 - 2014 INSURANCE COMPANY AMENDED RETURN FOR CORPORATE INCOME AND RETALIATORY TAXES

Tax Year	To/ From	Federal ID#	Company Name	Dom. St	19. Tax Before Credits	20a. MI WCPF	20b.. MI Basic PIA	Latest Return MAIPF	Corrected MAIPF	Transferred MAIPF	20c.. MAIPF Used	20d. PC Guar Assoc	20e.. LH Guar Assoc	21. Total L20 Credits	22b. Exam Fee Credit.	Total All Credits	25. Total Tax
2014		27-0114983	Allied Ins Co Of America	OH	0			0	0		0		0	0	125	125	0
2014		42-6054959	AMCO Ins Co	IA	610,761	4,716		996,633	996,633	0	996,633			1,001,349	9,022	1,010,371	0
2014		68-0066866	Crestbrook Ins Co	OH	0			0	0		0			0	125	125	0
2014		23-2253669	Harleysville Ins Co of NJ	NJ	0			0	0		0			0	125	125	0
2014		38-3198542	Harleysville Lake States Ins	MI	341,595	77,750		361,357	361,357		361,357			439,107	3,764	442,871	0
2014		04-1989660	Harleysville Worcester Ins Co	PA	16,738	20,056		1,188	1,188		1,188			21,244	125	21,369	0
2014		31-4425763	Nationwide General Ins Co	OH	0			0	0		0			0	125	125	0
2014		95-2130882	Nationwide Ins Co of America	WI	0			0	0		0			0	125	125	0
2014		74-2286759	Titan Indemnity Co	TX	464,513			689,602	689,602		689,602			689,602	5,634	695,236	0
2014	From	42-1201931	Allied P&C Ins Co	IA	303,354	2,057		657,306	657,306	-302,456	354,850			356,907	3,549	360,456	0
2014	From	86-0619597	Titan Ins Co	MI	140,819			1,413,284	1,413,284	-1,276,424	136,860			136,860	3,959	140,819	0
2014	To	42-1207150	Depositors Ins Co	IA	242,550	771		35,064	35,064	203,887	238,951			239,722	2,828	242,550	0
2014	To	75-6013587	Freedom Specialty Ins Co	OH	33,085			0	0	32,701	32,701		0	32,701	384	33,085	0
2014	To	41-0417250	Harleysville Ins Co	PA	104,270	3,684		37,914	37,914	62,005	99,919		0	103,603	667	104,270	0
2014	To	23-1580983	Harleysville Life Ins Co	PA	44,696			0	0	42,744	42,744		170	42,914	1,782	44,696	0
2014	To	23-2384978	Harleysville Pref. Ins Co	PA	50,830	1,236		21,883	21,883	27,175	49,058			50,294	536	50,830	0
2014	To	38-0865250	National Casualty Co	WI	240,449	606		143,764	143,764	92,992	236,756			237,362	3,087	240,449	0
2014	To	42-1015537	Nationwide Agribus. Ins Co	IA	101,174	3,549		21,356	21,356	75,066	96,422			99,971	1,203	101,174	0
2014	To	31-1000740	Nationwide Life & Ann Ins Co	OH	550,374			0	0	521,866	521,866		11,245	533,111	17,263	550,374	0
2014	To	31-4156830	Nationwide Life Ins Co	OH	375,572			0	0	318,864	318,864		40,690	359,554	16,018	375,572	0
2014	To	31-4177100	Nationwide Mutual Ins Co	OH	69,859	42		35,525	35,525	33,413	68,938			68,980	879	69,859	0
2014	To	31-0970750	Nationwide P&C Ins Co	OH	152,276	13		10,724	10,724	139,498	150,222		0	150,235	2,041	152,276	0
2014	To	31-1117969	Scottsdale Indemnity Co	OH	34,972			5,884	5,884	28,669	34,553		0	34,553	419	34,972	0
Total					3,877,887	114,480		4,431,484	4,431,484	0	4,431,484		52,105	4,598,069	73,785	4,671,854	

EXHIBIT B

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STATEMENT ATTACHED TO AND MADE PART OF
Form 4906
AMENDED 2015 INSURANCE COMPANY ANNUAL RETURN FOR
CORPORATE INCOME AND RETALIATORY TAXES
UNITARY CALCULATION of
Nationwide Group of Companies

Pursuant to the letter from the Michigan Department of Treasury dated May 13, 2016, copy attached, and MCL Sections 206.611 and 206.607, the Nationwide group of companies are all insurance companies that are part of a unitary business group. The NAIC group code of the Nationwide group is 0140.

As indicated in the May 13, 2016 letter, "therefore, an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group, even though the company is filing separately".

Certain companies in the Nationwide unitary business group have excess premium tax credits available on line 20a and can utilize the benefits of the excess credits by transfer to offset the premium tax liability of other unitary companies. Also, certain companies have amounts on line 38 which also may be transferred to other companies as needed to reduce or eliminate the retaliatory tax on a unitary basis.

Schedules are attached to provide details for each insurance company of the line 20c credits available, the credits utilized by each company on the amended returns, and the excess credits transferred to another company to utilize the benefits of a unitary filing.

Other insurance groups have previously filed either original returns on Form 4905 or amended returns on Form 4906 utilizing the benefits of their excess premium tax credits to offset the premium tax liability of other unitary insurance companies. An example is the 2014 amended and original 2015-2016 returns of Auto Club Insurance Association, Fremont Insurance Company, and Auto Club Life Insurance Company which utilized such unitary filing benefits for excess credits of \$1,243,997.

Nationwide
2015

Credits/Unitary Filing - Michigan Refund Report

Federal ID#	St Dom	Company Name	Tax Before Credits	Latest Return Credits	Tax Due After Credits	Addtl Credits Line 20c	Tax Due After Addtl Credits	Savings before Retal Tax	Dom St Taxes, Fees and Assmnts	Latest Return MI Taxes, Fees and	Latest Return Retal Tax	Latest Return Total Tax Due	New Addtl Assmnts Line 38B	New Retal Tax	New Total Tax Due	Refund
04-1989660	PA	Harleysville Worcester Ins Co	22,102	2,001	20,101	20,101	0	20,101	36,121	29,818	6,303	26,404	26,404	0	0	26,404
23-1580983	PA	Harleysville Life Ins Co	27,831	1,312	26,519	26,519	0	26,519	45,345	29,168	16,177	42,696		0	0	42,696
23-2253669	NJ	Harleysville Ins Co of NJ	0	125	0	0	0	0	0	275	0	0		0	0	0
23-2384978	PA	Harleysville Pref. Ins Co	60,570	21,839	38,731	38,731	0	38,731	97,776	69,975	27,801	66,532	66,532	0	0	66,532
27-0114983	OH	Allied Ins Co Of America	469	125	344	344	0	344	912	619	293	637		0	0	637
31-0970750	OH	Nationwide P&C Ins Co	151,202	13,965	137,237	137,237	0	137,237	201,042	156,105	44,937	182,174	182,174	0	0	182,174
31-1000740	OH	Nationwide Life & Ann Ins Co	729,865	19,345	710,520	710,520	0	710,520	815,549	749,234	66,315	776,835		0	0	776,835
31-1117969	OH	Scottsdale Indemnity Co	34,197	1,325	32,872	32,872	0	32,872	39,007	34,831	4,176	37,048	37,048	0	0	37,048
31-4156830	OH	Nationwide Life Ins Co	449,143	12,125	437,018	437,018	0	437,018	495,252	461,293	33,959	470,977		0	0	470,977
31-4177100	OH	Nationwide Mutual Ins Co	73,019	37,034	35,985	35,985	0	35,985	89,271	62,889	26,382	62,367	62,367	0	0	62,367
31-4425763	OH	Nationwide General Ins Co	714	125	589	589	0	589	1,258	864	394	983		0	0	983
38-0865250	WI	National Casualty Co	245,031	201,919	43,112	43,112	0	43,112	53,642	282,812	0	43,112	-186,058	0	0	43,112
38-3198542	MI	Harleysville Lake States Ins	307,839	386,988	0	-79,149	0	0	0	287,341	0	0	-144,933	0	0	0
41-0417250	PA	Harleysville Ins Co	128,869	49,428	79,441	79,441	0	79,441	206,914	153,463	53,451	132,892	132,892	0	0	132,892
42-1015537	IA	Nationwide Agribus. Ins Co	129,541	38,170	91,371	91,371	0	91,371	102,408	145,223	0	91,371	48,556	0	0	91,371
42-1201931	IA	Allied P&C Ins Co	404,466	147,673	256,793	256,793	0	256,793	326,454	481,515	0	256,793	101,732	0	0	256,793
42-1207150	IA	Depositors Ins Co	283,690	51,501	232,189	232,189	0	232,189	229,043	297,333	0	232,189	163,899	0	0	232,189
42-6054959	IA	AMCO Ins Co	546,058	1,141,340	0	-595,282	0	0	440,848	1,022,413	0	0	-581,565	0	0	0
68-0066866	OH	Crestbrook Ins Co	0	125	0	0	0	0	600	275	325	325		0	0	325
74-2286759	TX	Titan Indemnity Co	482,037	1,301,021	0	-818,984	0	0	638,237	1,433,816	0	0	-795,579	0	0	0
75-6013587	OH	Freedom Specialty Ins Co	35,714	373	35,341	35,341	0	35,341	40,350	36,111	4,239	39,580		0	0	39,580
86-0619597	MI	Titan Ins Co	122,763	934,724	0	-684,748	0	0	0	445,502	0	0	-445,502	0	0	0
95-2130882	WI	Nationwide Ins Co of America	0	125	0	0	0	0	200	275	0	0		0	0	0
Total for 2015			4,235,120	4,362,708	2,178,163	0	0	2,178,163	3,860,229	6,181,150	284,752	2,462,915	-1,332,033	0	0	2,462,915

Nationwide
Attachment to Line 38B

Unitary Filing - Transfer of Line 38B Other Assessments / Michigan ACP

Statement attached to and made part of

FORM 4906 - 2015 INSURANCE COMPANY AMENDED RETURN FOR CORPORATE INCOME AND RETALIATORY TAXES

Tax Year	Federal ID#	Company Name	Dom St	26A. Dom St Tax	27B. Michigan Tax	Dom St Fees and Assessmnts	MI Fees and Assessmnts Excluding Line 38	Latest Return Line-38B Other Assessmnts	Corrected Line-38B Other Assessmnts	Transfer Other Assessmnts	38B. Other Assessmnts Used	39A..	39B.	40B. Retal Amount	41B. Tax Liability
												Dom St Tot Taxes, Fees, and Assessmnts	MI Tot Taxes, Fees, and Assessmnts		
2015	23-2253669	Harleysville Ins Co of NJ	NJ	0	0	0	275				0	0	275	0	0
2015	95-2130882	Nationwide Ins Co of America	WI		0		275				0	200	275	0	0
2015 From	42-6054959	AMCO Ins Co	IA	440,748	0	100	32,624	989,789	989,789	-581,565	408,224	440,848	440,848	0	0
2015 From	38-3198542	Harleysville Lake States Ins	MI		0		20,584	266,757	266,757	-144,933	121,824	0	142,408	0	0
2015 From	38-0865250	National Casualty Co	WI	8,492	0	45,150	6,452	233,248	233,248	-186,058	47,190	53,642	53,642	0	0
2015 From	74-2286759	Titan Indemnity Co	TX	617,007	0	21,230	10,478	1,423,338	1,423,338	-795,579	627,759	638,237	638,237	0	0
2015 From	86-0619597	Titan Ins Co	MI		0		0	445,502	445,502	-445,502	0	0	0	0	0
2015 To	27-0114983	Allied Ins Co Of America	OH	528	0	384	275			637	637	912	912	0	0
2015 To	42-1201931	Allied P&C Ins Co	IA	326,354	0	100	12,549	212,173	212,173	101,732	313,905	326,454	326,454	0	0
2015 To	68-0066866	Crestbrook Ins Co	OH	250	0	350	275			325	325	600	600	0	0
2015 To	42-1207150	Depositors Ins Co	IA	228,943	0	100	7,312	57,832	57,832	163,899	221,731	229,043	229,043	0	0
2015 To	75-6013587	Freedom Specialty Ins Co	OH	40,000	0	350	770			39,580	39,580	40,350	40,350	0	0
2015 To	41-0417250	Harleysville Ins Co	PA	206,064	0	850	15,872	58,150	58,150	132,892	191,042	206,914	206,914	0	0
2015 To	23-1580983	Harleysville Life Ins Co	PA	44,495	0	850	2,649			42,696	42,696	45,345	45,345	0	0
2015 To	23-2384978	Harleysville Pref. Ins Co	PA	96,926	0	850	9,329	21,915	21,915	66,532	88,447	97,776	97,776	0	0
2015 To	04-1989660	Harleysville Worcester Ins Co	PA	35,271	0	850	2,689	7,028	7,028	26,404	33,432	36,121	36,121	0	0
2015 To	42-1015537	Nationwide Agribus. Ins Co	IA	102,308	0	100	12,382	41,470	41,470	48,556	90,026	102,408	102,408	0	0
2015 To	31-4425763	Nationwide General Ins Co	OH	804	0	454	275			983	983	1,258	1,258	0	0
2015 To	31-1000740	Nationwide Life & Ann Ins Co	OH	815,199	0	350	38,714			776,835	776,835	815,549	815,549	0	0
2015 To	31-4156830	Nationwide Life Ins Co	OH	494,902	0	350	24,275			470,977	470,977	495,252	495,252	0	0
2015 To	31-4177100	Nationwide Mutual Ins Co	OH	81,832	0	7,439	3,536	23,368	23,368	62,367	85,735	89,271	89,271	0	0
2015 To	31-0970750	Nationwide P&C Ins Co	OH	170,447	0	30,595	3,777	15,091	15,091	182,174	197,265	201,042	201,042	0	0
2015 To	31-1117969	Scottsdale Indemnity Co	OH	38,301	0	706	812	1,147	1,147	37,048	38,195	39,007	39,007	0	0
Total				3,748,871	0	111,158	206,179	3,796,808	3,796,808	0	3,796,808	3,860,229	4,002,987	0	0

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Nationwide
Attachment to Line 20C
Unitary Filing - Transfer of Line 20c MAIPF

Statement attached to and made part of

FORM 4906 - 2015 INSURANCE COMPANY AMENDED RETURN FOR CORPORATE INCOME AND RETALIATORY TAXES

Tax Year	To/ From	Federal ID#	Company Name	Dom. St	19. Tax Before Credits	20a. MI WCPF	20b.. MI Basic PIA	Latest Return MAIPF	Corrected MAIPF	Transferred MAIPF	20c.. MAIPF Used	20d. PC Guar Assoc	20e.. LH Guar Assoc	21. Total L20 Credits	22b. Exam Fee Credit.	Total All Credits	25. Total Tax
2015		68-0066866	Crestbrook Ins Co	OH	0			0	0		0			0	125	125	0
2015		23-2253669	Harleysville Ins Co of NJ	NJ	0			0	0		0			0	125	125	0
2015		95-2130882	Nationwide Ins Co of America	WI	0			0	0		0			0	125	125	0
2015	From	42-6054959	AMCO Ins Co	IA	546,058	5,241		1,129,227	1,129,227	-595,282	533,945			539,186	6,872	546,058	0
2015	From	38-3198542	Harleysville Lake States Ins	MI	307,839	44,614		338,530	338,530	-79,149	259,381			303,995	3,844	307,839	0
2015	From	74-2286759	Titan Indemnity Co	TX	482,037			1,295,794	1,295,794	-818,984	476,810			476,810	5,227	482,037	0
2015	From	86-0619597	Titan Ins Co	MI	122,763			933,139	933,139	-684,748	248,391			248,391	1,585	249,976	0
2015	To	27-0114983	Allied Ins Co Of America	OH	469			0	0	344	344			344	125	469	0
2015	To	42-1201931	Allied P&C Ins Co	IA	404,466	1,416		142,844	142,844	256,793	399,637			401,053	3,413	404,466	0
2015	To	42-1207150	Depositors Ins Co	IA	283,690	811		47,961	47,961	232,189	280,150			280,961	2,729	283,690	0
2015	To	75-6013587	Freedom Specialty Ins Co	OH	35,714			0	0	35,341	35,341			35,341	373	35,714	0
2015	To	41-0417250	Harleysville Ins Co	PA	128,869	3,615		44,640	44,640	79,441	124,081			127,696	1,173	128,869	0
2015	To	23-1580983	Harleysville Life Ins Co	PA	27,831			0	0	26,519	26,519			26,519	1,312	27,831	0
2015	To	23-2384978	Harleysville Pref. Ins Co	PA	60,570	1,109		20,158	20,158	38,731	58,889			59,998	572	60,570	0
2015	To	04-1989660	Harleysville Worcester Ins Co	PA	22,102	136		1,676	1,676	20,101	21,777			21,913	189	22,102	0
2015	To	38-0865250	National Casualty Co	WI	245,031	380		198,833	198,833	43,112	241,945			242,325	2,706	245,031	0
2015	To	42-1015537	Nationwide Agribus. Ins Co	IA	129,541	3,232		33,799	33,799	91,371	125,170			128,402	1,139	129,541	0
2015	To	31-4425763	Nationwide General Ins Co	OH	714			0	0	589	589			589	125	714	0
2015	To	31-1000740	Nationwide Life & Ann Ins Co	OH	729,865			0	0	710,520	710,520			710,520	19,345	729,865	0
2015	To	31-4156830	Nationwide Life Ins Co	OH	449,143			0	0	437,018	437,018			437,018	12,125	449,143	0
2015	To	31-4177100	Nationwide Mutual Ins Co	OH	73,019	167		36,081	36,081	35,985	72,066			72,233	786	73,019	0
2015	To	31-0970750	Nationwide P&C Ins Co	OH	151,202	9		12,242	12,242	137,237	149,479			149,488	1,714	151,202	0
2015	To	31-1117969	Scottsdale Indemnity Co	OH	34,197			931	931	32,872	33,803			33,803	394	34,197	0
Total					4,235,120	60,730		4,235,855	4,235,855	0	4,235,855			4,296,585	66,123	4,362,708	

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 14



Michigan Department of Treasury
168 (Rev. 04-19) INTENT

Bill for Taxes Due

Intent to Assess

Issued under P.A. 122 of 1941, as amended.
For monthly PENALTY/INTEREST provisions, correspondence, and informal conference information, see page 2.

NATIONWIDE AGRIBUSINESS
INSURANCE CO
1100 LOCUST ST
DES MOINES IA 50391-1100

Assessment Number VA7AV7G	Date Issued 12/11/2020
Account Number F421015537	
For payment options, contact the Collection Services Bureau 517-636-5265 michigan.gov/collectionseservice	
For questions regarding reasons for this billing BUSINESS TAX (517) 636-6925	

BILL SUMMARY

Tax Due	\$53,231.00
Penalty	\$13,307.75
Interest	\$13,412.81
Total Due	\$79,951.56

Detail of Tax Liability

Type of Tax	Taxable Period	Tax Due	Penalty	Interest
CORP INCOME RETALIATORY TAX	12/15	\$53,231.00	\$13,307.75	\$13,412.81

Reason for Tax Bill

WE RECEIVED A TAX RETURN FOR THE TAXABLE PERIOD(S) SHOWS ABOVE WITH INSUFFICIENT PAYMENT OF TAX, PENALTY AND/OR INTEREST.

168 (Rev. 04-19)

Detach and mail the payment voucher with your payment. Do not staple.

Bill for Taxes Due

Please pay the amount indicated above using one of the options listed below. If you have questions regarding this bill, review the back of the page for additional information.

To pay online and view account details, visit:
michigan.gov/collectionseservice

To pay by mail: Send payment and voucher in the enclosed envelope.
Make your check payable to the State of Michigan.
Include the account number on all payments and correspondence.

Assessment Number VA7AV7G	Date Issued 12/11/2020
Taxpayer Name NATIONWIDE AGRIBUSINESS	
Account Number F421015537	
Write Payment Amount Here	

Notify the Collection Services Bureau if your address above is incorrect.

▼ DO NOT WRITE IN THIS SPACE ▼

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App. Appx. 000040

App'e. Appx. 000278

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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 15

STATE OF MICHIGAN
DEPARTMENT OF TREASURY

Nationwide Agribusiness Insurance Co
c/o Nationwide Insurance
Matt Street
One Nationwide Plaza
Columbus, OH 43215

Docket No. 20190195
Corporate Income Tax
Claimed Overpayment
Tax Period: 01/2015-12/2015

DECISION AND ORDER OF DETERMINATION

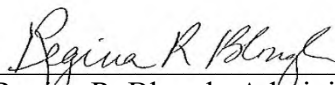
The Department, having reviewed the recommendation of the Referee in the above captioned matter, and having been advised in the premises; and

It appearing that the recommendation is supported by authority and reasoned opinion, that group-wide computation and the sharing of credits is not available to members of a unitary group that are insurance companies, and that the same is accepted;

Accordingly, it is determined and ordered that Petitioners claim for refund should be denied and the Department may issue denial(s) or assessment(s) that contain appropriate appeal rights, to recover amounts issued prior to review.

If you disagree with all or part of this Decision and Order of Determination you may, as provided at MCL 205.22, appeal to the Michigan Tax Tribunal within 60 days of this Decision and Order of Determination, or to the Michigan Court of Claims at any of its District Offices, within 90 days of this Decision and Order of Determination. All undisputed amounts must be paid prior to appeal. Appeal instructions and contact information for the Michigan Tax Tribunal are available at www.mi.gov/taxtrib. Appeal instructions and contact information for the Court of Claims District Offices are available at www.courts.mi.gov/courts/coc.

DATED: NOV 17 2020


Regina R. Blough, Administrator
Hearings Division
On Behalf of the State Treasurer

cc: Paul V. McCord
Fraser Trebilcock Davis & Dunlap PC
124 W Allegan St, Ste 1000
Lansing, MI 48933

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

STATE OF MICHIGAN
DEPARTMENT OF TREASURY

Nationwide Agribusiness Insurance Co
c/o Nationwide Insurance
Matt Street
One Nationwide Plaza
Columbus, OH 43215

Docket No. 20190195
Corporate Income Tax
Claimed Overpayment
Tax Period: 01/2015-12/2015

INFORMAL CONFERENCE RECOMMENDATION

An informal conference concerning the above-captioned matter was held on December 9, 2019. Nationwide Mutual Insurance Co (Petitioner) was represented by Matt Street and Scott Woodling who participated by telephone. The Michigan Department of Treasury (the Department) was represented by Nick Arcaro and Joe D'Souza of the Department's Business Taxes Technical Services Division.

The informal conference was held in conjunction with 10 related dockets. A separate recommendation will be issued for each docket.

FACTS

Petitioner is one of several large, affiliated insurance and financial service companies based in Columbus, Ohio.

For the tax year at issue, Petitioner and related entities separately filed amended Michigan Premiums and Retaliatory Tax Returns.

On November 23, 2018, the Department issued a Michigan Corporate Income Tax (CIT) Annual Return Notice of Refund Adjustment indicating that it allowed Petitioner's 2015 claim for refund of \$91,371.00 in part as a credit forward in the amount of \$38,140.00 and in part as a refund in the amount of \$53,231.00.

Petitioner appealed the Department's Refund Adjustment notice because the refund request was inappropriately "reduced by the amount of overpayment carryforward credit or refund already received per the original return."

The Department later determined that the refund amounts requested on the related amended returns should all be fully denied because it believes that a group-wide tax computation and the sharing of credits is not available to members of a unitary group that are insurance companies.

Petitioner's Position

Petitioner argues that under the statutory scheme of Part 2 of the Income Tax Act of 1967 (ITA), Michigan has adopted the single-entity approach to combined reporting, rather than the separate-entity approach.

Petitioner focuses on MCL 206.691, MCL 206.623(3), and MCL 206.663(2), which all contain language indicating that “state taxable income (or loss) is apportioned to the taxing state by using the group’s income/loss on a combined basis and using the group’s combined apportionment factor.” [Petitioner’s position memo dated 1/26/2020].

Petitioner argues that, because Michigan follows the single-entity approach for determination of tax liability, the members of a Unitary Business Group (UBG) should also be treated as a single-entity with regard to other tax attributes, such as sharing of credits.

Further, Petitioner argues that the Department is mistaken in its argument because the tax is levied upon “each insurance company,” the legislature precluded the sharing of tax attributes among insurance companies in a UBG. Petitioner explains that under Michigan’s rule of statutory interpretation, “[e]very word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number.”

Because Petitioner believes that insurance companies can be part of a UBG, and UBGs are treated as a single entity throughout Part 2 of the ITA, the statute should read as levying the tax on “each insurance company(ies).” As such, a group of insurance companies, organized as a UBG, would be treated as a single entity the same as any other taxpayer group.

The Department's Position

The Department argues that the overall structure of Part 2 of the ITA, MCL 206.601 *et seq.* does not support a group-wide tax computation or the sharing of credits among insurance companies that are part of a UBG.

The crux of the Department’s contention is that the premium and retaliatory taxes are only levied upon “each insurance company.” MCL 206.635(1)-(2). The Department argues that because the statute discusses insurance companies as a singular entity, the legislature intended for them to be treated differently than UBGs subject to other sections of the ITA.

Specifically, the Department points to two provisions within the ITA to support its contention that the tax on insurance companies being levied on “each insurance company” is a departure from the norm.

First, the Department points to the corporate income tax provisions [MCL 206.623(2)] being levied on any “taxpayer,” which is specifically defined to include UBGs [MCL 206.611(5)], and the levy of the tax on financial institutions which defines “financial institutions” to explicitly include UBGs [MCL 206.651(g)].

Further, the Department argues that Michigan's requirement that UBGs file a "combined return" should not be interpreted as meaning that Michigan requires group-wide reporting of all tax attributes.

The Department argues that while some states do apply this "single-entity" approach to UGB combined filing, other states, including Virginia and Wisconsin apply a "separate-entity" approach whereby each member does not share tax attributes. The Department argues that because the legislature has intentionally defined insurance companies under Chapter 12 of Part 2 as precluding group-wide taxation and group-wide credits, Michigan has also indicated an intent to treat each insurance company in a UBG as a separate entity.

ANALYSIS AND CONCLUSIONS OF LAW

The overarching issue in this case is whether Part 2 of the ITA supports a group-wide tax computation that includes the sharing of credits by insurance companies who are members of a UBG.

A UBG under the Part 2 of the ITA is defined as:

a group of United States persons that are corporations, *insurance companies*, or financial institutions, other than a foreign operating entity, 1 of which owns or controls, directly or indirectly, more than 50% of the ownership interest with voting rights or ownership interests that confer comparable rights to voting rights of the other members, and that has business activities or operations which result in a flow of value between or among members included in the unitary business group or has business activities or operations that are integrated with, are dependent upon, or contribute to each other. [MCL 206.611(6) (emphasis added)].

The corporate income tax, under Chapter 11 of the ITA, is levied upon each "taxpayer." [MCL 206.623(2)]. And "taxpayer" is defined as "a corporation, insurance company, financial institution, or unitary business group"[MCL 206.611(5)].

Michigan's UBG filing requirements provide:

Except as otherwise provided under section 680(3), a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group. Each United States person included in a unitary business group or included in a combined return shall be treated as a single person, and all transactions between those persons included in the unitary business group shall be eliminated from the corporate income tax base, the apportionment formulas, and for purposes of determining exemptions, credits, and the filing threshold under this part.[MCL 206.691(1).]

Although the ITA specifically defines a "taxpayer" to include a UBG, the Premiums Tax and the Retaliatory Tax levied upon insurance companies states that "each insurance company shall pay a

tax determined under this chapter.” [MCL 206.635(1)-(2), MCL 206.643, and MCL 206.635(2)(e)]. Insurance company under the ITA is defined as, “an authorized insurer as defined in section 108 of the insurance code of 1956, 1956 PA 218, MCL 500.108.” [MCL 206.607(5)].

The Legislature could have required a group-wide computation of tax as it did for corporations and financial intuitions; however, it chose to levy the tax on “each insurance company.” The Legislature’s narrow framing of the tax in this context is inconsistent with allowing either the Premiums tax or the Retaliatory tax to be computed on a group-wide, unitary basis. See, *D’Agostini Land Co LLC v Dep’t of Treasury*, 322 Mich App 545, 561 (2018) (refusing to apply a limitation to the small business alternative credit at the group level because a UBG was “not one of the types of taxpayer listed in the disqualifying provisions of the MBT’s small business alternative credit”).

Because the Legislature has intentionally defined insurance companies under Chapter 12 of Part 2 in a way that precludes group-wide taxation and group-wide credits, return filing provisions of section 691 should be interpreted consistent with that general intent and Petitioner’s amended return appears to have been properly disallowed.

RECOMMENDATION

For the above-stated reasons, it is recommended that Petitioner’s claim for a refund of \$91,371.00 should remain denied. The Department may issue denial(s) and or assessment(s) as necessary to recover amounts issued prior to review that contain appropriate appeal rights.

Respectfully submitted,

Elisabeth Avery, Referee
Hearings Division

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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Attorneys for Respondent-Appellant

APPELLEES' APPENDIX

TAB 16

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL

NATIONWIDE AGRIBUSINESS
INSURANCE COMPANY,

Petitioner,

v

MOAHR Docket No. 21-000039-TT

DEPARTMENT OF TREASURY,

Respondent.

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ThompsonD18@michigan.gov

Attorneys for Respondent

FIRST AMENDED PETITION

Petitioner, NATIONWIDE AGRIBUSINESS INSURANCE COMPANY, petitions for a redetermination of various appealable notices (more particularly described below) that seek to recover refunds previously paid, assert additional tax due, or adjust refund claims of Corporate Income Tax (Insurance Company) – Retaliatory Tax, together with any interest or penalty by the

DEPARTMENT OF TREASURY (the "Department "). As the basis for this proceeding, Petitioner alleges as follows:

1. Petitioner is an insurance company whose principal offices are located at One West Nationwide Blvd, Columbus, Ohio 43215-2752 (Attn: Enterprise Reporting – Mail Code 1-99-FIN3.

2. Respondent, Department, was at all times relevant hereto, a principal department of the State of Michigan under MCL 16.175 responsible for the assessment and collection of state taxes, including the CIT under MCL 206.601, *et seq.* Defendant's principal offices are located at 430 W. Allegan St., Lansing, Michigan 48922.

3. The Department has issued a blizzard of notices or decisions within the past sixty (60) days asserting the following claims against Petitioner in regard to Corporate Income Tax (Insurance Company) – Retaliatory Tax – including, at times, penalties and interest thereon, for the taxable years specified below:

Tax Due, Adjustments, Additions to Tax and Penalties

<u>Taxable Year</u>	<u>Type of Notice</u>	<u>Date of Notice</u>	<u>Tax Claimed Due or Adjusted</u>	<u>Penalty</u>	<u>Interest</u>
12/31/2015	NIA ¹	12/11/2020	\$53,231.00 ²	\$13,307.75	\$13,412.81

¹ On or about December 11, 2020, the Department issued a Notice of Intent to Assess (VA7A7G) for the same 2015 taxable year end at issue in its Informal Conference Decision and Order denying Petitioner's refund claim of \$91,371.00. A copy of the Department's Notice of Intent to Assess and Informal Conference Decision and Order is attached as **Exhibit A**. A Notice of Intent to Assess is appealable per *Montgomery Ward & Co. v Department of Treasury*, 191 Mich App 674; 478 NW2d 745 (1991).

² Petitioner originally requested a refund in the amount of \$91,371.00 which was denied in full by the department. In its December 12, 2020 Notice of Intent to Assess, the Department asserts that \$53,231.00 is due. It is not clear from the Notice of Intent to Assess precisely what the Department's claim relates too or the discrepancy between Petitioner's denied refund claim, and the amount stated in the Intent to Assess. Accordingly the Department's Notice of Intent to Assess violates MCL 205.21(2)(b). In an abundance of caution, Petitioner is left to assume that the Department is claiming, additional tax due, in addition to the denial of its refund claim resulting in an amount in dispute of \$171,322.56

12/31/2016 NIA 12/11/2020 \$38,140.00 \$16,588.00 \$8,725.25

4. Copies of the Department's notices are attached and marked as **Exhibit A** and are incorporated herein by this reference.

5. Petitioner disputes all amounts claimed due or adjusted by the Department for the tax years at issue.

6. The aggregated amount in dispute for all tax years at issue is \$234,775.81, as follows

(a) Petitioner originally claimed refund of \$91,371.00 for tax year ending 2015, that was eventually disallowed by the Hearings Division on November 11, 2020.

(b) On December 11, 2020, the Department issued a Notice of Intent to Assess (VA7AV7G) asserting a total of \$79,951.56, of tax, interest and penalties due for the 2015 tax year.

(c) Also on December 11, 2020, the Department issued a Notice of Intent to Assess (VA7AV7H) asserting a total of \$63,453.25 of tax, interest and penalties due for the 2016 tax year.

7. The Department erred in its numerous determinations of tax due and/or refund adjustments, and the imposition of any penalties and interest based on the following errors:

(a) That Petitioner filed its tax return for the period at issue with insufficient, payment of tax, penalty and/or interest. This determination is both false and erroneous.

- (b) That Petitioner owes interest and penalty for the tax period at issue due to underpayment and/or late payment of estimated tax. This determination is both false and erroneous.
- (c) The Departments interpretation of MCL 206.611(6), not authorizing Petitioner and its other insurance affiliates to comprise as a unitary business group is erroneous and flawed as it renders this provision of the statute of no value or importance, mere surplus.
- (d) The Department interpretation of the presence of the word "each" in MCL 206.635(1), defies conventions of English grammar and cannons of statutory interpretation.
- (e) The Department grafts the adjective "individual" in its interpretation of MCL 206.635(1), a word not appearing in the statute.
- (f) The Department has failed to administer Part 2, Chapters 10, 12, and 16, in accordance with the Legislature's prescribed design.
- (g) The Department's interpretation of MCL 206.685(1) to justify its ultra vires administration is wrong; the Department has not been granted the discretion to proscribe forms not authorized by law or fail to proscribe forms in conformity with law.
- (h) The Department misreads MCL 206.691(1) as not requiring insurance companies to file on a combined basis; nothing in MCL 206.691(1) excludes the combined of a unitary business group of insurance companies.

- (i) That the unitary business group, of which Petitioner was a member, was not entitled to claim under MCL 206.637(1)(c) a credit against tax for Assigned Claims Plan assessments paid during the previous year which were maintained by the Michigan Automobile Insurance Placement Facility (MAIPF).
 - (j) The Department's conclusion that credits claimed under MCL 206.637 can only be claimed on a separate-entity basis ignores the Legislature's chosen form of combined reporting and is unlawful.
8. The facts upon which Petitioner relies as a basis of its case are as follows:
- (a) Petitioner is an insurance company affiliated with Nationwide Mutual Insurance Company based in Columbus, Ohio.
 - (b) Petitioner timely filed its tax returns for each of the tax years at issue on or before March 1st following the close of the relevant taxable year.
 - (c) For the tax years at issue the Petitioner, along with its other insurance affiliates comprised a Michigan unitary business group by ownership and control.
 - (d) For the tax year at issue, certain constituent companies within the Nationwide family of companies had creditable Assigned Claims Plan assessments paid during the previous year to the MAIPF in excess of tax liability.
 - (e) On or about May 13, 2016, the Department's Tax Policy Division issued a letter in response to a technical advice request that addressed unitary/combined filing by insurance companies.
 - (f) Relying on the Department's May 13, 2016, letter authored by the now Director of the Bureau of Tax Policy, Petitioner, together with its insurance affiliates prepared amended returns for the tax years at issue, reporting its gross premiums, subtractions, and credits as a unitary group.

- (g) During the tax years at issue the Department failed (and has continued to fail) to prescribe a group/combined return for insurance companies as required by law.
- (h) The NAIC group code of the Michigan unitary business group is 0140.
- (i) Included with the amended group returns was a schedule providing details for the credits available, credits used, credits effectively transferred to another insurance company in the unitary business group to utilize the benefits of a unitary filing for purposes of Chapter 12 of the Michigan Corporate Income Tax Act (38 PA 211, the "CIT").
- (j) The amounts reflected on its schedules filed with its amended group returns support the amount reported on line 20c of Petitioner's group amended Form 4906.
- (k) Petitioner's group attached additional schedules to the amended group tax returns providing details of the assessment amounts available and utilized by the unitary business group to reduce retaliatory taxes.
- (l) The amounts reflected on its additional schedules filed with its amended group returns support the amount reported on line 38 of Petitioner's group amended Forms 4906.
- (m) On the amended group returns, Petitioner attributed and claimed the following refunds due:

<u>Tax Year</u>	<u>Refund Claimed due</u>
2014	\$75,066.00
2015	\$91,371.00
2016	\$0
Total	\$166,437.00

- (n) The Department processed the amended group returns in an inconsistent manner in that: (1) the Department apparently treated the group members as though they were separate filers; (2) some constituent group members were issued their claimed refunds, (3) others were denied.
- (o) For the tax years at issue the following group member insurance companies received either Notices of Refund Adjustment or Notices of Additional Tax Due, Notices of Intent to Assess Notices of Final Assessment or have yet to receive any administrative action on their claims:
1. Nationwide Mutual Insurance Co.
 2. Nationwide Agribusiness Insurance Co.
 3. Nationwide General Insurance Co.
 4. Nationwide Insurance Company of America
 5. Nationwide Life Insurance Company
 6. Nationwide Life & Annuity Insurance Co.
 7. Nationwide Property & Casualty Insurance Co.
 8. Allied Insurance Company of America
 9. Allied Property & Casualty Insurance Co.
 10. Crestbrook Insurance Company
 11. Depositors Insurance Company.
 12. Freedom Specialty Insurance Company
 13. Harleysville Insurance Company
 14. Harleysville Life Insurance Company
 15. Harleysville Preferred Insurance Company
 16. Harleysville Worcester Insurance Company
 17. National Casualty Co
 18. Scottsdale Indemnity Corp

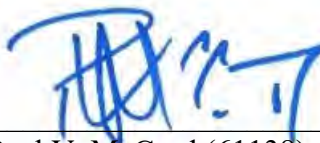
WHEREFORE, Petitioner prays for judgment against Respondent as follows:

1. CANCEL or VACATE all of the Notices attached as **Exhibit A** in their entirety.
2. Award Petitioner a refund in the aggregate amount of \$91,371.00 (before credit for any amounts previously received or permitted as a carryforward) for all tax years at issue.

3. Award costs to Petitioner pursuant to MCL 205.752(1); and
4. Award such other and further relief as the Tribunal may consider proper including reasonable attorneys' fees pursuant to MCL 24.323 and/or MCL 600.2591(3)(a) as applicable.

Respectfully submitted,

FRASER TREBILCOCK DAVIS & DUNLAP, PC,
Attorneys for Petitioner



By: _____
Paul V. McCord (61138)
124 West Allegan Street, Suite 1000
Lansing, Michigan 48933
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pmccord@fraserlawfirm.com

Dated: February 5, 2021

EXHIBIT A

STATE OF MICHIGAN
DEPARTMENT OF TREASURY

Nationwide Agribusiness Insurance Co
c/o Nationwide Insurance
Matt Street
One Nationwide Plaza
Columbus, OH 43215

Docket No. 20190195
Corporate Income Tax
Claimed Overpayment
Tax Period: 01/2015-12/2015

DECISION AND ORDER OF DETERMINATION

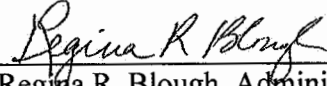
The Department, having reviewed the recommendation of the Referee in the above captioned matter, and having been advised in the premises; and

It appearing that the recommendation is supported by authority and reasoned opinion, that group-wide computation and the sharing of credits is not available to members of a unitary group that are insurance companies, and that the same is accepted;

Accordingly, it is determined and ordered that Petitioners claim for refund should be denied and the Department may issue denial(s) or assessment(s) that contain appropriate appeal rights, to recover amounts issued prior to review.

If you disagree with all or part of this Decision and Order of Determination you may, as provided at MCL 205.22, appeal to the Michigan Tax Tribunal within 60 days of this Decision and Order of Determination, or to the Michigan Court of Claims at any of its District Offices, within 90 days of this Decision and Order of Determination. All undisputed amounts must be paid prior to appeal. Appeal instructions and contact information for the Michigan Tax Tribunal are available at www.mi.gov/taxtrib. Appeal instructions and contact information for the Court of Claims District Offices are available at www.courts.mi.gov/courts/coc.

DATED: NOV 17 2020


Regina R. Blough, Administrator
Hearings Division
On Behalf of the State Treasurer

cc: Paul V. McCord
Fraser Trebilcock Davis & Dunlap PC
124 W Allegan St, Ste 1000
Lansing, MI 48933

CERTIFIED MAIL - RETURN RECEIPT REQUESTED



Michigan Department of Treasury
168 (Rev. 04-19) INTENT

Bill for Taxes Due

Intent to Assess

Issued under P.A. 122 of 1941, as amended.
For monthly PENALTY/INTEREST provisions, correspondence, and informal conference information, see page 2.

NATIONWIDE AGRIBUSINESS
INSURANCE CO
1100 LOCUST ST
DES MOINES IA 50391-1100

Assessment Number VA7AV7G	Date Issued 12/11/2020
Account Number F421015537	
For payment options, contact the Collection Services Bureau 517-636-5265 michigan.gov/collectionseservice	
For questions regarding reasons for this billing BUSINESS TAX (517) 636-6925	

BILL SUMMARY

Tax Due	\$53,231.00
Penalty	\$13,307.75
Interest	\$13,412.81
Total Due	\$79,951.56

Detail of Tax Liability

Type of Tax	Taxable Period	Tax Due	Penalty	Interest
CORP INCOME RETALIATORY TAX	12/15	\$53,231.00	\$13,307.75	\$13,412.81

Reason for Tax Bill

WE RECEIVED A TAX RETURN FOR THE TAXABLE PERIOD(S) SHOWS ABOVE WITH INSUFFICIENT PAYMENT OF TAX, PENALTY AND/OR INTEREST.

168 (Rev. 04-19)

Detach and mail the payment voucher with your payment. Do not staple.

Bill for Taxes Due

Please pay the amount indicated above using one of the options listed below. If you have questions regarding this bill, review the back of the page for additional information.

To pay online and view account details, visit:
michigan.gov/collectionseservice

To pay by mail: Send payment and voucher in the enclosed envelope.
Make your check payable to the State of Michigan.
Include the account number on all payments and correspondence.

Assessment Number VA7AV7G	Date Issued 12/11/2020
Taxpayer Name NATIONWIDE AGRIBUSINESS	
Account Number F421015537	
Write Payment Amount Here	

Notify the Collection Services Bureau if your address above is incorrect.

▼ DO NOT WRITE IN THIS SPACE ▼

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App. Appx. 000040

App'e. Appx. 000296

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Michigan Department of Treasury
168 (Rev. 04-19) INTENT

Bill for Taxes Due

Intent to Assess

Issued under P.A. 122 of 1941, as amended.
For monthly **PENALTY/INTEREST** provisions,
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information, see page 2.

Assessment Number VA7AV7H	Date Issued 12/11/2020
Account Number F421015537	
For payment options, contact the Collection Services Bureau 517-636-5265 michigan.gov/collectionseservice	
For questions regarding reasons for this billing BUSINESS TAX (517) 636-6925	

NATIONWIDE AGRIBUSINESS
INSURANCE CO
1100 LOCUST ST
DES MOINES IA 50391-1100

BILL SUMMARY

Tax Due	\$38,140.00
Penalty	\$16,588.00
Interest	\$8,725.25
Total Due	\$63,453.25

Detail of Tax Liability

Type of Tax	Taxable Period	Tax Due	Penalty	Interest
CORP INCOME RETALIATORY TAX	12/16	\$38,140.00	\$16,588.00	\$8,725.25

Reason for Tax Bill

PENALTY AND/OR INTEREST IS DUE FOR UNDERPAYMENT AND/OR LATE PAYMENT OF ESTIMATED TAX AS PROVIDED BY LAW.
WE RECEIVED A TAX RETURN FOR THE TAXABLE PERIOD(S) SHOWS ABOVE WITH INSUFFICIENT PAYMENT OF TAX, PENALTY AND/OR INTEREST.

168 (Rev. 04-19)

Detach and mail the payment voucher with your payment. Do not staple.

Bill for Taxes Due

Please pay the amount indicated above using one of the options listed below. If you have questions regarding this bill, review the back of the page for additional information.

To pay online and view account details, visit:
michigan.gov/collectionseservice

To pay by mail: Send payment and voucher in the enclosed envelope.
Make your check payable to the State of Michigan.
Include the account number on all payments and correspondence.

Assessment Number VA7AV7H	Date Issued 12/11/2020
Taxpayer Name NATIONWIDE AGRIBUSINESS	
Account Number F421015537	
Write Payment Amount Here	

Notify the Collection Services Bureau if your address above is incorrect.

DO NOT WRITE IN THIS SPACE

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App. Appx. 000041

App'e. Appx. 000297

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RECEIVED by MCOA 4/26/2023 1:26:40 PM

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

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Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 17

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



DANA NESSEL
ATTORNEY GENERAL

P.O. Box 30754
LANSING, MICHIGAN 48909

March 12, 2021

Via Electronic Filing

Michigan Tax Tribunal
Attn: Samantha M. Welton, Chief Clerk
611 West Ottawa Street, 4th Floor
P.O. Box 30232
Lansing, MI 48909

RE: *Nationwide Agribusiness Insurance Co v Department of Treasury*
MOAHR Docket No. 21-000039-TT

Dear Ms. Welton:

Enclosed for filing, please find *Respondent Department of Treasury's Answer to Petition and Affirmative Defenses*, along with the respective *Proof of Service*, as it pertains to the above-captioned matter.

If you should have any questions relative to the enclosure, please do not hesitate to contact this office.

Very truly yours,

/s/ Justin R. Call

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David W. Thompson (P75356)
Justin R. Call (P80892)
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JRC/kac
Enclosures

cc: Paul V. McCord, w/enclosures (***via E-Mail only***)

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL

NATIONWIDE AGRIBUSINESS
INSURANCE COMPANY,

Docket No. 21-000039-TT

Petitioner,

v

DEPARTMENT OF TREASURY,

Respondent.

Paul V. McCord (P61138)
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PROOF OF SERVICE

Kellie Christopher, states that on this 12th day of March, 2021, she served a copy of *Respondent Department of Treasury's Answer to Petition and Affirmative Defenses*, along with a copy of this *Proof of Service*, upon Petitioner's counsel, via e-mail at pmccord@fraserlawfirm.com.

I declare that the above statement is true to the best of my knowledge,
information, and belief.

/s/ Kellie Christopher
Kellie Christopher, Legal Secretary

RECEIVED by MSC 7/24/2025 4:17:16 PM

RECEIVED by MCOA 4/26/2023 1:26:40 PM

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL

NATIONWIDE AGRIBUSINESS
INSURANCE COMPANY,

Docket No. 21-000039-TT

Petitioner,

v

DEPARTMENT OF TREASURY,

Respondent.

_____/

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_____/

**RESPONDENT DEPARTMENT OF TREASURY'S ANSWER TO PETITION
AND AFFIRMATIVE DEFENSES**

NOW COMES Respondent, DEPARTMENT OF TREASURY (Treasury),
through counsel, Attorney General Dana Nessel and Assistant Attorneys General
Scott L. Damich, David W. Thompson, and Justin R. Call, and states for its answer
to the petition as follows:

1. Treasury neither admits nor denies the allegations in this paragraph based on a lack of knowledge or information sufficient to form a belief as to the truth of the allegations at the present time and leaves Petitioner to its proofs.

2. Treasury admits the allegations in this paragraph.

3. Treasury admits that it issued a Bill for Taxes Due Intent to Assess, relating to the 2015 tax year (Notice of Intent to Assess). By way of further response, the Notice of Intent to Assess, attached to the petition as Exhibit A, speaks for itself. By way of further response, Treasury issued Petitioner a Final Bill for Taxes Due Final Assessment, dated February 19, 2021, relating to the 2015 tax year. See attached Exhibit 1.

4. Treasury admits the allegations in this paragraph.

5. Treasury neither admits nor denies the allegations in this paragraph because the allegations contained in this paragraph constitute a claim for relief, to which no response is required. To the extent a response is required, Treasury denies that Petitioner is entitled to its requested relief.

6. As to the allegations of this paragraph, Treasury denies as untrue. Petitioner originally filed a 2015 return claiming an overpayment of \$38,140 to be credited forward to 2016. Further, on information and belief, the amount at issue for the 2015 tax period is tax due amount of \$53,231 plus interest and penalty. By way of further response, statutory interest continues to accrue. Finally, Treasury denies that Petitioner is entitled to the requested relief.

7. Treasury responds to the allegations of paragraph 7 as follows:

- a. Treasury denies as untrue that its determination is false or erroneous.
- b. Treasury denies as untrue that its penalty and interest determination is false or erroneous.
- c. Treasury denies the allegations in this paragraph as untrue. By way of further response, Treasury asserts that the more specific, and governing, provision in this case is MCL 206.635(1), which requires that “each” individual company must file a return and pay tax.
- d. Treasury denies the allegations in this paragraph as untrue.
- e. Treasury denies the allegations in this paragraph as untrue.
- f. Treasury denies the allegations in this paragraph as untrue.
- g. Treasury denies for the reason that Treasury prescribes forms in accordance with Michigan law: “[a]n annual or final return shall be filed with the department in the form and content prescribed by the department.” MCL 206.685(1). By way of further response, Treasury’s forms are in accordance with the Corporate Income Tax (CIT) Act, which provides that “each” individual company must file a return and pay tax. MCL 206.635(1).
- h. Treasury denies as untrue that it misreads MCL 206.691.

Treasury neither admits nor denies the remaining allegations for the reason that “nothing in MCL 206.691(1) excludes the

combined of a unitary business group of insurance companies” is vague and ambiguous. By way of further response, the CIT Act requires that “each” insurance company must file a return and pay tax. MCL 206.635(1).

- i. Treasury admits that it determined the unitary business group cannot claim a tax credit for the Michigan Automobile Insurance Placement Facility assessments, but instead only individual members can. By way of further response, the CIT Act requires that “each” insurance company must file a return and pay tax. MCL 206.635(1).
 - j. Treasury denies the allegations of this paragraph as untrue. By way of further response, the CIT Act requires that “each” insurance company must file a return and pay tax. MCL 206.635(1).
8. Treasury responds to the allegations in this paragraph, as follows:
- a. Treasury neither admits nor denies the allegations in this paragraph based on a lack of knowledge or information sufficient to form a belief as to the truth of the allegations at the present time and leaves Petitioner to its proofs.
 - b. Treasury neither admits nor denies the allegations in this paragraph based on a lack of knowledge or information

sufficient to form a belief as to the truth of the allegations at the present time and leaves Petitioner to its proofs.

- c. Treasury neither admits nor denies the allegations in this paragraph based on a lack of knowledge or information sufficient to form a belief as to the truth of the allegations at the present time and leaves Petitioner to its proofs.
- d. Treasury neither admits nor denies the allegations in this paragraph based on a lack of knowledge or information sufficient to form a belief as to the truth of the allegations at the present time and leaves Petitioner to its proofs.
- e. Treasury admits that the Tax Policy Division issued the informal May 13, 2016 letter in response to an inquiry. The letter speaks for itself.
- f. Treasury neither admits nor denies the allegations in this paragraph based on a lack of knowledge or information sufficient to form a belief as to the truth of the allegations at the present time and leaves Petitioner to its proofs. To the extent a response is required, Treasury denies that the Tax Policy Division's May 13, 2016 letter supports Petitioner's position in this case, or that Petitioner properly and reasonably relied on the letter in "reporting its gross premiums, subtractions, and credits as a unitary group."

- g. Treasury admits that it has not prescribed a combined return form for insurance companies. Treasury denies that this is required by law for the reason that the CIT Act requires “each” insurance company to file a return and pay tax.
MCL 206.635(1).
- h. Treasury neither admits nor denies the allegations in this paragraph based on a lack of knowledge or information sufficient to form a belief as to the truth of the allegations at the present time and leaves Petitioner to its proofs.
- i. Treasury neither admits nor denies the allegations in this paragraph based on a lack of knowledge or information sufficient to form a belief as to the truth of the allegations at the present time and leaves Petitioner to its proofs. To the extent a response is required, Treasury denies that there is a schedule or form available to transfer credits “to another insurance company in the unitary business group” for the reason that the CIT Act requires “each” insurance company to file a return and pay tax.
MCL 206.635(1).
- j. Treasury neither admits nor denies the allegations in this paragraph based on a lack of knowledge or information sufficient to form a belief as to the truth of the allegations at the present time and leaves Petitioner to its proofs. To the extent a

response is required, Treasury denies that there is a schedule or form available for “amended group returns” for the reason that the CIT Act requires “each” insurance company to file a return and pay tax. MCL 206.635(1).

- k. Treasury neither admits nor denies the allegations in this paragraph based on a lack of knowledge or information sufficient to form a belief as to the truth of the allegations at the present time and leaves Petitioner to its proofs. To the extent a response is required, Treasury denies that there is a schedule or form available for “amended group returns” for the reason that the CIT Act requires “each” insurance company to file a return and pay tax. MCL 206.635(1).
- l. Treasury neither admits nor denies the allegations in this paragraph based on a lack of knowledge or information sufficient to form a belief as to the truth of the allegations at the present time and leaves Petitioner to its proofs. To the extent a response is required, Treasury denies that there is a schedule or form available for “amended group returns” for the reason that the CIT Act requires “each” insurance company to file a return and pay tax. MCL 206.635(1).
- m. Treasury neither admits nor denies the allegations in this paragraph based on a lack of knowledge or information

sufficient to form a belief as to the truth of the allegations at the present time and leaves Petitioner to its proofs. To the extent a response is required, Treasury denies that there is a schedule or form available for “amended group returns” for the reason that the CIT Act requires “each” insurance company to file a return and pay tax. MCL 206.635(1).

- n. Treasury denies as untrue that the returns were treated in an inconsistent manner for the reasons that the CIT Act requires “each” insurance company to file a return and pay tax, MCL 206.635(1), and there is no schedule or form available for “amended group returns.” Accordingly, each entity was properly and consistently treated as a standalone taxpayer.
- o. Treasury admits that certain entities listed have received notices from Treasury. Treasury neither admits nor denies the remaining allegations in this paragraph because without itemization by entity, notice, tax year, tax type, and/or informal conference docket number, these allegations lack sufficient definition and specificity in the form and manner alleged. Accordingly, Treasury lacks the knowledge or information sufficient to form a belief as to the truth of the allegations.

WHEREFORE, Respondent, Department of Treasury, respectfully requests that this Honorable Tribunal deny Petitioner any relief under the petition, grant

Treasury all other appropriate relief including costs and attorney's fees, and dismiss said petition with prejudice.

AFFIRMATIVE DEFENSES

NOTICE that Respondent, DEPARTMENT OF TREASURY, will rely upon the following affirmative defenses and expressly reserves the right to assert such other affirmative defenses as may become apparent in the course of discovery or other proceedings in this matter:

1. Petitioner may have failed to state a cause of action, in whole or in part, upon which relief can be granted and Treasury is entitled to judgment in its favor according to MCR 2.116(C)(8) and/or MCR 2.116(C)(10).
2. Petitioner may have failed to timely contest the assessment at issue, as required by MCL 205.22(4)–(5), for which reason this Tribunal may lack jurisdiction over this action, which is subject to dismissal under MCR 2.116(C)(4).
3. Petitioner may not be aggrieved by an assessment, decision, or order of Treasury, as required by MCL 205.22, for which reason this Tribunal may lack jurisdiction over this action, which is subject to dismissal under MCR 2.116(C)(4).
4. Petitioner's claims may be barred as collateral attacks of prior year assessments, decisions, or orders of Treasury, which is not permitted under MCL 205.22(4), for which reason this Tribunal may lack jurisdiction over this action, which is subject to dismissal under MCR 2.116(C)(4).
5. The petition may be barred because of: release, and/or payment, and/or prior judgment, and/or immunity granted by law, and/or assumption of risk, and/or

fraud, and/or estoppel, and/or statute of limitations, and/or lack of jurisdiction over the person or property, and/or insufficient process and service of process, and/or lack of legal capacity, and/or failure to exhaust its administrative remedies, and/or lack of subject matter jurisdiction, and/or existence of another action involving the same claim and parties to the extent discovery reveals the applicability of the same.

6. Treasury reserves the right to amend its affirmative defenses and add additional affirmative defenses as they become known and necessary during the course of discovery and/or prior to trial.

Respectfully submitted,

DANA NESSEL
Attorney General

/s/ Justin R. Call
Scott L. Damich (P74126)
David W. Thompson (P75356)
Justin R. Call (P80892)
Assistant Attorneys General
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Dated: March 12, 2021

Exhibit 1



Michigan Department of Treasury
169 (Rev. 04-19) FINAL-C

Final Bill for Taxes Due Final Assessment

Issued under P.A. 122 of 1941, as amended.

**For monthly PENALTY/INTEREST provisions,
correspondence, and appeal information, see page 2.**

Assessment Number VA7AV7G	Date Issued 02/19/2021
Account Number [REDACTED]	
For payment options, contact the Collection Services Bureau 517-636-5265 michigan.gov/collectionseservice	
For questions regarding reasons for this billing BUSINESS TAX (517) 636-6925	

NATIONWIDE AGRIBUSINESS
INSURANCE CO
1100 LOCUST ST
DES MOINES IA 50391-1100

BILL SUMMARY

Tax Due	\$53,231.00
Penalty	\$13,307.75
Interest	\$13,850.60
Total Due	\$80,389.35

Detail of Tax Liability

Type of Tax	Taxable Period	Tax Due	Penalty	Interest
CORP INCOME RETALIATORY TAX	12/15	\$53,231.00	\$13,307.75	\$13,850.60

Reason for Tax Bill

WE RECEIVED A TAX RETURN FOR THE TAXABLE PERIOD(S) SHOWS ABOVE WITH INSUFFICIENT PAYMENT OF TAX,
PENALTY AND/OR INTEREST.

169 (Rev. 04-19)

Detach and mail the payment voucher with your payment. Do not staple.

Final Bill for Taxes Due

Pay the amount indicated above within 90 days using one of the
options listed below to avoid collection activity. If you have questions
regarding this bill, review the back of the page for additional information.

To pay online and view accounts details, visit:
michigan.gov/collectionseservice

To pay by mail: Send payment and voucher in the enclosed envelope.
Make your check payable to the State of Michigan.
Include the account number on all payments and correspondence.

Assessment Number VA7AV7G	Date Issued 02/19/2021
Taxpayer Name NATIONWIDE AGRIBUSINESS	
Account Number [REDACTED]	
Write Payment Amount Here	

Notify the Collection Services Bureau if your address above is incorrect.

▼ DO NOT WRITE IN THIS SPACE ▼

000080389351 OVA7AV7G0 000000000009 2 [REDACTED] 3 6

App. Appx. 000057

App'e. Appx. 000313

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RECEIVED by MCOA 4/26/2023 1:26:40 PM

If you disagree with this bill, please select one of the following options:	
For general information regarding why this Final Bill for Taxes Due was sent.	Contact the Tax Division printed at the top of this form. You can also visit michigan.gov/taxes for information and forms.
To file an appeal: You may appeal all or part of this Final Bill for Taxes Due directly to the Tax Tribunal within 60 days or the Court of Claims within 90 days of the date on this bill. The uncontested portion must be paid before you appeal.	Contact the Tax Tribunal: You can appeal to the Tax Tribunal by filing a petition, with filing fee to PO Box 30232 Lansing, MI 48909. Include a copy of this Final Bill for Taxes Due with the petition. Visit michigan.gov/taxtrib for additional information.
	Contact the Court of Claims: You can appeal to the Court of Claims by filing a complaint with the Court of Claims at any of its district offices. For contact information for the Court of Claims District Offices visit courts.mi.gov/courts/coc
To file Sales, Use, or Withholding returns or amended returns for tax years 2015 or newer, please use Michigan Treasury Online (MTO).	Visit Michigan Treasury Online (MTO): mto.treasury.michigan.gov
To send correspondence, returns not filed on MTO, and/or amended returns related to this Final Bill for Taxes Due: Include your account number on all correspondence.	Send information to: Michigan Department of Treasury Collection Services Bureau PO Box 30199 Lansing, MI 48909-7699
If you agree with this bill, please select one of the following payment options:	
Additional penalty and interest will be applied to your account at the beginning of each month. If your payment will not be received by the last day of the month, visit michigan.gov/TreasuryPICalculator to estimate additional penalty and interest	
To pay online.	Visit: michigan.gov/collectionseservice Payments can be made using a checking account, savings account, or debit/credit card
To view account information online.	Visit: michigan.gov/collectionseservice
For payment arrangements and/or to correct address information.	Contact: Collection Services Bureau at 517-636-5265
To pay by mail: Make your check payable to the State of Michigan and include your account number on the payment(s).	Send payment to: Michigan Department of Treasury Collection Services Bureau PO Box 30199 Lansing, MI 48909-7699

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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Attorneys for Respondent-Appellant

APPELLEES' APPENDIX

TAB 18

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



DANA NESSEL
ATTORNEY GENERAL

P.O. Box 30754
LANSING, MICHIGAN 48909

August 4, 2021

Michigan Tax Tribunal
Attn: Samantha M. Welton, Chief Clerk
611 West Ottawa Street, 4th Floor
P.O. Box 30232
Lansing, MI 48909

Via Electronic Filing

RE: *Nationwide Mutual Ins Co, et al. v Michigan Dep't of Treasury*
Michigan Tax Tribunal Docket No. 21-000036-TT and 21-000607-TT
Consolidated with Nos. 21-000039-TT and 21-000611-TT

Dear Ms. Welton:

On August 2, 2021, we filed Respondent's motion for summary disposition and brief in support, along with the respective exhibits, in the above-referenced matter.

The motion and brief should be corrected by replacing the originally submitted motion and brief with the attached errata motion and brief. The originally submitted brief incorrectly states financial institutions fall under Chapter 12 of Michigan's Corporate Income Tax Act. The errata brief corrects this error by stating that financial institutions fall under Chapter 13. See page 12. The exhibits filed on August 2, 2021 remain the same for the errata motion and brief, therefore, we submit with this letter an original copy of the errata motion and brief, without exhibits. A copy of same has been served upon Petitioners' counsel via e-mail.

We respectfully request this Honorable Tribunal docket and file this letter and attachments as part of the Tribunal's record.

As always, please do not hesitate to contact our office with any questions or concerns.

Very truly yours,

/s/ David W. Thompson
David W. Thompson (P75356)
Assistant Attorney General
Revenue and Tax Division
(517) 335-7584

DWT/kac
Enclosures

cc: Paul V. McCord, w/enclosures (***via E-Mail only***)
Wayne D. Roberts, w/enclosures (***via E-Mail only***)
Joseph S. Shannon, w/enclosures (***via E-Mail only***)
Jeffrey A. Lipps, w/enclosures (***via E-Mail only***)

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL

NATIONWIDE MUTUAL INSURANCE CO.
and NATIONWIDE AGRIBUSINESS
INSURANCE CO.,

Petitioners,

v

DEPARTMENT OF TREASURY,

Respondent.

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Docket Nos. 21-000036-TT and
21-000607-TT
Consolidated with Nos. 21-000039-TT and
21-000611-TT

PROOF OF SERVICE

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PROOF OF SERVICE

Kellie Christopher, states that on this 4th day of August, 2021, she served a copy of *Respondent Department of Treasury's 08/04/2021 Errata Motion and Brief in Support for Summary Disposition (without exhibits)*, along with a copy of this *Proof of Service*, upon the following:

1. Mr. Paul V. McCord, via e-mail at pmccord@fraserlawfirm.com;
2. Mr. Wayne D. Roberts, via e-mail at wroberts@bodmanlaw.com;
3. Mr. Joseph S. Shannon, via e-mail at jshannon@bodmanlaw.com; and
4. Mr. Jeffrey A. Lipps, via e-mail at lipps@carpenterlipps.com.

I declare that the above statement is true to the best of my knowledge, information, and belief.

/s/ Kellie Christopher
Kellie Christopher, Legal Secretary

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL

NATIONWIDE MUTUAL INSURANCE CO.
and NATIONWIDE AGRIBUSINESS
INSURANCE CO.,

Petitioners,

v

DEPARTMENT OF TREASURY,

Respondent.

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Docket Nos. 21-000036-TT and
21-000607-TT
Consolidated with Nos. 21-000039-TT and
21-000611-TT

**RESPONDENT'S 08/04/2021 ERRATA
MOTION AND BRIEF IN SUPPORT
FOR SUMMARY DISPOSITION**

Scott L. Damich (P74126)
David W. Thompson (P75356)
Justin R. Call (P80892)
Assistant Attorneys General
Michigan Dep't of Attorney General
Revenue and Tax Division
Attorneys for Respondent
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**RESPONDENT DEPARTMENT OF TREASURY'S 08/04/2021 ERRATA MOTION AND
BRIEF IN SUPPORT OF SUMMARY DISPOSITION**

INTRODUCTION

This case concerns a foreign insurance company's tax liability under Michigan's Corporate Income Tax Act (CITA) and Insurance Code. Each insurance company is responsible for paying a tax on either its gross premiums, or a "retaliatory" tax—which seeks to impose the same tax on a foreign insurer as its state of origin would impose on a Michigan insurer—whichever is greater. An insurance company may also take credits against its premiums tax base. Those credits include payments of Michigan Automobile Insurance Placement Facility (MAIPF) assessments.

Here, Petitioners claim to be a unitary business group of insurance companies that may share credits. In other words, Petitioners assert that an insurance company that did not pay any MAIPF assessments may still claim MAIPF credits because it is "unitary" with another entity in the group that did generate those credits. Essentially, Petitioners seek to prevent credit waste when the entity that generated the credits (i.e., paid MAIPF assessments) has little or zero tax liability. In those instances, Petitioners attempt to distribute the otherwise useless credits to entities that do have significant tax liabilities so as to reduce tax liability as much as possible even though those insurance companies did not pay into those funds.

But Petitioners misunderstand that the premiums tax and the retaliatory tax are imposed on "an" insurance entity. There is no "unitary business group" of insurance entities for purposes of the premiums tax or the retaliatory tax. The same is true of tax credits, which may only be claimed by "an" insurance company—i.e., the entity that actually generated the credits by paying MAIPF assessments.

Further, Petitioners misunderstand that the retaliatory tax compares Michigan's burdens (taxes, fees, and assessments) to the burdens on the same premiums a hypothetical Michigan insurance company would pay in the foreign insurer's origin state. This analysis is impossible for a purported "unitary business group" of insurers from various foreign states that all impose different taxes and burdens on an insurance company.

For these reasons, Treasury respectfully requests that this Honorable Tribunal grant its motion for summary disposition under MCR 2.116(C)(10).

STATEMENT OF FACTS

Statutory background of the Corporate Income and Retaliatory Tax.

Under the CITA, special taxes are imposed on insurance companies. Part 2 of the CITA imposes a tax on insurance companies for direct premiums written in Michigan. The statute also allows certain credits to be claimed against the premiums tax, including MAIPF credits. To claim MAIPF credits, an insurance company must pay an assessment amount to the MAIPF (i.e., the Facility). The Facility issues MAIPF assessments to individual insurance companies, which are responsible for paying these assessed amounts. The assessment is based on the individual insurance company's participation ratio (percent of total automobile written premiums in Michigan) for anticipated expenses of operation and/or administration of the Plan, per MCL 500.3171. In other words, each insurance company must calculate and claim its own MAIPF credits on an individual basis.

The CITA also includes a retaliatory tax component on foreign insurers doing business in Michigan. Unlike domestic insurers, foreign insurers doing business in Michigan are required to pay the greater of either the tax levied on gross direct premiums, or a retaliatory tax as set for under § 476a of the Insurance Code.

Retaliatory tax regimes have been common insurance taxation for over a century and Michigan has had a form of retaliatory tax since 1871. *TIG Ins Co v Dep't of Treasury*, 464 Mich 548, 552 (2001). Foreign insurers determine their retaliatory tax by computing the total burdens imposed on the foreign insurer by Michigan. That amount is compared with the total burdens that would be imposed by the foreign insurer's domicile state on a hypothetical Michigan insurer conducting the same amount of business in the foreign insurer's domicile state. If the total charges on the Michigan insurer exceeds the charges imposed by Michigan on the foreign insurer, then the foreign insurer owes retaliatory tax. The retaliatory tax on foreign insurers is designed to encourage states to impose equal tax burdens on foreign and domestic insurers with the goal of promoting interstate commerce. *Commerce & Indus Ins Co v Dep't of Treasury*, 301 Mich App 256, 265 (2013); See also MCL 500.476a(2) ("The purpose of this section is to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes."). Michigan's retaliatory tax achieves that purpose by ensuring the total burden levied on a foreign insurer in Michigan are at least equal to the burdens that would be imposed on a Michigan insurer operating in that foreign insurer's home state.

Treasury's policy and forms do not allow for group-wide tax computation and the sharing of credits amongst separate insurance companies.

The premiums tax and retaliatory tax both require that each insurance company report its own tax liability, including credits against tax. Neither the CITA nor the Insurance Code supports a group-wide tax computation and the sharing of credits for insurance companies that are members of a unitary group. Consequently, Treasury has not promulgated a schedule or form for group returns. Similarly, there is no schedule or form available to transfer credits to

another insurance company in the unitary business group. Instead, Treasury's promulgated forms for insurance companies require each insurance company to report its own direct premiums and credits as separate entities when computing Michigan's tax on premiums. Treasury's forms also require each foreign insurer operating in Michigan to compute the retaliatory tax as separate entities.

Petitioners' business operations.

Insurance companies must be duly authorized insurers in the State of Michigan. (MCL 500.108; Ex 1, Crestbrook Cert.) Petitioners in this litigation are foreign insurance companies from various states of origin. For example, Nationwide Agribusiness Insurance Company (Nationwide Agribusiness) is a corporation domiciled in Iowa. (Ex 2, Nationwide Agribusiness 2015 Insurance Company Annual Return for Corporate Income and Retaliatory Taxes, ln 4.) Nationwide Mutual Insurance Company (Nationwide Mutual) is a corporation domiciled in Ohio. (Ex 3, Nationwide Mutual 2015 Insurance Company Annual Return for Corporate Income and Retaliatory Taxes, ln 4.) Other Petitioners to this litigation have various states of origin, including Pennsylvania and Wisconsin. (Ex 4, Harleysville Insurance Company 2015 Insurance Company Annual Return for Corporate Income and Retaliatory Taxes, ln 4; Ex 5, National Casualty Company 2015 Insurance Company Annual Return for Corporate Income and Retaliatory Taxes, ln 4.) Both Nationwide Mutual and Nationwide Agribusiness (as well as all other Petitioners) are licensed to engage in the business of insurance in Michigan.

Petitioners' original returns calculated their Michigan Corporate Income and Retaliatory tax on a separate entity basis.

The dispute in this case involves Premiums and Retaliatory tax liability for the 2014 through 2016 tax years. For those years, Petitioners and related entities each filed Insurance

Company Returns for Corporate Income and Retaliatory Taxes on an individual basis, reporting their own direct premiums written in Michigan when calculating their own premium tax liability. For example, for 2015, Nationwide Agribusiness reported the amount of direct premiums it wrote in Michigan, \$10,363,260. (Ex 2, ln 11; Ex 6, Nationwide Agribusiness Insurance Company Annual Statement for the 2015 year, p 59.)

Petitioners' original returns calculated and claimed credits against its reported premium tax calculation, also on an individual basis. For example, Nationwide Agribusiness claimed a \$33,799 credit for payments Nationwide Agribusiness made to the Facility. (Ex 2, ln 20c; Ex 7, Michigan Assigned Claims Plan Participation Report and Assessment, Assessment Year 2013.) That credit and others were derived from Nationwide Agribusiness' activities. Ultimately, Nationwide Agribusiness reported \$91,371 in premium tax liability. (Ex 2, ln 41.)

Because Petitioners were foreign insurers operating in Michigan, Petitioners completed the portion of the Corporate Income and Retaliatory Tax Return dedicated to Michigan's retaliatory tax. For example, Nationwide Agribusiness reported \$102,408 as the total burdens that would be imposed by Iowa on a hypothetical Michigan company doing the same business in Iowa. (Ex 2, ln 39.) The Michigan burdens reported by Nationwide Agribusiness totaled \$103,754. (*Id.*) That amount includes credits that are derived from Nationwide Agribusiness' own activities, including but not limited to, a \$2,277 regulatory assessment paid to the State of Michigan, Department of Insurance and Financial Services and a \$4,473 payment by Nationwide Agribusiness to the Safety Education and Training Fund. (Ex 2, ln 33b and ln 37b; Ex 8, Department of Insurance and Financial Services, Invoice dated June 22, 2015; Ex 9, Michigan Department of Licensing & Regulatory Affairs, Safety Education and Training Levy Invoice, dated May 18, 2015.) Because the Michigan actual burdens Nationwide Agribusiness claimed

on its return exceeded the Iowa burdens, Nationwide Agribusiness reported \$0 as its retaliatory amount. (Ex 2, ln 40.) Ultimately, Nationwide Agribusiness reported \$91,371 in premium tax liability for the 2015 tax year. (*Id.* at ln 41.)

Petitioners filed amended returns calculating their corporate income and retaliatory taxes and credits on a purported “unitary” basis.

Petitioners amended their returns calculating their corporate income and retaliatory taxes contrary to the method provided in Treasury’s forms for insurance companies. Specifically, Petitioners computed their premium and retaliatory taxes and credits on a “unitary,” or group-wide basis with several other insurance companies with whom Petitioners claim to have a unitary relationship. (Ex 10, Statement Attached to and Made Part of Form 4906 Amended 2015 Insurance Company Annual Return for Corporate Income and Retaliatory Taxes Unitary Calculation of Nationwide Group of Companies.) By doing so, Petitioners reduced their retaliatory tax calculations for foreign insurers included within the purported unitary business group.

The group also redistributed otherwise unused nonrefundable credits to reduce the premiums tax liability of other members. For example, Nationwide Agribusiness’ 2015 Amended Return increased the Michigan Automobile Insurance Placement Facility from \$33,799 to \$125,170. (Ex 11, Nationwide Agribusiness 2015 Insurance Company Amended Return for Corporate Income and Retaliatory Taxes, ln 20c.) The \$91,371 credit increase does not tie back to payments Nationwide Agribusiness made to the Facility. Instead, the \$91,371 represents a portion of a credit that went unused by another member of the group that was transferred to Nationwide Agribusiness so that it could reduce its premiums tax calculation from \$91,371 to \$0. (Ex 12, Pet’rs’ Letter supplementing Discovery Responses, dated June 11, 2021.)

In short, Petitioners' amended returns claimed amounts paid to the Facility as MAIPF credits on a "unitary," or group-wide computation basis, i.e., distributed excess credits among the insurance company entities of Petitioners purported unitary business group to offset premium tax liability imposed by MCL 206.635. But the entities claiming the credits did not necessarily generate those credits—instead, they claimed those credits as their own when the credits would reduce their tax liability, and when the credits would otherwise be unused by the original credit-generating entities whose tax liabilities were already low or zero.

Petitioners also amended their retaliatory tax calculation, this time claiming amounts as "other assessments" on a "unitary," or group-wide computation basis and distributing those amounts among the insurance company entities of its purported unitary business group to offset any retaliatory tax imposed by MCL 500.476a and MCL 206.643. For example, Nationwide Agribusiness increased the line 38b total of all other assessments paid in state of incorporation and/or to State of Michigan on its 2015 amended return from \$0 to \$90,026. (Ex 2, ln 38b; Ex 11, ln 38b.) According to Petitioners, "certain companies have amounts on line 38 which also may be transferred to other companies as needed to reduce or eliminate the retaliatory tax on a unitary basis." (Ex 10, p 1.) Petitioner has confirmed that the \$90,026 amount it claimed on line 38b of its 2015 Amended Return "constitutes a portion of the Unitary Business Group's [Michigan Assigned Claims Plan] assessments that were paid to the MAIPF." (Ex 13, Pet'rs' Letter re: Suppl Resp to Interrog No. 23, dated June 15, 2021.) This is contrary to MCL 500.134(5), which prohibits MAIPF assessments being claimed as "burdens" for purposes of the retaliatory tax.

Nationwide Agribusiness again reported \$102,408 as the total taxes, fees, and assessments that would be imposed by Iowa on a hypothetical Michigan company doing the

same business in Iowa. (Ex 11, ln 39A.) But this time, Nationwide Agribusiness' Michigan burdens also totaled \$102,408. (*Id.* at ln 39B.) To achieve that result, Nationwide Agribusiness reduced its previous reported Michigan premium tax from \$91,371 to \$0. (Ex 2, ln 27b; Ex 11, ln 27b.) Nationwide Agribusiness then reported \$90,026 in Michigan burdens transferred to it from other insurance companies. (Ex 11, ln 38B; Ex 13.) Like its original return, the Michigan actual burdens Nationwide Agribusiness claimed on its Amended Return did not exceed the Iowa burdens. As a result, Petitioner reported \$0 as its retaliatory amount. Ultimately, Petitioner reported \$0.00 in Michigan Corporate Income and Retaliatory taxes and requested a \$91,371 refund for alleged Corporate Income Tax overpayments. (Ex 11, ln 41 and ln 58.)

The Department of Treasury initially honored the overpayment amounts claimed on Petitioners' returns and issued refunds where requested. Treasury then discovered that the refunds were based on Petitioners' computation of the retaliatory and premiums tax and the claiming of credits on a "unitary," or group-wide basis. After that, Treasury issued notices of refund adjustments and assessments where necessary for the refunded amounts. Petitioners requested an informal conference. (Ex 14, Nationwide Agribusiness Inf Conference Req; Ex 15, Nationwide Mutual Inf Conf Req.) Treasury held informal conferences December 9, 2019, and issued an Informal Conference Recommendation, which were affirmed by Decisions and Orders of Determination, dated November 17, 2020. (Ex 16, Nationwide Agribusiness Inf Conf Rec & Decision and Order of Determination; Ex 17, Nationwide Mutual Inf Conf Rec & Decision and Order of Determination.)

Petitioners' allegations

Petitioners allege that Treasury's Corporate Income and Retaliatory Tax computations are contrary to law because they do not calculate Petitioners' Michigan corporate income and

retaliatory tax liability on a group-wide basis. (1st Am Pet, Docket No. 21-000039-TT, ¶ 7.)

Petitioners further allege that Treasury has failed to administer Part 2 of the CITA because it has not promulgated forms allowing group-wide tax computation and the sharing of credits amongst members of a unitary business group. (*Id.* at ¶¶ 7(f), (g).)

STANDARD OF REVIEW

Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164 (2002). A question of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183 (2003).

LAW & ARGUMENT

I. The CITA mandates that the premiums tax and credits be calculated and reported on an individual entity basis.

The CITA is clear that the premiums tax is levied against “an insurance company,” which is defined as a duly authorized insurer in the State of Michigan. MCL 206.635. Further, the Act provides that credits against the tax, including the MAIPF credits at issue, are available only to “an” individual insurance company. MCL 206.637.

A. The CITA premiums tax requires “an” individual insurance company to report its liability and pay tax.

The CITA imposes one of three separate types of taxes upon an entity depending on whether the entity is a standard corporation, an insurance company, or a financial institution. For insurance companies, Chapter 12 of the CITA imposes a premium tax. MCL 206.635. The

premiums tax is calculated as 1.25% of gross direct premiums written on property or risk located in Michigan. MCL 206.635. Importantly, under Chapter 12 of the CITA, an insurance company's premiums tax liability is *calculated* on an individual entity-basis.

Specifically, the code states, "*each* insurance company shall pay a tax determined under this chapter . . ." and "[t]he tax imposed by this chapter on *each* insurance company shall be a tax equal to 1.25% of gross direct premiums written on property or risk located or residing in this state" MCL 206.635(1) and (2) (emphasis added). In short, under the plain language of the CITA, it is clear that the insurance premium tax is calculated in the singular rather than the aggregate.

Petitioners allege that the term "insurance company" as used in the CITA consists of multiple insurance companies as a purported "unitary business group." (Pet, Docket No. 21-000039-TT, ¶¶ 8(c)–(d).) Petitioners' argument defies the plain language of the statute. The CITA defines an "insurance company" in the singular rather than the "plural." It states that an insurance company "means *an* authorized insurer as defined in section 108 of the insurance code of 1956, 1956 PA 218, MCL 500.108." MCL 206.607(5) (emphasis added). The Insurance Code of 1956 defines an "authorized" insurance company as "*an* insurer duly authorized, by a subsisting certificate of authority issued by the [insurance] commissioner, to transact insurance in this state." MCL 500.108 (emphasis added).

The indefinite article "an" as used both in the CITA and the Insurance Code of 1956 is used to modify the singular noun "insurance company." This also comports with the Insurance Code, which defines an "insurance company" as an "authorized insurer," which is another textual indication that the tax base and credits are computed at the individual entity level. Further, authorized insurers are issued certificates of authority by the Michigan Insurance

Commissioner. (Ex 1.) Thus, from a plain reading of the CITA, an insurance company's tax liability is determined and calculated in the singular rather than the aggregate. Accordingly, Petitioners erred in calculating their tax liability on a group-wide basis.

Treasury's position is further supported by comparing the taxing scheme for insurance companies under Chapter 12 of the CITA, which calculates tax liability on an individual entity basis for "each" insurance company. This is to be contrasted with standard taxpayers under Chapter 11 and financial institutions under Chapter 13, which calculate taxes on either an individual or group-wide basis depending on whether the entities form a unitary business group. Had the Legislature wanted the premium tax for insurance companies to be calculated on a group-wide basis, it certainly knows how. Accordingly, it must be presumed that the Legislature's failure to do so must be intentional. As explained by the Michigan Supreme Court in *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65 (2017):

We do not read requirements into a statute where none appear in the plain language and the statute is unambiguous. It is not within the province of this Court to read therein a mandate that the [L]egislature *has* not seen fit to incorporate. Further, the Legislature knows how to require that an institution be a nonprofit for an exemption to apply, as evidenced by the express imposition of that requirement in MCL 211.7n and in other portions of MCL 211.9(1)(a). We must presume that the Legislature's failure to limit the tax exemption found in MCL 211.9(1)(a) to nonprofit educational institutions was intentional. Therefore, we will not write a nonprofit requirement into the applicable portion of MCL 211.9(1)(a). [*Id.* at 72–73 (emphasis added) (citations omitted).]

Similarly, had the Legislature meant to provide for "unitary" filings for premiums and retaliatory tax purposes, it knew how to do so. Its omission from the more specific/applicable provisions in Chapter 12, means that each individual insurance company must report its own credits and tax liability.

For standard corporations under Chapter 11, the CITA imposes a corporate income tax on every *taxpayer* with business activity within Michigan. MCL 206.623(1). The corporate income

tax is imposed on the corporate income tax base, which means a taxpayer's business income subject to certain adjustments under the code. MCL 206.623(1) and (2). In summary, the corporate income tax is determined by the *taxpayer's* income and adjustments.

The definition of "taxpayer" under the CITA includes either individual entities or a unitary business group of entities: "[t]axpayer means a corporation, insurance company, financial institution, or unitary business group, whichever is applicable under each chapter, that is liable for a tax, interest, or penalty under this part." MCL 206.611(5). The statutory language further states that "[f]or purposes of chapters 11 and 14, taxpayer does not include an insurance company or financial institution." MCL 206.611(5). In short, the corporate income tax is imposed on either an individual corporation or a unitary business group of corporations.

Similar to standard corporations, tax liability for financial institutions under Chapter 13 of the CITA can be determined either on an individual entity basis or group-wide basis depending on whether the financial institutions form a unitary business group. The definition of "financial institution" includes a unitary business group of financial institutions such as certain banks, associations, and institutions. MCL 206.651(f). Under the CITA, a financial institution is subject to a franchise tax imposed on the tax base of the financial institution "as determined under [MCL 206.655] after allocation or apportionment" MCL 206.653(1). The tax liability is calculated on either an individual entity basis or a group-wide basis depending on whether the financial institution is a unitary business group.

The Legislature has not defined an "insurance company" to include a unitary business group because, gross premiums (which comprise the tax base) are written by "an insurance company." As shown in Chapters 11 and 13, had the Legislature wanted the premiums tax to be

determined on a group-wide basis, it knows how. It is not for a court to write a group-wide calculation into a statute where it does not exist.

Finally, Petitioners attempt to rely on MCL 206.691 as requiring that the premium tax must be calculated on a group-wide basis for unitary business groups. This statutory provision is not the “silver bullet” they hope. Pursuant to MCL 206.691(1) “a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group.” MCL 206.691(1). But § 691 is the more general provision applicable to corporate taxpayers and unitary business groups subject to a corporate income tax base, whereas the premiums and retaliatory taxes, MCL 206.635 and MCL 500.476a, are the more specific and applicable provisions.¹

Further, the CITA is clear that the premiums tax is imposed on “an” insurance company. Specifically, Chapter 12 of the CITA provides for the filing of a return for “an insurance company.” It states, in part: “*an* insurance company shall file the annual return required under this part before March 2 after the end of the tax year, and an automatic extension under

¹ A plain reading of MCL 206.691 and MCL 206.643(3) as a whole, indicates that the “combined return” requirement under MCL 206.691 specifically applies to entities filing a corporate income tax return, and not to insurance companies filing a premium tax return. This statutory provision requires all transactions between those persons included in a unitary business group be eliminated from the corporate income tax base, the apportionment formulas, and for purposes of determining exemptions, credits, and the filing threshold. MCL 206.691(1). Neither the corporate income tax base nor the apportionment formula apply to insurance companies.

Further, even if § 691 had application in this case, it would have no effect. As an undefined term, there is no indication that a “combined return” should be defined so broadly, as not all states view a “combined return” as equivalent to group-wide calculation of tax attributes. For instance, Virginia defines “combined return” as a single return for a group of corporations affiliated within the meaning of § 58.1-302, in which income or loss is *separately determined . . .*” VA Code Ann § 58.1-442 (emphasis added). In other words, a combined return is simply a “single return” where income or loss is determined on an individual entity basis. In summary, like Virginia, Michigan law provides no support for the sharing of otherwise wasted credits.

section 685(3) is not available.” MCL 206.643(3) (emphasis added). The indefinite article “an” modifies the singular noun “insurance company.”

In short, the Legislature could have required a group-wide computation of tax similar to standard corporations and financial institutions but did not. Its decision to narrowly frame the calculation of premium tax on a single entity basis does not support a group-wide calculation. See *D’Agostini Land Co LLC v Dep’t of Treasury*, 322 Mich App 545, 561 (2018) (finding that the disqualifying provisions of the Michigan Business Tax Act’s small-business alternative credit do not reference a taxpayer who is a unitary business group even though one of the unitary business group members would be disqualified individually).

B. The CITA and Insurance Code mandate that any credits claimed against the Premiums Tax, including MAIPF credits, be calculated and reported on an individual entity basis.

The CITA is clear that only single insurance companies may claim credits, including MAIPF credits, against the premiums tax. MCL 206.637(1) provides that “an insurance company may claim a credit against the tax imposed under this chapter in the following amounts: . . . Amounts paid to the Michigan automobile insurance placement facility pursuant to chapter 33 of the insurance code of 1956, 1956 PA 218, MCL 500.3301 to 500.3390.”

Neither the CITA nor the Insurance Code make any mention of a “unitary business group” of insurance companies—either as an assessed entity or as a credit claimant. And this makes sense: only individual insurers are assessed by the MAIPF (i.e., the Facility). (Ex 7.) Neither the CITA nor the Insurance Code contemplates that an entity that did not pay any MAIPF assessment can still benefit from a tax credit as if it had. The omission of a “unitary” group of insurance company taxpayers as an eligible credit claimant is intentional and must be given effect. *SBC Health Midwest*, 500 Mich at 72–73.

II. The CITA and Insurance Code mandate that the retaliatory tax be calculated and reported on an individual entity basis.

An “alien or foreign insurer” is responsible for paying Michigan’s retaliatory tax, which is imposed by the Insurance Code, MCL 500.476a. The retaliatory tax puts non-Michigan insurers writing policies/risk in Michigan on the same footing as Michigan insurers operating in other states. Specifically, the Code provides that:

[W]henever, by a law in force outside of this state or country, a domestic insurer or agent of a domestic insurer is required to make a deposit of securities for the protection of policyholders or otherwise, or to make payment for taxes, fines, penalties, certificates of authority, valuation of policies, or otherwise, or a special burden or other burden is imposed, greater in the aggregate than is required by the laws of this state for a similar alien or foreign insurer or agent of an alien or foreign insurer, the alien or foreign insurer of that state or country is required, as a condition precedent to its transacting business in this state, to make a like deposit for like purposes with the state treasurer of this state, and to pay to the revenue commissioner for taxes, fines, penalties, certificates of authority, valuation of policies, and otherwise an amount equal in the aggregate to the charges and payments imposed by the laws of the other state or country upon a similar domestic insurer and the agents of a domestic insurer, regardless of whether a domestic insurer or agent of a domestic insurer is actually transacting business in that state or country. [MCL 500.476a(1).]

Petitioners’ allegations fundamentally misunderstand the retaliatory tax and its computation. Because the retaliatory tax analyzes and compares the burdens and taxes imposed by Michigan against those imposed by the origin state of the insurer, it is impossible to make this comparison for a series of foreign entities all from different origin states. There is no single point of comparison: because Petitioners have various states of origin, those various tax/burden amounts would have to be compared with Michigan’s burdens/taxes. But the statute does not contemplate that Michigan’s single amount of taxes/burdens could be compared with that of a multitude (or even two) foreign states. It is a simple one-to-one calculation.

This makes sense within the context of the statute’s purpose and the business realities concerning the insurance industry. “[T]he selective imposition of the tax on only those insurers

incorporated in states that tax Michigan insurers more heavily than Michigan taxes them indicates that the purpose of the legislation is to pressure those states to relieve the tax burden on Michigan insurers doing business in those states.” *TIG Ins Co*, 464 Mich at 559. Here, Petitioners come from a number of various foreign states. It may very well be that some of those states already have taxes and burdens lower than those imposed by Michigan, while others have taxes and burdens that are higher than Michigan. The purpose of the retaliatory taxes would be frustrated if there were one single computation of Michigan against a multitude of insurers who may or may not have tax burdens higher than Michigan’s.

Treasury’s forms comport with the statute and its purpose. The form requires the foreign insurer to compute its premium tax liability (page 1 of the return), and then compares Michigan’s burdens to the foreign state’s burdens (page 2 of the return). There is no place on the form (or in the statute) for multiple foreign states’ taxes and burdens to be computed, indexed, or compared to Michigan’s.

Here, it is impossible to analyze Petitioners’ purported “unitary business group” of insurance companies, which come from Ohio, Pennsylvania, Iowa, and Wisconsin—all of which may differ in the amount of taxes and burdens they impose on insurers.

Accordingly, only “an” insurance company is responsible to pay the retaliatory tax, and Petitioners’ assertions otherwise are contrary to statute, common sense, and mathematical realities.

CONCLUSION

Petitioners misunderstand the premiums tax, the retaliatory tax, and the tax credits at issue. They are imposed and available only to “an” insurance company, not a “unitary business group.”

Accordingly, Treasury respectfully requests that this Honorable Tribunal grant Treasury's motion for summary disposition and enter an order dismissing the first amended petition with prejudice, and grant it such other relief, including attorney's fees and costs, as the Tribunal deems appropriate.

Respectfully submitted,

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Dated: August 4, 2021

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 19



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GOVERNOR

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DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

ORLENE HAWKS
DIRECTOR

Nationwide Agribusiness Insurance Company et al, MICHIGAN TAX TRIBUNAL
Petitioners,

v

MOAHR Docket No. 21-000039

Michigan Department of Treasury,
Respondent.

Presiding Judge
Peter M. Kopke

PROPOSED ORDER DENYING PETITIONER'S
MOTION FOR SUMMARY DISPOSITION

PROPOSED ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DISPOSITION

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

On March 5, 2021, the Tribunal issued a Scheduling Order in the above-captioned cases, which, in pertinent part, ordered the parties to file motions for summary disposition by August 2, 2021, and responses to the opposing party's motion by September 2, 2021. The parties complied with the scheduling order.

The Tribunal has reviewed the Motions, the Responses, and the case file and finds that the granting Respondent's Motion for Summary Disposition and the denial of Petitioners' Motion for Summary Disposition is warranted at this time.

PETITIONERS' CONTENTIONS

Petitioners move for summary disposition under MCR 2.116(C)(10). In support of its Motion, Petitioners contend that they are entitled to summary disposition because they are a unitary business group ("UBG") under MCL 206.611(6). Petitioners and

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affiliated insurance companies filed amended Michigan Corporate Income Tax (“CIT”) returns based upon Respondent’s guidance. The amended returns sought to apply credits of certain group members against the aggregate CIT liability. After some but not all refunds were processed, Respondent issued assessments against the issued refunds. Petitioners contend Respondent does this because it now claims that an insurance company can never be part of a UBG if there is a benefit to the UBG.

Petitioners contend that they and their affiliates satisfy the definition of a UBG under RAB 2018-12, participate in a cost-sharing agreement, and participate in reinsurance pooling together. They also contend they and their affiliates satisfy both the value-flow requirement and the dependent-operations requirement. Petitioners contend that a plain reading of UBG rules under CIT Act Chapter 10 indicates that those rules apply across the Act and not in the narrow scope posited by Respondent.¹

Petitioners contend that the CIT Act does not limit the application of MCL 206.611 and MCL 206.691 across the entirety of the Act. It relies on MCL 206.611(5) in support of its interpretation of a plain reading of the statute. Petitioners contend that no statutory text prohibits its interpretation and that Respondent’s reliance upon MCL 206.635(1) and MCL 206.637 is mistaken. Petitioners contend Respondent violates statutory construction rules and cites case law they contend supports their position.

RESPONDENT’S RESPONSE TO PETITIONER’S CONTENTIONS

In support of its Response, Respondent contends that Petitioner’s Motion errs in two respects. First, Respondent argues that Petitioner’s reliance upon the general

¹ UBG is defined under MCL 206.611.

definition of UBG is undercut by the premiums and retaliatory tax appearing under Chapter 12 of the CIT Act, which applies to insurance companies. Respondent contends that Petitioner is therefore subject to the more specific entity-by-entity calculation required under Chapter 12² and that it is not appropriate to consider an insurance company under MCL 206.691 when the taxes and credits associated with insurance companies operate under Chapter 12. Respondent also argues that Petitioners' brief makes an unnecessary connection between the phrases "an insurance company" and "UBG." Respondent argues that Petitioners' interpretation of MCL 206.691 would fundamentally undermine administration of the retaliatory tax.

Second, Respondent argues that Petitioners' argument under *TCF* is irrelevant because that case addresses issues for financial institutions under Chapter 13 of the CIT Act. Also, it states that the comparison is not apt because a "financial institution" can be a UBG under Chapter 13, but an "insurance company" is only "an authorized user" and not a UBG.

Respondent also argues that Petitioner's brief erred in relying on Wilkinson's deposition because only legal issues can be considered on summary disposition. It also points to other depositions it claims puts Wilkinson's statements in context.

Respondent requests oral argument or the opportunity to respond to Petitioner's response to its Motion.

² Respondent cites MCL 206.635(1) and (2); MCL 206.643(3); and MCL 206.637(1).

RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends that the statute prohibits an insurance entity from claiming to be a UBG for purposes of premiums tax, retaliatory tax, or tax credits. Further, Respondent contends that insurers from various foreign states cannot be compared to the burdens a Michigan company would pay in the insurer's origin state.

Respondent contends that the structure of the CIT Act and insurance code make it inappropriate to allow insurance companies to group taxes and share credits.

Respondent states that the State of Michigan utilizes a retaliatory tax to ensure equal tax burdens on domestic and foreign corporations. Respondent argues that appropriate forms and schedules do not exist to support Petitioners' legal interpretation.

Respondent states that Petitioners are companies from various states and initially completed their respective returns appropriately. However, Respondent contends that Petitioners erred in their amended returns by filing on a unitary, group-wide basis, allowing the reduction of retaliatory tax calculations and utilization of unused nonrefundable credits contrary to law.

Respondent contends that the insurance premium tax is calculated on each individual insurance company and relies upon the CIT Act. Specifically, it contends that the indefinite article "an" as used in the CIT Act and the Insurance Code of 1956 supports its position and undercuts Petitioners' argument that the tax can be calculated against a UBG. Respondent further relies upon other sections of the CIT Act, such as calculations for standard taxpayers or financial institutions, as discernible from the omitted language Petitioner seeks in this chapter of the CIT. However, Respondent

contends that insurance companies were not statutorily included, because the gross premiums that comprise the tax base must be written by “an insurance company.”

Respondent also contends that MCL 206.691 does not support Petitioners’ position because it is a general provision of the CIT Act and not as specific to the applicable issue as MCL 206.635 and MCL 500.476a. Respondent relies upon *D’Agostini Land Co LLC v Dep’t of Treasury*.³ It also relies upon MCL 206.637(1) and the lack of reference to a “unitary” group of insurance companies in the CIT Act.

Respondent contends that an alien or foreign insurer must pay the retaliatory tax in Michigan, as required under MCL 500.476a, and that this is a simple one-to-one calculation, despite Petitioner’s contention to the contrary. Respondent states it is designed in this manner to ensure that companies from both lower- and higher-taxing jurisdictions are calculated to be equal to the liability of a domestic insurance provider. Respondent contends the purpose of that analysis is frustrated if a unitary business group involving insurers from various states with various tax rates may pay the retaliatory tax.

PETITIONER’S RESPONSE TO RESPONDENT’S CONTENTIONS

In support of its Response, Petitioners contend that Respondent’s Motion misconstrues relevant statute by over-emphasizing portions of MCL 206.635 and MCL 206.637 while ignoring relevant statutory language under MCL 206.611 and MCL 206.691. It states this contention is contrary to MCL 8.3b, the Michigan Court of Appeals’ decision in *TCF*, and Wilkinson’s 2016 guidance. Petitioners contend that

³ *D’Agostini Land Co LLC v Dep’t of Treasury*, 322 Mich App 545, 561 (2018).

Respondent's interpretation of Chapter 12 of the CIT Act ignores the other pertinent portions of the statute relating to UBG in a manner not envisioned by the Legislature.

Petitioners argue that the CIT Act definition of UBG includes "insurance companies" and that those insurance companies are mandated to file combined returns. It relies upon MCL 8.3b and its interpretation in cited Michigan Court of Appeals cases. Petitioners contend that Respondent's readings of MCL 206.611(5) and MCL 206.651(g) are misconstrued. Petitioners state that Respondent's Motion wholly fails to confront the *TCF* decision, which Petitioners contend is analogous to the subject facts. They also point again to Wilkinson's guidance letter in 2016. Petitioners contend that Respondent misconstrues *D'Agostini* and that it supports Petitioners' position.

Regarding the retaliatory tax calculation, Petitioners contend this argument is not proper because it is raised for the first time in Respondent's Motion. They contend that raising the argument for the first time at this stage of litigation violates Respondent's Notice of Intent to Assess requirement under MCL 205.21 and relevant appellate opinions. Petitioners also reject the argument upon its merits, stating that nothing in MCL 206.643 prohibits the calculation of retaliatory tax on a unitary business group, and that calculating the retaliatory tax on a group-wide basis is possible based on Respondent's exhibits in its own Motion.

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a

decision on such motions.⁴ In this case, each party moves 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.⁵

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.⁶ The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.⁷ The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.⁸ 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.⁹ If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.¹⁰

⁴ See TTR 215.

⁵ See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

⁶ See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).

⁷ See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

⁸ *Id.*

⁹ See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

¹⁰ See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

CONCLUSIONS OF LAW

The Tribunal has carefully considered the parties' Motions and Responses under MCR 2.116(C)(10) and finds that granting Respondent's Motion and the denial of Petitioners' Motion is, as indicated above, warranted.

This case involves the calculation of tax under the Income Tax Act of 1967, MCL 206.1 *et seq.* Part II, Chapters 10 and 16 of the Act contain general rules and definitions. Part II, Chapter 12 of the Act controls the taxation of insurance companies in Michigan. Petitioners argue that under MCL 206.611(6) and MCL 206.691, they are permitted to file combined returns as a UBG for the purposes of calculating premiums tax and retaliatory tax. Respondent argues that MCL 206.635(1) and MCL 206.637 preclude Petitioner from filing combined returns for premiums and retaliatory taxes. As such, this case boils down to whether the more general provisions of the CIT Act that Petitioners cite control the ability of insurance companies to file combined returns for premiums and retaliatory taxes, or whether the more specific provisions of Chapter 12 of the CIT Act preclude the ability of insurance companies to file combined returns for premiums and retaliatory taxes.

MCL 206.611(6) defines a unitary business group as follows:

... a group of United States persons that are corporations, insurance companies, or financial institutions, other than a foreign operating entity, 1 of which owns or controls, directly or indirectly, more than 50% of the ownership interest with voting rights or ownership interests that confer comparable rights to voting rights of the other members, and that has business activities or operations which result in a flow of value between or among members included in the unitary business group or has business activities or operations that are integrated with, are dependent upon, or contribute to each other. Unitary business group includes an affiliated

group that makes the election to be treated, and to file, as a unitary business group . . .¹¹

MCL 206.691(1) concerns the filing of combined returns by a UBG and states in pertinent part:

. . . a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group. Each United States person included in a unitary business group or included in a combined return shall be treated as a single person, and all transactions between those persons included in the unitary business group shall be eliminated from the corporate income tax base, the apportionment formulas, and for purposes of determining exemptions, credits, and the filing threshold under this part. If a United States person included in a unitary business group or included in a combined return is subject to the tax under chapter 12 or 13, any corporate income attributable to that person shall be eliminated from the corporate income tax base and any sales attributable to that person shall be eliminated from the apportionment formula under this part.¹²

MCL 206.635 discusses taxes on direct premiums and states:

Except as otherwise provided under subsection (4) or (6), each insurance company shall pay a tax determined under this chapter.¹³

The tax imposed by this chapter on each insurance company shall be a tax equal to 1.25% of gross direct premiums written on property or risk located or residing in this state.¹⁴

MCL 206.637 concerns tax credits insurance companies may claim and states:

Except as otherwise provided under subsection (3), an insurance company may claim a credit against the tax imposed under this chapter . . .¹⁵

¹¹ See MCL 206.611(6).

¹² See MCL 206.691(1).

¹³ See MCL 206.635(1).

¹⁴ See MCL 206.635(2).

¹⁵ See MCL 206.637(1).

Section 476a of the Insurance Code of 1956, MCL 500.1 *et seq*, controls the conduct of alien or foreign insurers in Michigan.¹⁶ Specifically, a foreign insurer must pay retaliatory tax if a Michigan insurer conducting the same amount of business in that foreign insurer's home state would pay more tax in that foreign insurer's home state than the foreign insurer would pay in Michigan.

There is no question Petitioners satisfy the elements of a UBG. Nationwide Mutual Insurance Company controls, directly or indirectly, more than 50% of the ownership interest with voting rights.¹⁷ Petitioners also satisfy both the relationship and control requirements of the UBG.¹⁸ However, this case does not concern whether Petitioners are a UBG. This case concerns whether Petitioners, as a UBG, may file combined returns as a UBG to reap the benefits of claiming MAIPF tax credits. So, even though Petitioners satisfy the requirements of a UBG, the question of whether they may file returns as a UBG turn on statutory interpretation.

The primary goal of statutory interpretation is to give effect to the intent of the Legislature.¹⁹ To ascertain the Legislature's intent, a reviewing court should focus first on the plain language of the relevant statutes.²⁰ Respondent cited the definition of "taxpayer" under MCL 206.611(5), which is "a corporation, insurance company, financial institution, or unitary business group, *whichever is applicable under each chapter*, that is liable for a tax, interest, or penalty under this part."²¹ There is no question Petitioners are

¹⁶ See MCL 500.476a.

¹⁷ See MCL 206.611(6)

¹⁸ See MCL 206.611(6).

¹⁹ See *Lafarge Midwest, Inc. v City of Detroit*, 290 Mich. App. 240, 246, 801 N.W.2d 629 (2010).

²⁰ See *Fisher Sand & Gravel Co. v Neal A. Sweebe, Inc.*, 594 Mich. 543, 560, 837 N.W.2d 244 (2013).

²¹ See MCL 206.611(5) (*emphasis added*)

taxpayers. However, the italicized language indicates that the entity being taxed depends on the type of tax being assessed. Therefore, an entity may be taxed as a UBG if the provision for which the tax is assessed allows for it. However, if a provision does not allow for UBGs to file jointly, then an entity must file individually.

Petitioners' main argument is that MCL 206.611(6) and MCL 206.691, as general provisions of the CIT Act, guide the ability of Petitioners to file combined returns for premiums and retaliatory taxes. There is no doubt MCL 206.691 is applicable to corporate taxpayers and UBGs subject to a corporate income tax base. But Respondent correctly stated MCL 206.691 makes no reference to premiums and retaliatory taxes. The Legislature intended this provision to concern general corporate income taxes, and not every subcategory of taxes. If the Legislature intended for this provision to apply to all taxes, it would have said so in this provision.²² Therefore, although MCL 206.691 requires UBGs to file combined returns for taxpayers subject to a corporate income tax base, it does not require UBGs to file combined returns for premiums and retaliatory taxes.

Respondent cited Chapter 12 of the CIT Act, which imposes corporate taxes on insurance companies. MCL 206.635(1) states "*each* insurance company shall pay a tax equal to 1.25% of gross direct premiums written on property or risk located or residing in this state"²³ [Emphasis added.] MCL 206.637 states "*an* insurance company may claim a credit against the tax imposed under this chapter"²⁴ [Emphasis added.] MCL 206.635 is the relevant statute for taxes on direct premiums. There are no

²² See *SBC Health Midwest v City of Kentwood*, 500 Mich. 65, 73, 894 N.W.2d 535, 539 (2017).

²³ See MCL 206.635(1)

²⁴ See MCL 206.637(1).

references made to UBGs regarding paying premium taxes or UBGs claiming MAIPF tax credits. UBGs not being mentioned in these statutes has meaning. It means the Legislature did not intend to have premiums tax calculated on a group wide basis. The Legislature's failure to mention UBGs is presumed to be intentional.²⁵ This Tribunal, nor any court, is permitted to write into a statute.

Petitioners contend since MCL 8.3(b) allows a singular word to extend to and embrace the plural number, "insurance company" can mean a group of insurance companies. This is correct. MCL 206.635 and MCL 206.637 can be modified so singular "insurance company" can be made plural to "insurance companies."²⁶ However, Respondent argued, correctly, that Petitioners' argument that "insurance company" may be modified to "UBGs" is a stretch. This Tribunal agrees. UBGs are totally different from insurance companies. UBGs do not write premiums nor do any other functions that an insurance company does. UBGs are simply a creation of Tax law. Again, if the Legislature intended for UBGs to be included in these statutes, it would have written them in.²⁷

Petitioners cited *TCF National Bank v Department of Treasury* to bolster their position that UBGs should be allowed to file combined returns for premiums tax. The dispute in *TCF* involved whether a UBG was considered a single taxpayer for the purposes of Michigan's franchise tax on financial institutions under the Michigan Business Tax Act ("MBTA").²⁸ Petitioners contended that like this case, Treasury's

²⁵ See *SBC Health Midwest*, 500 Mich. App. at 73, 894 N.W.2d at 539.

²⁶ See MCL 8.3(b),

²⁷ *Id.*

²⁸ See *TCF Nat'l Bank v Dept. of Treasury*, 330 Mich. App. at 599.

argument was the reference to the singular phrase “every financial institution” in the MBTA required that the tax calculations for financial institutions had to be performed on an entity-by-entity basis, essentially reading the UBG provision out of the MBTA.²⁹ The Court of Appeals ruled against the Treasury, stating the plain language of the definitional provision for “financial institution” established that a “financial institution” may be a type of bank, or an entity owned by such a bank that is a member of the UBG, or a UBG made up of either or both of these two type of entities.³⁰ However, Respondent’s response is the correct interpretation of *TCF* as it relates to the present case. Respondent explained that in *TCF*, UBGs were included in the definition of “financial institutions.”³¹ In the CIT Act, the definition of “insurance company” is as follows:

[A]n authorized insurer as defined in section 108 of the insurance code of 1956, 1956 PA 218, MCL 500.108. . . .³²

An “authorized” insurer is defined in MCL 500.108 and states:

“Authorized” insurer means an insurer duly authorized, by a subsisting certificate of authority issued by the commissioner, to transact insurance in this state.³³

As seen above, the definition of “insurance company” does not include UBGs, while the definition of “financial institutions” in *TCF* did include UBGs. Had the Legislature wanted to include UBGs in the definition of “insurance companies” for the purposes of the CIT Act, it would have written it in as they did in the MBTA for financial institutions. The fact

²⁹ See Petitioner’s Brief at 15.

³⁰ *Id* at 608.

³¹ See MCL 208.1117(5).

³² See MCL 206.607(5).

³³ See MCL 500.108(1).

they did not do so shows the Legislature's intent was for premiums and retaliatory taxes to be calculated on an entity-by-entity basis.

Petitioner and Respondent both cite *D'Agostini Land Company v Department of Treasury*. In *D'Agostini*, Petitioner, which was a UBG, was denied a small-business alternative credit claimed under the MBTA.³⁴ In the MBTA, the small business alternative credit can be claimed by "any taxpayer" with gross receipts not exceeding \$20,000,000 and adjusted net income not exceeding \$1,300,000.³⁵ In addition, there were several disqualifying factors. The pertinent factor in this case was as follows:

An individual, a partnership, a limited liability company, or a subchapter S corporation is disqualified if the individual, any 1 partner of the partnership, any 1 member of the limited liability company, or any 1 shareholder of the subchapter S corporation receives more than \$180,000.00 as a distributive share of the adjusted business income minus the loss adjustment of the individual, the partnership, the limited liability company, or the subchapter S corporation.³⁶

One of the members of Petitioner's UBG was an S corporation who was disqualified under the above provision, so Treasury denied the whole UBG the tax credit.³⁷ The Court of Appeals ruled this was incorrect, since the statute stated broadly that *any* taxpayer could claim the credit, and the disqualifications were to more specific types of taxpayers.³⁸ Since UBGs were not expressly included in the disqualifications, then they were not inferred to be in these disqualifications since "any taxpayer" can claim the credits.

³⁴ See *D'Agostini v Department of Treasury*, 322 Mich. App. 545, 548, 912 N.W.2d 593, 594 (2018).

³⁵ See MCL 208.1417(1).

³⁶ See MCL 208.1417(1)(a).

³⁷ *Id* at 552.

³⁸ *Id* at 559.

Petitioners and Respondent both misinterpreted *D'Agostini*. Petitioners asserted that like *D'Agostini*, Treasury also did not provide forms to use for filing a tax return in the way the taxpayer in that case contended was proper but was not considered to be dispositive in that case. The Tribunal agrees, but this is not the main takeaway from *D'Agostini*. Respondent asserted that *D'Agostini* supports the Legislature's decision to narrowly frame the calculation of premium tax on a single entity basis. Although *D'Agostini* does support Respondent's position, it is not for this reason. The present case is different from *D'Agostini* because there is no list of exclusions in MCL 206.637(1). The statute only refers to "an insurance company" claiming a credit. MCL 206.637(1) refers to a specific entity who may claim a credit, and there are no exclusions in this statute because this statute pertains to insurance companies only. The statutory canon of *expressio unis est exclusio alterius* means "the express mention of one thing generally implies the exclusion of similar things that were not mentioned."³⁹ Here, the legislature only included insurance companies in MCL 206.637(1). This implies financial institutions, corporations, LLCs, and UBGs are not permitted to receive these tax credits since they were not expressly stated.

Petitioners allege that Respondent cannot bring up the retaliatory tax issue since it was not included as a reason for the assessment in the Notice of Intent to Assess, and Respondent is barred from bringing up this issue at this stage in the legal process. The Tribunal has jurisdiction over any proceeding provided by law.⁴⁰ Therefore, the Tribunal has authority to consider any issue brought up in these proceedings, therefore

³⁹ See *Houghton Lake Area Tourism v Wood*, 255 Mich App 127, 151 (2003).

⁴⁰ 205.731(e).

an analysis of the retaliatory tax is warranted, particularly given Petitioners' ability to respond to that issue when raised.

Petitioners asserted that the newer statute, more specifically the CIT Act's authorization of unitary filings by groups of insurance companies, prevails over the older statute creating the retaliatory tax. The Tribunal disagrees for the same reasons as why UBGs may not file combined returns for the purposes of the premiums tax. Respondent asserted MCL 500.476(a) concerns the retaliatory tax for insurance companies and refers only to *insurance companies* paying this tax.⁴¹ As this is indeed the older statute as Petitioners stated, in the newer CIT Act, had the Legislature wanted UBGs to file jointly for the retaliatory tax, it would have said so in MCL 206.691.⁴² MCL 206.691 makes no reference to retaliatory taxes, therefore Respondent is correct that MCL 500.476a controls how these taxes are filed, and shall be filed by an individual insurance company.

Petitioners discuss extensively in both their brief and response that Mr. Lance Wilkinson, Administrator of Tax Policy for the Department of Treasury, encouraged group filing for purposes of the premium tax. Mr. Wilkinson stated, "an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group."⁴³ In Respondent's response, Respondent stated the Wilkinson Letter does not adopt Mr. Wilkinson's filing methodology.⁴⁴ In addition, Mr. Wilkinson gave testimony indicating he was not aware of what Petitioners' goal was

⁴¹ See MCL 500.476(a).

⁴² See MCL 206.691.

⁴³ See Petitioner's Brief at 8.

⁴⁴ See Respondent's Response at 4.

concerning the posture of their premiums and retaliatory tax filings. Nevertheless, even if Mr. Wilkinson did encourage filing combined returns as a UBG for premium and retaliatory taxes, his advice is not legal precedent and has no bearing on how statutes are interpreted. The relevant statutes are clear that Petitioners are not permitted to file as a UBG for premium and retaliatory taxes and reap the benefits of claiming MAIPF tax credits. Therefore, the assessments issued by Respondent must be upheld.

PROPOSED JUDGMENT

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

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

IT IS FURTHER ORDERED that Assessment Numbers VA6WA6K and VA7AV7G are AFFIRMED.

EXCEPTIONS

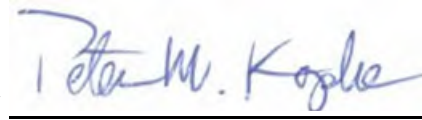
This POJ was prepared by the Michigan Office of Administrative Hearings and Rules. The parties have 20 days from the below "Date Entered by Tribunal" to notify the Tribunal and the opposing party in writing, by mail or by electronic filing, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions). Exceptions are limited to the evidence submitted prior to or at the hearing and any matter addressed in the POJ. There is no fee for filing exceptions.

The opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions.⁴⁵

A copy of a party's written exceptions or response must be sent by mail or electronic service, if agreed upon by the parties, to the opposing party and proof must be submitted to the Tribunal that the exceptions or response were served on the opposing party. Exceptions and responses filed by *facsimile* will not be considered.

Entered: August 22, 2022
ajs

By



⁴⁵ See MCL 205.762(2) and TTR 289(1) and (2).

PROOF OF SERVICE

I certify that a copy of the foregoing was sent on the entry date indicated above to the parties or their attorneys or authorized representatives, if any, utilizing either the mailing or email addresses on file, as provide by those parties, attorneys, or authorized representatives.

By: Tribunal Clerk

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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 20



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

ORLENE HAWKS
DIRECTOR

Nationwide Agribusiness Insurance
Company et al,
Petitioner,

MICHIGAN TAX TRIBUNAL

v

MOAHR Docket No. 21-000039

Michigan Department of Treasury,
Respondent.

Presiding Judge
Steven M. Bieda

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment (POJ) on August 22, 2022. The POJ states, in pertinent part, “[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal in writing, by mail or by electronic filing, if available, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions).”

Neither party has filed exceptions to the POJ.

The Administrative Law Judge (ALJ) considered the testimony and evidence submitted and made specific findings of fact and conclusions of law. The ALJ’s determination is supported by the testimony and evidence and applicable statutory and case law.

Given the above, the Tribunal adopts the POJ as the Tribunal’s final decision in this case.¹ The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the POJ in this Final Opinion and Judgment. As a result:

- a. The taxes, interest, and penalties, as levied by Respondent, are:

Assessment Number: VA6WA6K

Taxes	Interest	Penalties
\$43,352.00	\$12,758.53	\$10,838.00

Assessment Number: VA7AV7G

Taxes	Interest	Penalties
\$53,231.00	\$13,307.75	\$13,307.75

¹ See MCL 205.726.

b. The taxes, interest, and penalties, as determined by the Tribunal, are:

Assessment Number: VA6WA6K

Taxes	Interest ²	Penalties
\$43,352.00	\$12,758.53	\$10,838.00

Assessment Number: VA7AV7G

Taxes	Interest ³	Penalties
\$53,231.00	\$13,307.75	\$13,307.75

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties as indicated herein 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.

A motion for reconsideration must be filed with the Tribunal with the required filing fee within 21 days from the date of entry of the final decision. 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. You are required to serve a copy of the motion on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion. Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.

² Interest to be computed in accordance with 1941 PA 122 (Revenue Act).

³ Interest to be computed in accordance with 1941 PA 122 (Revenue Act).

A claim of appeal must be filed with the Michigan Court of Appeals with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave." You are required to file a copy of the claim of appeal with filing fee with the Tribunal in order to certify the record on appeal. The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.

By _____

Entered: January 23, 2023
bw

PROOF OF SERVICE

I certify that a copy of the foregoing was sent on the entry date indicated above to the parties or their attorneys or authorized representatives, if any, utilizing either the mailing or email addresses on file, as provide by those parties, attorneys, or authorized representatives.

By: Tribunal Clerk

RECEIVED by MSC 7/24/2025 4:17:16 PM

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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 21



Positive

As of: October 17, 2024 7:59 PM Z

Soave v. Dep't of Treasury

Court of Appeals of Michigan

November 30, 2023, Decided

No. 364415

Reporter

2023 Mich. App. LEXIS 9649 *; 2024 WL 56012

ANTHONY L. **SOAVE** and UNITARY AFFILIATES,
Plaintiffs-Appellants, v DEPARTMENT OF TREASURY,
Defendant-Appellee.

Notice: THIS OPINION IS UNCORRECTED AND
SUBJECT TO REVISION BEFORE FINAL
PUBLICATION IN THE MICHIGAN COURT OF
APPEALS REPORTS.

Subsequent History: [*1] The Publication Status of
this Document has been Changed by the Court from
Unpublished to Published January 4, 2024.

Prior History: Court of Claims. LC No. 21-000156-MT.

some of the individual entities' federal returns would
operate to extend the state deadline for the unitary
business group return; [3]-The court rejected appellant's
argument regarding appellee's change in policy
regarding "new filers", and failed to produce the
documentation required by [MCL 205.30c\(1\)](#) and (2)
required to participate in the voluntary disclosure
program.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

[Soave v. Dep't of Treasury, 2023 Mich. App. LEXIS
8765, 2023 WL 8286397 \(Mich. Ct. App., Nov. 30, 2023\)](#)

Core Terms

audit, returns, taxpayer, entities, tax year, refund,
statute of limitations, tax return, due date, limitations
period, unitary business, tolling, filer, informal
conference, limitations, deadline, argues, discovery, trial
court, overpayments, untimely, desk

Civil Procedure > Appeals > Standards of
Review > De Novo Review

Governments > Legislation > Statute of
Limitations > Time Limitations

Civil Procedure > ... > Summary
Judgment > Appellate Review > Standards of
Review

Case Summary**Overview**

HOLDINGS: [1]-The court of claims did not err when it
determined that an audit of an individual business
included in a unitary business group did not extend the
statute of limitations for the filing of the business's tax
returns per [MCL 205.27a\(2\)](#), because a return was not
required and thus whether it was timely or not was a
nonentity. Appellee was auditing returns that had no
meaningful existence and; [2]-Appellant failed to
demonstrate how an extension of the due dates for

HN1[📄] Standards of Review, De Novo Review

The appellate court reviews the trial court's ruling on a
motion for summary disposition de novo. When
addressing a motion for summary disposition, a trial
court must accept as true the allegations of the
complaint unless contradicted by the parties'
documentary submissions. Although not required to do
so, a party moving for summary disposition under [MCR
2.116\(C\)\(7\)](#) may support the motion with affidavits,
depositions, admissions, or other admissible
documentary evidence, which the reviewing court must
consider. If no material facts are disputed, whether a
plaintiff's claim is barred by the pertinent statute of

Wayne Roberts

App'e. Appx. 000361

limitations is a question of law for the court to determine.

Under the statute's clear language, a taxpayer can be either an individual or a UBG but not both.

Tax Law > ... > Administration > Place & Time for Filing Returns > Extensions of Time

Tax Law > ... > Income Taxes > Corporations & Unincorporated Associations > Imposition of Tax

Tax Law > State & Local Taxes > Administration & Procedure > Failure to File

[HN4](#) **Corporations & Unincorporated Associations, Imposition of Tax**

[HN2](#) **Place & Time for Filing Returns, Extensions of Time**

Once an entity is considered to be part of a unitary business group, that single entity ceases to be a separate taxpayer.

An extension afforded one taxpayer simply cannot be transferred to a different taxpayer.

Business & Corporate Law > Limited Liability Companies > Member Duties & Liabilities

Tax Law > ... > Income Taxes > Corporations & Unincorporated Associations > Imposition of Tax

Tax Law > ... > Income Taxes > Corporations & Unincorporated Associations > Imposition of Tax

Tax Law > ... > Income Taxes > Corporations & Unincorporated Associations > Special Entities

Tax Law > ... > Income Taxes > Corporations & Unincorporated Associations > Special Entities

[HN5](#) **Corporations & Unincorporated Associations, Imposition of Tax**

[HN3](#) **Limited Liability Companies, Member Duties & Liabilities**

MCL 208.1117(5), which defines the term "taxpayer" as a person or a unitary business group, recognizes a unitary business group as a separate and distinct taxpayer.

A unitary business group (UBG) is a taxpayer. *MCL 208.1117(5)*. It is required to file a tax return, both under the Michigan Business Tax Act (MBTA) and the successor Corporate Income Tax (CIT). A UBG is not a separate and distinct legal entity, like a corporation, limited liability company, or partnership; rather, the group is purely a creation of tax law. In general, a UBG is a group of related US persons whose business activities are sufficiently interdependent. [MCL 206.611\(6\)](#); *MCL 208.1117(6)*. To qualify as a unitary business group, one member of the proposed group must own or control more than 50% of the other members and there must be a sufficient connection between the members to meet one of two relationship tests. [MCL 206.611\(6\)](#); *MCL 208.1117(6)*. If a group of businesses qualifies as a unitary business group in a particular tax year, then the group must file a unitary tax return for that year. [MCL 206.691\(1\)](#); *MCL 208.1511 (MBT)*. Michigan, like several other states, has adopted the unitary-business-group concept in an effort to measure more accurately the related group's taxable activities in the state. Moreover, *MCL 208.1117(5)* defines a taxpayer as a person or a unitary business group, reflecting that a UBG is a separate taxpayer.

Governments > Legislation > Statute of Limitations > Time Limitations

Tax Law > State & Local Taxes > Administration & Procedure > Audits & Investigations

[HN6](#) **Statute of Limitations, Time Limitations**

As stated in the Revenue Act, [MCL 205.27a\(4\)](#), the statute of limitations is extended only as to those items that were the subject of the audit.

Tax Law > State & Local Taxes > Administration & Procedure > Audits & Investigations

[HN7](#) **Administration & Procedure, Audits & Investigations**

[MCL 205.27a\(4\)](#) defines items that were the subject of the audit to mean items that share a common characteristic that were examined by an auditor even if

there was no adjustment to the tax as a result of the examination. Items that share a common characteristic include items that are reported on the same line on a tax return or items that are grouped by ledger, account, or record or by class or type of asset, liability, income, or expense.

Tax Law > State & Local Taxes > Administration & Procedure > Audits & Investigations

Tax Law > State & Local Taxes > Administration & Procedure > Settlements

[HN8](#) Administration & Procedure, Audits & Investigations

The taxpayer must apply to participate in the voluntary disclosure program and enter into an agreement with the State Treasurer. [MCL 205.30c\(1\)](#) and [\(2\)](#).

Governments > Legislation > Interpretation

[HN9](#) Legislation, Interpretation

Use of the word "may" reflects something that is permissive, not mandatory.

Governments > Legislation > Statute of Limitations > Time Limitations

Tax Law > State & Local Taxes > Administration & Procedure > Credits, Overassessments & Refunds

[HN10](#) Statute of Limitations, Time Limitations

[MCL 205.30c](#) does not provide a basis to extend the period of limitations in order to claim a refund. Rather, it provides a mechanism to arrange for the payment of an unpaid tax liability and settling any potential liability.

Tax Law > State & Local Taxes > Administration & Procedure > Settlements

[HN11](#) Administration & Procedure, Settlements

[MCL 205.30c\(5\)\(a\)](#) restricts defendant's ability to assess any tax, delinquency for a tax, penalty, or interest covered under the agreement for any period before the

lookback period identified in the agreement.

Judges: Before: HOOD, P.J., and M. J. Kelly and FEENEY, JJ.

Opinion

PER CURIAM.

It is often said that nothing is certain but death and taxes. And it would seem that it is equally certain that there will still be appeals involving a tax that is long since dead. Although the *Michigan Business Tax Act (MBTA)*, *MCL 208.1101 et seq.* was repealed several years ago, we are still faced with a case involving the MBTA.¹ In this case, the question presented is whether an audit of an individual business included in a unitary business group (UBG) extends the statute of limitations for the filing of the UBG's tax returns. We agree with the Court of Claims that it does not and, therefore, the UBG's 2008 and 2009 returns were untimely. Accordingly, we affirm the Court of Claims.

THE UNITARY BUSINESS GROUP

The trial court summarized the background facts that led to this dispute:

Soave is an individual who held ownership interests in a variety of companies during the relevant tax years, including City Auto Storage, doing business as Parts Galore, LLC (Parts Galore), and Checker Sedan Co. Soave filed timely tax returns for Parts [*2] Galore and Checker Sedan Co. for tax years 2008 through 2011.

Sometime in 2012 or 2013, defendant selected Parts Galore and Checker Sedan Co. for a desk audit covering tax years 2008-2011, which related specifically to both companies' qualification for small business alternative credits (SBACs). Following the audit, defendant denied Parts Galore an SBAC for the 2008-2011 tax years.

Parts Galore requested an informal conference to address the denial of the SBAC, but withdrew its request so that it could refile its tax returns as part of a larger UBG that included 55 to 77 total

¹ The MBTA, enacted by 2007 PA 36, was replaced by the *Income Tax Act, MCL 206.1 et seq.* as amended by 2011 PA 38 and 2011 PA 39. Certain exemptions under the MBTA were continued over to the Income Tax Act and the MBTA will finally phase out by the tax year 2031. See 2019 PA 90.

companies, depending on the tax year. The parties dispute whether it was plaintiff or defendant that determined that Soave's companies were part of a UBG. [Tr Ct Op, pp 2-3.]

Regardless of the impetus for the refiling of the tax returns as part of a UBG, plaintiff did file combined UBG returns in October 2014 for tax years 2008 and 2009.² The UBG returns for tax years 2010 and 2011 were filed in early November 2014. [Tr Ct Op, p 4.] It was not until 2018 that defendant processed the returns, issuing a refund for tax year 2011. Plaintiff disagreed with the assessment and requested an informal conference. [*Id.*] This [*3] led to several telephone conferences and an informal conference in June 2019. Although some issues were resolved, as the trial court explained,

defendant argued, for the first time, that plaintiff's 2008-2009 UBG returns were untimely. According to defendant, during the audit, and "upon further review of the UBG member accounts during the reconciliation of payments, [defendant] determined that the UBG returns for 2008 and 2009 were untimely." More specifically, as a new filer, the UBG's 2008 and 2009 tax returns were filed outside of the four-year statute of limitations in the Revenue Act, [MCL 205.27a\(2\)](#). [Tr Ct Op, p 4.]

After another informal conference in September 2020 in relation to the 2008 and 2009 tax returns, the referee presiding over the informal conference agreed that plaintiff was entitled to a deadline extension for filing the 2008 and 2009 returns.³ [Tr Ct Op, p 5.] Defendant disagreed, as did the Hearings Division, which concluded in May 2021 that the referee's recommendation was rejected and plaintiff could not use the audit of a UBG member to extend the period of limitations for the UBG itself. [*Id.* at 5-6.]

[A] taxpayer is a person or a unitary business group, but not both. Two of [*4] the members of

² Both returns were initially filed on October 2, 2014. The 2009 return contained some formatting errors and was refiled on October 20, 2014. [Tr Ct Op, p 3-4.]

³ The Informal Conference Recommendation by the Department of Treasury's hearings division referee was in Docket No. 20200916 seeking MBTA claimed overpayment in 2008 and 2009. The parties subsequently entered into a settlement agreement on September 30, 2021 regarding plaintiff's MBTA liability for the 2010-2011 tax years that did not address the current refund request for 2008-2009. See Informal Conference Docket No. 20190413

the UBG here were audited before the UBG was even formed. But anywhere from 53-75 other members (depending on the tax year) were not under audit. The UBG is the taxpayer here, and it is only by virtue of the UBG's filing status as a UBG that it generated overpayments resulting in the claim for refund. The UBG cannot fail to satisfy its obligation to timely file and then use an audit of another single member(s), an entirely different taxpayer, to extend the limitations period to request overpayments that were never available to that other taxpayer. [Reasons and Authority for the Decision of the Department of Treasury, pp 4-5.]

This led to plaintiff filing suit in the Court of Claims for a refund of its claimed overpayments for tax years 2008 and 2009.

THE COURT OF CLAIMS ACTION

Plaintiff's March 3, 2022 Amended Complaint contained two counts asserting that plaintiff's claimed overpayments in its 2008 and 2009 MBTA returns were proper, and that plaintiff was entitled to the available MBTA loss on its 2010 MBTA return; in short, plaintiff anticipated a significant claimed overpayment or refund based on the "carryforward impact of the adjustments at issue from tax year ending [*5] December 31, 2009 to tax year ending December 31, 2010." [1st Amended Complaint, p 12.] Defendant moved for summary disposition based upon [MCR 2.116\(C\)\(7\)](#) (claim barred by release and by the statute of limitations) and [MCR 2.116\(C\)\(10\)](#) (no genuine issue of material fact). Plaintiff filed a countermotion for summary disposition. The trial court granted defendant's motion and denied plaintiff's counter motion.

STATUTE OF LIMITATIONS

We turn first to the question whether plaintiff's claim for a refund related to the 2008 and 2009 tax years is barred by the statute of limitations and, therefore, summary disposition under [MCR 2.116\(C\)\(7\)](#) was appropriate. [HN1](#) [↑] We review the trial court's ruling de novo. [Allstate Ins Co v State Farm Mut Auto Ins Co](#), 321 Mich App 543, 550; 909 NW2d 495 (495 (2017)). As explained in [Allstate, id. at 550-551](#):

When addressing such a motion, a trial court must accept as true the allegations of the complaint unless contradicted by the parties' documentary submissions. [Patterson v Kleiman](#), 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). Although not required to do so, a party moving for summary disposition under [Subrule \(C\)\(7\)](#) may support the

motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider. Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999). If no material facts are disputed, whether a plaintiff's claim is barred by the pertinent statute of limitations is a question of law for [*6] the court to determine. Dextrom JV Wexford Co. 287 Mich App 406, 429; 789 NW2d 211 (2010).]

The primary question presented in this appeal is whether the desk audits of the returns for the two entities extended the period of limitations for the UBG. MCL 205.27a(2) provides in relevant part that the "taxpayer shall not claim a refund of any amount paid to the department after the expiration of 4 years after the date set for the filing of the original return." It is not in dispute that, under the default four-year statute of limitations under MCL 205.27a, absent an extension, the 2008 return was due on April 30, 2009, with a deadline for claiming a refund being April 30, 2013, and the 2009 return was due on April 30, 2010, with a deadline for claiming a refund being April 30, 2014. Plaintiff argues that it was entitled to an extension of the statute of limitations under MCL 205.27a based upon the then-pending desk audits of the two constituent entities (i.e., Parts Galore, LLC and Checker Sedan Co.). Under the version of MCL 205.27a(3)(a) that applies to audits commenced before September 30, 2013, the statute of limitation is tolled for the duration of the audit and for one year afterward. But, even if the statute would give an extension to the constituent entities that, if also applied to the UBG returns, [*7] would render those returns timely, we agree with defendant and the Court of Claims that any such extension would not, in fact, apply to the UBG because the entities and the UBG are different taxpayers. HN2 [↑] An extension afforded one taxpayer (or, in this case, two taxpayers) simply cannot be transferred to a different taxpayer.⁴ And, more to the point, the tax returns for the individual entities should never have been filed.

HN3 [↑] First, it is clear that a UBG is a "taxpayer." MCL 208.1117(5). And as explained in D'Agostini Land Co. LLC v Dept of Treasury, 322 Mich App 545, 551; 912 NW2d 593 (2018), it is required to file a tax return, both under the MBTA and the successor Corporate Income

Tax (CIT):

A unitary business group is not a separate and distinct legal entity, like a corporation, limited liability company, or partnership; rather, the group is purely a creation of tax law. In general, a unitary business group is a group of related US persons whose business activities are sufficiently interdependent. MCL 206.611(6) (CIT); MCL 208.1117(6) (MBT). To qualify as a unitary business group, one member of the proposed group must own or control more than 50% of the other members and there must be a sufficient connection between the members to meet one of two relationship tests. MCL 206.611(6) (CIT); MCL 208.1117(6) (MBT). *If a group of businesses qualifies as a unitary [*8] business group in a particular tax year, then the group must file a unitary tax return for that year.* MCL 206.691(1) (CIT); MCL 208.1511 (MBT). Michigan, like several other states, has adopted the unitary-business-group concept in an effort to measure more accurately the related group's taxable activities in the state. [Emphasis added.]

Moreover, MCL 208.1117(5) defines a "taxpayer" as "a person or a unitary business group," reflecting that a UBG is a separate taxpayer. Under the statute's clear language, a taxpayer can be either an individual or a UBG but not both. Indeed, plaintiff concedes in its brief that a UBG is considered to be a separate taxpayer and that filing a UBG return is mandatory, not elective. HN4 [↑] This leads to the conclusion that once an entity is considered to be part of a UBG, that single entity ceases to be a separate taxpayer. Still, we are not led to the conclusion plaintiff promotes that an audit of the individual entity is necessarily an audit of the UBG.⁵

Rather, we find that either (1) a single return for the UBG should have been filed and no returns for the individual entities should have been filed and are nullities, or (2) the UBG did not qualify for the filing of a UBG return and, therefore, the individual [*9] entities properly filed their returns and the UBG return is a nullity. The parties appear to agree that the first possibility is the correct one. But in the final analysis, it

⁴ Defendant's argument focuses on the UBG being a separate taxpayer from the individual entities. Defendant does not dispute that plaintiff's argument would prevail if the UBG and the individual entities were deemed to be the same taxpayer.

⁵ Even if, as plaintiff argues, defendant looked to the other entities in the UBG to determine if the two individual entities being audited were entitled to receive the SBAC, that does not mean the audit would now extend to the UBG as a whole. The audit would still only extend to those two entities who are actually being audited.

does not matter because if in fact a UBG return was not required, it does not matter whether it was timely or not—it is a nonentity. And if the UBG return was required, then plaintiff is essentially arguing the audit of returns that should not have been filed tolls the statute of limitations for the returns that should have been filed but were not. Put simply, defendant was auditing returns that had no meaningful existence. Because the UBG was the taxpayer in this case and was a different taxpayer than the individual entities,⁶ we agree with the trial court that plaintiff "has no legal basis for its claim that a pending audit or informal-conference request for a single member of a UBG extends the statute of limitations for the entire UBG." [Tr Ct Op, p 11.]

We see no legal basis to transfer the tolling of the statute of limitations from the audit of returns that should never have been filed to returns that should have been filed but were not. For that matter, even if both sets of returns were proper, we are unaware [*10] of any support for the tolling of one set to create tolling for the other. [HN6](#) [↑] Furthermore, as stated in the [Revenue Act, MCL 205.27a\(4\)](#), "The statute of limitations is extended only as to those items that were the subject of the audit."⁷ The UBG returns, which did not even exist when the audit began, were not the subject of the audit of the individual entities. Nor, for that matter, were the individual entities being audited to determine whether there should have been a UBG return instead of the individual entity returns.⁸ Again, we agree with the Court of Claims that "the extension on the statute of limitations would have applied only to the SBAC issue [involved in the audit]. And the UBG contained 55 to 77 total companies, including Parts Galore and Checker Sedan Co., so 53 to 75 of which were not included in the audit."

⁶ [HN5](#) [↑] We agree with the trial court that [MCL 208.1117\(5\)](#), which defines the term "taxpayer" as "a person or a unitary business group," recognizes a UBG as a separate and distinct taxpayer. See [D'Agostini, 322 Mich App at 555](#).

⁷ [HN7](#) [↑] [MCL 205.27a\(4\)](#) goes on to define "items that were the subject of the audit" to mean "items that share a common characteristic that were examined by an auditor even if there was no adjustment to the tax as a result of the examination. Items that share a common characteristic include items that are reported on the same line on a tax return or items that are grouped by ledger, account, or record or by class or type of asset, liability, income, or expense."

⁸ And we fail to see how an audit of two entities could possibly determine that a UBG return covering over six dozen entities should have been filed.

[Tr Ct Op pp 11-12.]

Plaintiff also argues that a genuine issue of material fact persists whether it was plaintiff or defendant who first raised the issue of whether a UBG existed. While there may be a genuine issue of fact regarding who first raised the issue, it is not one of material fact. Just as it does not matter whether a UBG return was required for tax years 2008 and 2009, it [*11] also does not matter which party discovered that a UBG existed. Even assuming defendant discovered the existence of a UBG during the desk audits, that does not mean the scope of the audit was expanded to include the UBG or that the tolling provisions of [MCL 205.27a](#) would apply to the subsequent UBG returns. At best, information revealed during the audit may have led to the discovery that the individual entities were part of a larger UBG that should have been the taxpayer filing a return. But that does not, as plaintiff argues, somehow bring the UBG within the scope of the audit. While in either case the audit may have led to the discovery of the employer's or the UBG's failure to file, it does not extend the scope of the original audit. Simply put, the discovery during the audit that plaintiff was filing individual returns for each of its 55 to 77 business entities, rather than filing a UBG return, did not suspend the period of limitations for the filing the UBG returns. Rather, it merely revealed a case of a failure to file a tax return.

FEDERAL INCOME TAX EXTENSION

Plaintiffs next argues that some of the entities that make up the UBG requested extensions on their federal and MBTA returns [*12] for the years at issue; thus, the due date for the UBG return for 2009 was therefore also extended to December 30, 2010, which then means that the period of limitations for that return would not expire until December 30, 2014, making that return timely.⁹

The Court of Claims rejected this argument, noting that [MCL 208.1505\(4\)](#) "provided that if a taxpayer received a federal-income-tax extension, 'the filing of a copy of the request for extension together with a tentative return and payment of an estimated tax with the department by the due date . . . shall automatically extend the due date for the filing of an annual or final return' by eight months." The court went on to opine:

Plaintiff has not provided the Court with evidence that any of its companies ever received a federal-

⁹ This argument would not render the 2008 return timely as the period of limitations would have expired the year before.

income-tax extension, or that the companies submitted the necessary documentation and estimated tax payment in advance of the due date. Regardless, plaintiff does not support adequately its assertion that the federal-tax extension for some of the individual companies would also extend the state-tax deadline for a UBG. As explained above, the UBG is a distinct taxpayer under the MBTA. The Court declines to read language into *Section 505 of the MBTA* that [*13] would also extend the deadline to file a separate UBG return.

Unable to contradict the trial court's conclusion that it had not supplied the documentation, plaintiff argues that it was not required to file an extension request because a tax payment was not due. In support of its position, plaintiff refers to the 2021 version of defendant's Form 4: Instructions for Application for Extension of Time to File Michigan Tax Returns. Specifically, plaintiff quotes the line "An extension is not necessary when you expect to claim a refund." To the extent that this statement in a Treasury form is authoritative, plaintiff overlooks the import of the sentence. The sentence does not mean that filing the documentation is unnecessary because an extension is automatic. Rather, the sentence provides that, where a refund is expected, an extension is not necessary. The next sentence, which plaintiff does not quote, explains: "Late filing penalty may not apply as refunds can be claimed up to 4 years from the original due date without an extension." In other words, there is no penalty because there is no late payment of the tax and the taxpayer does not need an extension to claim a refund because the taxpayer [*14] has four years *from the original due date* to claim the refund.

Arguably an extension of the due date would also extend the period of limitations. But we need not decide if that is true because, as the Court of Claims concluded, plaintiff has not demonstrated that it requested and was granted an extension. Therefore, the four-year period of limitations expired four years after the original due date of the return, not four years after an extended due date.

Moreover, plaintiff fails to address the second reason the Court of Claims offered in rejecting its argument, namely that plaintiff does not demonstrate how an extension of the due dates for some of the individual entities' federal returns would operate to extend the state deadline for the UBG return. And we are not aware of any authority that provides the extension of one taxpayer's federal return automatically provides an extension for a different taxpayer's state return.

NEW FILERS

Plaintiff next argues that the Court of Claims disregarded its argument regarding defendant's change in policy regarding "new filers." But the Court of Claims did not disregard plaintiff's argument; it rejected plaintiff's argument:

The Court also disagrees [*15] with plaintiff's argument that defendant's discovery responses constituted an admission that defendant consented to an extension. In its discovery responses, defendant explained that its "official position and/or policy" is to consider a first-time UBG filer as a "new filer" for purposes of the statute of limitations, even if the UBG includes members that previously filed a tax return as a solo entity. Defendant explained, "While certain Treasury employees may have misapplied or misunderstood this policy, an error on the part of an employee cannot be viewed as a change in policy." The Court disagrees with plaintiff's characterization of defendant's statement as an admission that its employee misapplied the policy (or that defendant's policy position has somehow changed). Defendant's discovery response is framed in hypothetical terms. Defendant suggests that if an employee misinterpreted the policy, then the employee's misinterpretation would not bind the Department. Defendant does not concede that any of its employees misinterpreted the law. Even if they had, plaintiff provides no legal basis for why the Department would be bound by an auditor's misinterpretation of the law, particularly [*16] when only the state treasurer has the authority to extend the limitations period. See [MCL 205.27a\(3\)\(b\)](#). [Tr Ct Op, p 13.]

Plaintiff's argument regarding the alleged change in policy focuses on this statement in the hearing referee's decision:

According to the Department representative at the informal conference, the Department modified its position on UBG filings as non-filers for purposes of statute of limitations and voluntary disclosure process and based on this policy, the UBG as a taxpayer was now a new filer. As a new filer, the UBG did not have the protection of the tolling of statute of limitations for the desk audit and informal conference appeal. Without the tolling of the statute of limitations, the UBG Returns for 2008 and 2009 were deemed to be filed outside the statute of limitations and the credit forwards associated with

those Returns were denied. [Referee decision, p 6.]

On review, defendant rejected the hearing referee's determination and, in particular, concluded that "the referee incorrectly interpreted the testimony of the Department's auditor regarding Department policy positions and failed to cite to any published policy position establishing that there was in fact a policy change." [*17] (Dept decision, p 3.)

Plaintiff links the issue of whether it is a "new filer" to the voluntary disclosure process under [MCL 205.30c](#).¹⁰ The trial court's rejection of the factual predicate for plaintiff's argument aside, there are a number of flaws with plaintiff's argument. [HN8](#) [↑] First, as defendant points out, the taxpayer must apply to participate in the voluntary disclosure program and enter into an agreement with the State Treasurer. See [MCL 205.30c\(1\)](#) and [\(2\)](#). Plaintiff has not produced that documentation. Second, we would also point out that those sections specifically state the treasurer "may" enter into these agreements. [HN9](#) [↑] Use of the word "may" reflects something that is permissive, not mandatory. See [True Care Physical Therapy, PLLC v Auto Club Group Ins Co.](#), [Mich App : NW2d \(Docket No. 362094, rel'd 5/25/2023\), slip op at 5, 2023 Mich. App. LEXIS 3801](#). Thus, even if plaintiff may have qualified for the voluntary disclosure program and an

application had been submitted, the State Treasurer would not have been obligated to grant it.

Third, [HN10](#) [↑] [MCL 205.30c](#) does not provide a basis to extend the period of limitations in order to claim a refund. Rather, it provides a mechanism to arrange for the payment of an unpaid tax liability and settling any potential liability.¹¹ Fourth, it is not particularly relevant whether defendant changed its policy or interpretation of the statute nor whether any "previous" interpretation or [*19] policy would have benefited plaintiff. What matters is whether plaintiff is entitled to any such benefit under a correct interpretation of [MCL 205.30c](#). And that brings us back to the point that the statute simply cannot be used in the context of claiming a refund rather than arranging a settlement of overdue taxes where a taxpayer fails to timely file in the past.

What plaintiff ultimately overlooks in this case is that it was plaintiff's obligation to determine whether a UBG return should have been filed and, if it was, to file it in a timely fashion. While we would certainly expect that defendant endeavors to find taxpayers who failed to file a return, for both tax scofflaws as well as those making an honest mistake, the burden nevertheless rests with the taxpayer to determine what forms must be filed and what the deadline is for that filing. Simply put, any lost refund that plaintiff might have been entitled to receive is not the result of defendant's actions, but of plaintiff's failure to recognize its obligation to file a UBG return and to do so in a timely manner.

IMPACT OF SETTLEMENT AGREEMENT REGARDING 2010 AND 2011 TAX YEARS

Finally, plaintiff argues that the parties' settlement agreement [*20] regarding tax years 2010 and 2011 did not bar the claims in Count II of the complaint. The Court of Claims did not address this issue because it found it to be moot in light of its conclusion that the claims discussed above were barred by the statute of limitations. Had we determined that the Court of Claims erred in concluding that the claims related to the 2008 and 2009 were barred, we would agree that a remand to the Court of Claims would be appropriate to address plaintiff's argument regarding tax years 2010 and 2011. But plaintiff concedes that this argument is only relevant if we hold that the 2008 and 2009 returns are not

¹⁰ The Department's decision explained the voluntary disclosure program as follows:

The Department's voluntary disclosure program is an administrative procedure in which a taxpayer, usually a company located in another state that has had a taxable presence in this state for several years but has neither filed a return in nor paid tax to this state, can voluntarily disclose its nexus to this state and negotiate an agreement [*18] to pay its liability. A company typically agrees to register and pay its current and future taxes as well as tax and interest for a prescribed number of open lookback years.

The purpose of a voluntary disclosure program is to encourage companies to comply with the state's tax laws to generate revenue that the state may not have had if the company had not come forward to disclose its liabilities. In return, a company can receive benefits such as limitations on the lookback period and the abatement of penalties. The true benefit to the state is that a voluntary disclosure agreement requires a company to register for taxes in this state and agree to future compliance. Therefore, to be eligible, a company must not have previous[ly] filed a return in this state. [Reasons and Authority for the Decision of the DOT, p 4.]

¹¹ [HN11](#) [↑] See, e.g., [MCL 205.30c\(5\)\(a\)](#), which restricts defendant's ability to "assess any tax, delinquency for a tax, penalty, or interest covered under the agreement for any period before the lookback period identified in the agreement."

untimely. And because we agree with the Court of Claims that the 2008 and 2009 returns were untimely, we need not address the issue raised with respect to the 2010 and 2011 returns.

Affirmed. Defendant may tax costs.

/s/ Noah P. Hood

/s/ Michael J. Kelly

/s/ Kathleen A. Feeney

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1. [Soave v. Dep't of Treasury](#)

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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 22

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September 2, 2021

Via Electronic Filing

Michigan Tax Tribunal
Attn: Samantha M. Welton, Chief Clerk
611 West Ottawa Street, 4th Floor
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RE: *Nationwide Mutual Ins Co, et al. v Michigan Dep't of Treasury*
Michigan Tax Tribunal Docket No. 21-000036-TT and 21-000607-TT
Consolidated with Nos. 21-000039-TT and 21-000611-TT

Dear Ms. Welton:

Enclosed for submission, please find *Respondent Department of Treasury's Brief in Response to Petitioners' Motion for Summary Disposition*, along with the respective *Proof of Service*, as it pertains to the above-captioned matter.

If you should have any questions relative to the enclosure, please do not hesitate to contact this office.

Very truly yours,

/s/ David W. Thompson

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DWT/kac
Enclosures

cc: Paul V. McCord, w/enclosures (***via E-Mail only***)
Wayne D. Roberts, w/enclosures (***via E-Mail only***)
Joseph S. Shannon, w/enclosures (***via E-Mail only***)
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STATE OF MICHIGAN
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MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL

NATIONWIDE MUTUAL INSURANCE CO.
and NATIONWIDE AGRIBUSINESS
INSURANCE CO.,

Petitioners,

v

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PROOF OF SERVICE

Kellie Christopher, states that on this 2nd day of September, 2021, she served a copy of *Respondent Department of Treasury's Brief in Response to Petitioners' Motion for Summary Disposition*, along with a copy of this *Proof of Service*, upon the following:

1. Mr. Paul V. McCord, via e-mail at pmccord@fraserlawfirm.com;
2. Mr. Wayne D. Roberts, via e-mail at wroberts@bodmanlaw.com;
3. Mr. Joseph S. Shannon, via e-mail at jshannon@bodmanlaw.com; and
4. Mr. Jeffrey A. Lipps, via e-mail at lipps@carpenterlipps.com.

I declare that the above statement is true to the best of my knowledge, information, and belief.

/s/ Kellie Christopher
Kellie Christopher, Legal Secretary

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
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**RESPONDENT'S BRIEF IN
RESPONSE TO PETITIONERS'
MOTION FOR SUMMARY
DISPOSITION**

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**RESPONDENT DEPARTMENT OF TREASURY'S BRIEF IN RESPONSE TO
PETITIONERS' MOTION FOR SUMMARY DISPOSITION**

INTRODUCTION

Petitioners' motion and brief suffer from two fatal flaws in its statutory interpretation. First, Petitioners concede that they are relying on more general definitions, but ignore the implications of more specific definitions. Second, they attempt to convert a singular phrase "insurance company" into a completely different phrase, i.e., "unitary business group." Petitioners make this assertion under the guise of converting a singular phrase into a plural phrase, but their argument is not that "an insurance company" should be construed as "insurance companies." Instead, they assert that "an insurance company" should be construed as an entirely different (and singular) phrase of "unitary business group."

Petitioners attempt to bolster this argument with mischaracterizations of Michigan law, along with reference to a federal case. Further, they attempt to use carefully selected testimony from Treasury's Tax Policy Bureau's director, Lance Wilkinson, to demonstrate the validity of their position. But this testimony runs counter to Petitioners' assertions. Further, Petitioners ignore that their own vice president of tax testified that he did not know how to square their position with the dictates and computations of the retaliatory tax.

In short, the governing provisions (i.e., the more specific definitions) are clear and unambiguous that both the taxed entity and the proper credit claimant are "an insurance company." Petitioners' tortured reading of the statute, case law mischaracterizations, and selective testimony references do not otherwise undermine this simple and unremarkable conclusion.

Accordingly, Treasury asks that this Tribunal grant its motion for summary disposition.

COUNTER-STATEMENT OF FACTS

Treasury relies on the facts set forth in its August 2, 2021 motion and brief for summary disposition and incorporates that discussion by reference. Treasury does, however, point out facts that are undisputed and other facts that appear to be inaccurate in Petitioners' brief in support of its motion for summary disposition concerning Mr. Wilkinson's letter and testimony.

The following facts are undisputed:

- Unitary business groups (UBGs) are not "authorized insurers" in the State of Michigan—only individual insurance companies are;
- Individual insurance companies write risk (insurance policies) in Michigan, not UBGs;
- Individual insurance companies charge and collect premiums in Michigan, not UBGs;
- Individual insurance companies are assessed by the Michigan Assigned Claims Plan, not UBGs;
- Individual insurance companies pay Michigan Automobile Insurance Placement Facility (MAIPF) assessments, not UBGs.

Accordingly, there is no dispute that a UBG has no gross premiums, and, therefore, no tax base against which to levy the premiums (or retaliatory) tax. Further, a UBG has no credits to apply against the premiums (or retaliatory) tax. Petitioners' tax returns reflect the compromised position that the undisputed facts pin them into—admittedly manufacturing new and unapproved tax forms to accommodate claims that have no basis in law or business reality. In so doing, Petitioners undermine the intention of the retaliatory tax scheme, i.e., to put different states and their domiciled insurers on equal footing.

In order for the Tribunal to rule in Petitioners' favor, it must make findings contrary to each and every undisputed point above, and make a legal determination that is contrary to the governing law.

Petitioners claim the Wilkinson Letter approved the way Petitioners filed their amended returns. (Pet'rs' Br, pp 3, 9.) Those claims are false. The Wilkinson Letter does not adopt Petitioners' filing methodology—which Treasury did not authorize before Petitioners' filings or since. Neither does the letter say that Petitioners should aggregate taxable premiums, credits, and other tax attributes when reporting their Michigan Premiums and Retaliatory Taxes. Indeed, Mr. Wilkinson testified that he “certainly was not aware of the return posture that Mr. Pratschler was contemplating” at the time he wrote the letter. (Ex 18,¹ Wilkinson Dep Tr, p 39.) Mr. Wilkinson testified extensively that neither his letter nor the statute support Petitioners' position in this case: “[W]e did not think that insurance companies could share tax attributes that way.” (*Id.* at 25).

Finally, Petitioners conveniently overlook that Petitioners only included 22 entities in its Michigan UBG, despite, according to Petitioners' own documents, the parent company owning directly or indirectly at least 50% of approximately 99 entities that share common officers and directors, and have entered into the cost sharing agreement. (Pet'rs' Mot Summ Disp Ex 4 (Aff of Eppley), Exs A–E.) The reason for Petitioners' apparent cherry-picking is unknown—Treasury only first learned who for Petitioners could testify as to the UBG composition and preparation of tax returns (i.e., Kyle Shaner) in the deposition of Daniel Eppley. (Ex 19, Eppley Dep Tr, p 128.) This deposition was conducted on July 23, 2021, which was three days before the close of discovery per this Tribunal's order. (07/09/2021 Order Grant Joint Mot to Extend.)

¹ Exhibits 1–17 were attached to Treasury's August 2, 2021 motion and brief for summary disposition.

LAW & ARGUMENT

I. Petitioners concede their argument relies on general provisions concerning “unitary business groups,” and ignore that the more specific statutory provisions concerning insurance companies control.

Petitioners concede that the definition they rely on for a “unitary business group” is “part of chapter 10’s general definitions.” (Pet’rs’ Br, p 12.) This forms the core of Petitioners’ statutory argument: “applying MCL 206.606 [*sic*²] and 206.691 regarding unitary business groups to all elements of Part 2 is consistent with their plain meaning, and with the overall structure of the [Corporate Income Tax (CIT)] Act.” (*Id.*) But Petitioners do not consider the implications of this concession—specifically, that more specific provisions trump general provisions. “When two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute must control over the more general statute.” *Donkers v Kovach*, 277 Mich App 366, 371 (2007).

Here, Petitioners are correct that certain general definitions are found in Chapter 10, and that general rules of tax administration are found in Chapter 16. But the premiums and retaliatory tax are imposed on insurance companies under Chapter 12 of the CIT Act (CITA), as well as the Insurance Code. This is to be distinguished from franchise taxes on financial institutions (Chapter 13) and corporate income taxes on standard corporate taxpayers (Chapter 11).

Petitioners assert that “[i]n the absence of explicit statutory text indicating that the unitary business group tax computation provisions in the CITA do not apply to the insurance companies text contained in chapter 12,” the UBG provisions of MCL 206.606 (see footnote 2 above) and

² There is no such statute.

206.691 must be applied. (Pet’rs’ Br, p 13.) Petitioners are wrong. Chapter 12 of the CITA has “explicit statutory text” to the effect that “each” insurance company is responsible for its own premiums/retaliatory tax liability, which is calculated on an entity-by-entity basis.

MCL 206.635(1) and (2); MCL 206.643(3); MCL 206.637(1). Chapter 12 contains the more specific provision, and, therefore, governs this matter. *Donkers*, 277 Mich App at 371.

The statutory language in MCL 206.691, on the other hand, does not address the calculation of the premiums/retaliatory tax for insurance companies, or the gross premiums tax base. Rather, for purposes of determining tax liability, this statutory provision specifically addresses the elimination of intercompany transactions for purposes of determining *the corporate tax base, apportionment formulas, exemption, credits, and filing thresholds* for regular corporations. Under Chapter 11 of the CITA, regular corporations are taxed on their corporate income tax base, after allocation or apportionment. See MCL 206.623. Insurance companies, on the other hand, are taxed on their gross premiums and they are not subject to apportionment or a filing threshold. MCL 206.635. Further, foreign insurers are subject to the comparative analysis of the retaliatory tax. MCL 206.643. This is further evidenced by the remaining statutory text, which, in pertinent part, eliminates financial institutions and insurance companies’ corporate income tax from the corporate income tax base. MCL 206.691. This Tribunal must recognize this distinction and give meaning to the more specific provisions governing the premiums tax base and premiums/retaliatory tax. *Donkers*, 277 Mich App at 371.

Petitioners’ argument that interpreting the CITA in accordance with the singular language of “an insurance company” would render MCL 206.611 and 206.691 superfluous (Pet’rs’ Br, p 16) is wrong—these provisions have general application. Merely because they have no

application to the calculation of premiums/retaliatory tax in Chapter 12 (owing to more specific provisions) does not mean they are superfluous or nugatory.

Chapter 12 specifically mandates “each insurance company” pay a tax determined under this chapter. MCL 206.635. This chapter requires “each insurance company” to pay a tax equal to 1.25% of gross direct premiums written on property or risk located or residing in Michigan. MCL 206.635(2). Chapter 12 permits “an insurance company” to claim “a credit against the tax imposed under this chapter” including amount paid to the MAIPF. MCL 206.637(1)(c). In addition, “an insurance company” is subject to the premium tax or the retaliatory tax, whichever is greater. MCL 206.641. In short, “each” insurance company is responsible for its own premiums/retaliatory tax liability. Petitioners cannot calculate their tax liability on a shared basis and credits are available only at an entity-level for “an insurance company.” MCL 206.637(1); MCL 206.639; MCL 206.641.

This makes sense within the context of the statutory scheme. Individual insurance companies are authorized insurers who can write policies and charge premiums in the State of Michigan, in accordance with the Insurance Code. Thus, certificates of authorization are issued to individual insurance companies, e.g., Crestbrook Insurance Company—not the unitary business group. (Ex 1.) The Legislature understood that, and so matched the CITA to the Insurance Code by levying premiums/retaliatory taxes on “each insurance company.” MCL 206.635(1) and (2). Further, they are required to pay the greater of either the tax levied on gross direct premiums written on property or risk in Michigan, or a retaliatory tax as set forth under MCL 500.476a of the Insurance Code. MCL 206.643. Calculation of the premiums tax/retaliatory tax must be made on an entity-by-entity basis comparing an insurance company’s

tax burden in Michigan to that entity's tax burden in another state. MCL 206.643; MCL 500.476a.

Finally, Petitioners argue that Treasury's interpretation "violates basic rules of statutory construction." Petitioners cite MCL 8.3b, which provides that "[e]very word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number." But:

[T]he statute only states that a word importing the singular number "may extend" to the plural. The statute does not say that such an automatic understanding is required. Moreover, MCL 8.3 (citation omitted) provides that the rule stated in § 3b shall be observed "unless such construction would be inconsistent with the manifest intent of the Legislature." Second, the Legislature has directed that "all words and phrases shall be construed and understood according to the common and approved usage of the language . . . [MCL 8.3a (citation omitted).]" [*Robinson v Detroit*, 462 Mich 439, 461 n 18 (2000).]

Here, there is no necessary connection ("automatic understanding") between the singular phrase "an insurance company" and a unitary business group (which itself is still a singular phrase). If anything, the logic of Petitioners' argument would have to mean that in place of "an insurance company," the language reads as a plural phrase, i.e., "insurance companies." But Petitioners do not make this argument (which would also be erroneous), and the one that they make is contradicted by the statutory language, the statute that they rely on for interpretation (MCL 8.3b), and by common sense. And their citation to *Public Citizen, Inc v Mineta*, 340 F3d 39 (2003) does not help. First, it does not construe Michigan law—it is a federal case from the Second Circuit. Second, this case does not support Petitioners' argument.

Public Citizen dealt with the question of whether a rule issued by the U.S. Secretary of Transportation to regulate tire pressure monitoring systems was valid. Specifically, the rule allowed automakers to comply with an under-inflation standard of either four tires, 25% or one tire, 30%. *Id.* at 42. Essentially, the issue dealt with whether tire monitoring systems had to

monitor for inflation in all four tires, or only in “a tire.” While the secretary took the position that the federal statute (the Tread Act) required only monitoring for “a” tire—i.e., singular, not more than one tire—the federal court rejected this argument. The court reasoned that the secretary’s interpretation conflicted with the plain language of the federal statute. *Id.* at 54.

“The Tread Act’s ‘a tire’ plainly means one tire, two tires, three tires, or all four tires, under the elementary rule of statutory construction that the singular (‘a tire’) includes the plural (‘tires’).” *Id.* at 54.

Here, the statutory definition at issue concerns “an insurance company,” and a faithful application of the *Public Citizen* case (assuming it was on-point) would mean changing the singular “insurance company” to the plural “insurance companies.” There is no indication in the text that this is a faithful interpretation of the statute—instead, the statute defines an “insurance company” as “an authorized insurer.” MCL 500.108. Further, whereas common sense suggests that if any one, or more than one tire is underinflated, the driver should be aware of that. Here, there is no common sense basis for a plural construction (“insurance companies”) of a singular phrase (“insurance company”).

But that is not Petitioners’ argument; instead, they seek to convert the phrase “insurance company” to “unitary business group.” *This is not a plural construction of a singular phrase*—accordingly, this is fundamentally different than the argument made in *Public Citizen*, which otherwise has no binding authority or persuasive value. And there is no statutory or case law support for this proposition in the CITA. In short: Petitioners’ position is nonsensical on its own terms and otherwise conflicts with the purpose of the retaliatory tax. The Legislature’s purpose for the retaliatory tax “is to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes.” MCL 500.476a(2). See also

Commerce & Indus Ins Co v Dep't of Treasury, 301 Mich App 256, 265 (2013) (“[t]he purpose of a retaliatory tax is to encourage states to impose equal tax burdens on all insurance companies, whether foreign or domestic, thereby promoting interstate business.”). Petitioners’ reading of the statute does not promote the interstate business of insurers, but rather hinders it.

If Petitioners’ reading of the statute is correct—that Section 691 of the Act requires consolidation of tax bases and sharing of credits—then insurance companies will cherry-pick their purported UBG members (which Petitioners appear to do in this case), tax bases, and tax credits based on what is most advantageous to them in any given state, which will make uniformity across states impossible. Concomitantly, the comparison between Michigan and the foreign insurer’s state of origin becomes impossible to calculate insurer-by-insurer, and the retaliatory tax itself would become un-administrable. This result does not put Michigan insurers on an equal footing with other states’ insurers, but instead fundamentally undermines that intent by eliminating the possibility of measuring burdens state-by-state. This problem is only exacerbated if some states incorporate unitary principals (even if not expressly provided by statute) while others do not.

II. Petitioners mischaracterize case law concerning unitary business groups, which has no application in this matter.

Petitioners cite *TCF National Bank v Department of Treasury*, 330 Mich App 596 (2019), as support for their position. But it does them no good because the statutes, including definitions, and issues are completely different. Specifically, unlike the definitions for “financial institution” under Chapter 13, which specifically defines financial institutions to include UBGs, the definition for “insurance company” under Chapter 12 does not contemplate a unitary business group of insurance companies. Further, *TCF* dealt with the question of how to compute

net capital for financial institutions (banks), not how to compute premiums or retaliatory tax liability for insurance companies.

The Michigan Business Tax Act (MBTA) provides that various entities, including the financial institution UBGs and their members, are “financial institutions.” Specifically, MCL 208.1261(f) provides that “[f]inancial institution” means “any of the following:”

(i) A bank holding company, a national bank, a state chartered bank, an office of thrift supervision chartered bank or thrift institution, a savings and loan holding company other than a diversified savings and loan holding company as defined in 12 USC 1467a(a)(F)

(ii) Any person, other than a person subject to the tax imposed under chapter 2A, who is directly or indirectly owned by an entity described in subparagraph (i) and is a member of the unitary business group.

(iii) A *unitary business group* of entities described in subparagraph (i) or (ii), or both. [Emphasis added.]

The *TCF* Court recognized as much: “[t]he plain language of this definitional provision establishes that a ‘financial institution’ may be a type of bank, or an entity owned by such a bank that is a member of the UBG, or a UBG made up of either or both of these two types of entities.” 330 Mich App at 607. Further, “the legislature intended the term ‘financial institution’ to mean a UBG when a UBG taxpayer’s franchise-tax liability is at issue.” *Id.* at 609. The Court concluded: “the [Court of Claims] based its decision on an erroneous interpretation of the meaning of the statutory term ‘financial institution,’ because the statute plainly defines a UBG as a financial institution” *Id.* at 612.

Here, unlike Chapter 13’s franchise tax discussed in *TCF*, there is no parallel definition for “insurance company” that embraces or otherwise references a UBG. The statutory definition for “insurance company” instead refers *only* to “an authorized insurer” in the State of Michigan, and contains no reference to a UBG. MCL 206.607(5). The same is true of the Insurance Code, MCL 500.108 (defining an “authorized” insurance company as “*an* insurer duly authorized, by a

subsisting certificate of authority issued by the [insurance] commissioner, to transact insurance in this state.” (Emphasis added.) The statutes contemplate only a singular entity, not a conglomerate. And this makes sense—the comparative retaliatory tax cannot be computed for a conglomerate of different entities from different states with different burdens and taxes.

Petitioners also cite *D’Agostini Land Company LLC v Department of Treasury*, 322 Mich App 545, 561 (2018) for the proposition that a “credit denial must be specifically delineated” (Pet’rs’ Br, p 15.) First, this assertion contradicts the burden in tax cases. Because a tax deduction “presents a matter of legislative grace, and a clear provision must be identified to allow for a particular deduction,” Petitioners bear the burden of showing that they are entitled to the deduction. *Menard Inc v Dep’t of Treasury*, 302 Mich App 467, 473 (2013). Further, “exemptions are the antithesis of tax equality.” *Andrie Inc v Dep’t of Treasury*, 496 Mich 161, 178 (2014).

This assertion also violates well established rules of statutory construction. Specifically, courts apply the doctrine of *expressio unis est exclusio alterius*, which provides that “an express mention of one thing generally implies the exclusion of similar things that were not mentioned.” *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 151 (2003). As applied in this matter, the express mention of “an” insurance company as the entity upon which tax is levied, and the credit claimant means the exclusion of the UBG as either the taxed entity or the credit claimant. This is especially so given that the Legislature knew how to include UBGs as the taxed entity and credit claimant in other areas of the statute.

This analysis follows from *D’Agostini*, in which the Court of Appeals noted that, unlike the MBTA, the CITA added “unitary business group” to the “credit disqualifying provision.”

322 Mich App at 560.³ Just like the Legislature knew how to add “unitary business group” to that credit disqualifying provision, it also knew how to add a “unitary business group” to the list of levied entities (as it did in Chapters 11 and 13) and to tax credits for purposes of the premiums and retaliatory taxes. It did not. Similarly, the Legislature could have allowed for group-wide computation of tax similar to standard corporations and financial institutions but did not. Its decision to narrowly frame the calculation of premium tax on a single entity basis is consistent with the Insurance Code’s requirement that “an insurance company” be “authorized” before writing insurance and collecting premiums in Michigan and does not support a group-wide calculation. Petitioners do not take on this clear language directly; instead, Petitioners engage in misdirection, patching testimony from Mr. Wilkinson’s deposition together to support its filing methodology and interpretation of the statute.

III. Petitioners selectively cites deposition testimony, which otherwise does not support their interpretation of the statute.

This case presents a legal issue. It is the Tribunal’s job to interpret and apply the statute as written. No witness testimony in this matter can affect the proper interpretation of the statute.

³ Petitioners make the remarkable claim that “[a]s a result of the Court of Appeals decision in *D’Agostini*, the Legislature added a unitary business group limitation to the credit under MCL 206.671.” (Pet’rs’ Br, p 15.) But the CITA credit disqualifiers existed before the *D’Agostini* opinion; the Court relied on the Legislature’s adding “unitary business group” to the CITA credit-disqualifying provision as proof that the Legislature intended to exclude unitary business groups from the MBTA’s Small Business Alternative Credit disqualifiers. 322 Mich App at 559–560.

Accordingly, Petitioners' selective references to Mr. Wilkinson's deposition testimony (Pet'rs' Br, pp 7–8) are irrelevant.⁴

But even if this testimony had any bearing on the legal issue, Mr. Wilkinson testified extensively that neither his letter nor the statute support Petitioners' position in this case:

- “[W]e did not think that insurance companies could share tax attributes that way” [Ex 18, p 25];
- “I understand that this letter is being held to, maybe, stand for things that was not my intent at the time I wrote it” [*Id.* at 31];
- “I did not know that there were any benefits to filing combined and certainly was not aware of the return posture that Mr. Pratschler was contemplating, until after this.” [*Id.* at 39];
- “At the time I [wrote] the letter, I didn’t think there were any benefits to filing on a unitary basis for an insurance company. *Hence the “if any,” which, you know, I wasn’t aware that there were any benefits at the time, put a big caveat there to make that clear.*

You know, this particular question of utilizing attributes of any particular company on a group basis was not part of what I was reviewing at the time I wrote the letter.” [*Id.* at 47 (emphasis added).]

Further, Petitioners make a sweeping, ad hominem attack that Treasury's position in this case is based on “economic consequences” with no record evidence cited:

The only explanation for this disregard of Michigan tax law lies in the Department's apparent decision to refuse to follow established Michigan tax law where it did not like the economic consequences of a unitary business group of insurance companies filing to “utilize the benefits, if any, of inclusion in a unitary

⁴ Petitioners assert that there is a “strong need to obtain” certain information concerning an internal Treasury recommendation, or in the alternative, this Tribunal “should grant an inference for purposes of this litigation” that the recommendation supports its argument that insurance companies should be allowed to file on a unitary basis and share credits. (Pet'rs' Br, p 9 n 6.) Because this case presents a strictly legal issue to be decided summarily by this Tribunal, the recommendation (even if it said what Petitioners wanted to say) is irrelevant, and is otherwise protected by the deliberative process privilege. Further, Petitioners cite no authority for the proposition that an inference should be granted for materials that are subject to deliberative process privilege and otherwise are not relevant to a matter that concerns a strictly legal dispute.

business group, even though the insurance company is filing separately.” [Pet’rs’ Br, p 4.]

This statement has no citation because there is no support in the record. Instead, it is contradicted by Mr. Wilkinson’s deposition testimony:

Q. [L]et’s be candid. As I understand it, when you found out that the benefits included these credits and the use of them on a groupwide basis, your analysis changed. Is that what you’re saying?

A. No.

* * *

A. [The Witness]: For insurance companies, calculation is on a member-by-member basis. And I think that’s borne out by the statute. So to the extent that you might be a unitary business group of insurance companies, it has no relevance to calculating your actual liability.

That’s where Mr. Pratschler ended up going. That’s what he wanted to do. But in our initial conversations and based on the information I had when I sent the letter, I did not know that they were trying to -- seeking to use the attributes of any particular company against the liability or base of the other entities in that group. [Ex 18, pp 47–48.]

Petitioners state “[t]here is no rational or justifiable basis for this result-dependent distinction.” (Pet’rs’ Br, p 4.) But this statement is contradicted by the statute itself, which makes clear that “each” insurance company is responsible for its own premiums or retaliatory tax liability. The statement is also contradicted by common sense: there is no single origin state for a unitary business group of insurance companies from different origin states. Yet this is exactly the computation that the retaliatory tax requires.

Petitioners also ignore the testimony of Nationwide Mutual Insurance Company’s vice president of tax, Daniel Eppley, who admitted that *unitary business groups are not authorized insurers in the State of Michigan*:

Q. Is there a certificate of authority for the Unitary Business Group, are you aware of that?

A. I am not aware of one.

Q. Okay. Is -- is the Unitary Business Group an authorized insurer subsisting -- by a subsisting certificate of authority; do you know?

Mr. Lipps [Petitioners' counsel]: Objection. Asks for a legal conclusion, but go ahead.

A. [The Witness]: I would guess not. [Ex 19, p 25.]

Further, Mr. Eppley admitted that unitary business groups do not write insurance policies:

Q. So does the Unitary Business -- is there a policy written in Michigan that's -- where the insurer is Unitary Business Group and then there's a named insured? Is there any kind of policy like that in Michigan?

A. No.

Q. Okay. Instead, are the policies written by, like going back to this schedule of unitary -- Michigan Unitary Business Group, the policies would be written by somebody like Allied Insurance Company of America, right?

A. Yes.

* * *

Q. Are you aware of any policy that's ever been written where the insurer, the writer of the policy, is ["Unitary Business Group"]?

Mr. Lipps [Petitioners' counsel]: Objection, asked and answered now three times, but go ahead.

A. [The Witness]: No. [*Id.* at 31–32.]

Finally, Mr. Eppley admitted that Petitioners come from various origin states (*Id.* at 11), and made clear that he had no understanding how to apply the retaliatory tax in the context of a UBG:

Q. [T]he retaliatory analysis is asking us to compare the treatment between the domicile state and the State of Michigan?

Mr. Lipps [Petitioners' counsel]: Objection, without foundation to him. Go ahead.

A. [The Witness]: Yes.

Mr. Thompson [defense counsel]: But the UBG has member entities from all over the -- there's no one domicile state?

A. Yes.

* * *

Q. Okay. So is it fair -- like, so is it fair to say you don't know how the retaliation analysis would work in this instance then?

A. I do not. [*Id.* at 86.]

In short, the testimony in this matter is not relevant for purposes of resolving a strictly legal issue. However, if it were, neither Mr. Wilkinson's letter nor his testimony support Petitioners' position in this matter, which is itself contradicted by the testimony of their own vice president of tax.

REQUEST FOR ORAL ARGUMENT

Under the Tribunal rules, Treasury is not permitted to file a written reply brief to address any arguments Petitioners may raise in its response to Treasury's motion for summary disposition. See TTR 225(6). Because this case presents an issue of first impression—group wide tax computation and the sharing of credits for insurance companies that are members of a purported unitary business group—the interests of judicial economy will be served if the parties are permitted to present oral arguments. This would allow both parties to address the assertions made in their respective briefs, as well as enable the Tribunal to question the parties if there are any issues that need clarification before a decision can be issued.

Therefore, Treasury respectfully requests that this Tribunal set a hearing for oral argument. In the alternative, Treasury requests that an order be issued allowing Treasury to file a written reply brief to Petitioners' response to Treasury's motion for summary disposition.

CONCLUSION

Petitioners misunderstand the premiums tax, the retaliatory tax, and the tax credits at issue. They are imposed and available only to "an" insurance company, not a "unitary business group." Their attempts to prioritize general language over specific language is contrary to law and rules of statutory construction. Further, Petitioners' position finds no support in the case law they cite, or in the testimony given in this matter.

Accordingly, Treasury respectfully requests that this Honorable Tribunal grant Treasury's motion for summary disposition and enter an order dismissing the first amended petition with prejudice, and grant it such other relief, including attorney's fees and costs, as the Tribunal deems appropriate. In the alternative, Treasury asserts that even if this Tribunal grants Petitioners' motion on the legal issue, factual issues remain concerning the apparently cherry-picked composition of Petitioners' purported UBG (which the testimony of Kyle Shaner would be necessary to resolve), and these issues would, therefore, require a hearing.

Respectfully submitted,

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Dated: September 2, 2021

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 23

**STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL**

NATIONWIDE AGRIBUSINESS
INSURANCE COMPANY AND
NATIONWIDE MUTUAL INSURANCE
COMPANY,

Petitioners,

V.

DEPARTMENT OF TREASURY,

Respondent.

CONSOLIDATED CASES

MOAHR Docket No. 21-000036-TT; 21-000039-TT; 21-000607-TT; 21-000611-TT

Peter M. Kopke,
Administrative Law Judge

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PETITIONERS' MOTION FOR SUMMARY DISPOSITION

Petitioners, Nationwide Mutual Insurance Company and Nationwide Agribusiness Insurance Company ("Petitioners"), by their counsel, hereby move for summary disposition pursuant to MCR 2.116(C)(10) on their Petitions. There are no disputed material facts about the propriety of the Michigan Corporate Income Tax filings by Petitioners for tax years 2014 and 2015. Likewise, the applicable Michigan law expressly and unambiguously validates the filings in those tax years. Accordingly, Petitioners respectfully request the Tax Tribunal to enter, on a summary basis, judgment:

- (1) Holding that an affiliated group of insurance companies that satisfies requirements of MCL 206.611(6) constitutes a unitary business group that can utilize the benefits of filing a combined return for purposes of computing its tax liability under the Michigan Corporate Income Tax ("CIT") Act;
- (2) Vacating and canceling Assessment Number VA6WA6K for the 2014 tax year issued to Petitioner Nationwide Mutual Insurance Company;
- (3) Vacating and canceling the November 17, 2020 Decisions and Orders of Determination assessing additional tax for the 2014 and 2015 tax years against Petitioners Nationwide Mutual Insurance Company and Nationwide Agribusiness;
- (4) Vacating and canceling Assessment Number VA7AV7G for the 2015 tax year issued to Petitioner Nationwide Agribusiness Insurance Company;
- (5) Ordering the Department to process and pay the refund claims, as filed, by Petitioners for the tax years 2014 and 2015 in full, plus applicable statutory interest for all refunds; and
- (6) Ordering the Department to pay Petitioners' attorney fees and costs associated with this litigation.

This motion is supported by the accompanying Brief in Support of Motion for Summary Disposition, deposition testimony of Tax Policy Bureau Director Lance Wilkinson, the affidavits of Dan Eppley and Kyle Shaner, and attached exhibits (summarized in the attached Appendix of Exhibits).

Respectfully submitted,

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Dated: August 2, 2021

By:

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PETITIONERS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

I. Introduction

For many years, it has been established under the Michigan Corporate Income Tax Act, MCL 206.601, *et. seq.* (the "CIT Act") that an affiliated group of insurance companies that constitute a "unitary business group" is permitted to file – or to realize the benefits of filing - a combined annual Michigan Corporate Income Tax return. Indeed, on May 13, 2016, Lance Wilkinson, the current Director of the Bureau of Tax Policy - a position just a short step below the Chief Deputy and Michigan State Treasurer - issued guidance confirming the validity of this approach. Specifically, Mr. Wilkinson, advised, in writing and on Michigan Department of Treasury official stationery the following "informal" guidance:

[T]here is **no dispute** over the following issues:

* The definition of "taxpayer" in section 611 includes an insurance company. (MCL 206.611(5)).

*The definition of "unitary business group" in section 611 includes and insurance company. (MCL 206.607(6)).

*The affiliated group election in section 691, by way of definition of "affiliated group" in section 603, may apply to an insurance company. The affiliated group election is an election to "have all of the persons that are included in an affiliated group to be treated as a unitary business group." (MCL 206.691(2); MCL 206.603(1))

*Two or more insurance companies may be unitary with one another and may constitute a unitary group.

Therefore, an insurance company included in a unitary group may utilize the benefits, if any, of inclusion in a unitary business group, even though the insurance company is filing separately."

Deposition of Lance Wilkinson Exhibit 8, attached as Exhibit 1 (Emphasis added; Footnote cites in the original are included as parentheticals).

In that same "informal guidance," Mr. Wilkinson also acknowledged that the Department of Treasury had not yet developed the forms necessary to accommodate a combined filing by a unitary business group comprised of insurance companies. *Id.* However, to fill this gap, in May of 2016, Mr. Wilkinson committed to, and did, contact the forms and systems development divisions in the Department of Treasury to work on generating such a form. *See id.* at 43:11-16. Mr. Wilkinson urged those divisions to generate the form so it could be included

in the next Department of Treasury forms release publication. *Id.*

Consistent with both the plain language of the applicable statutes and the Department's written advice, and in recognition of the absence of a specific form to accomplish a combined filing by a unitary business group comprised of insurance companies, Petitioners, Nationwide Mutual Insurance Company and Nationwide Agribusiness Insurance Company ("Petitioners"), along with the other 21 affiliated insurance companies that make up their unitary business group, amended their previously filed, separate Michigan Corporate Income Tax returns to reflect the fact that they were filing a unitary business group combined return.¹ Affidavit of Kyle Shaner ("Shaner"), ¶ 8; attached as Exhibit 2. In that regard, Petitioners attached to each of their amended returns a Schedule specifically setting forth how the members of the unitary business group were amending their originally filed, separate returns to "utilize the benefits, if any, of inclusion in a unitary business group, even though the insurance company is filing separately." *Id.* at Exhibits A and B. The heading at the top of each amended return's Schedule read:

STATEMENT ATTACHED TO AND MADE PART OF

FORM 4906 AMENDED [2014/2015]² INSURANCE
COMPANY ANNUAL RETURN FOR CORPORATE
INCOME AND RETALIATORY TAXES UNITARY
CALCULATION OF NATIONWIDE GROUP OF
COMPANIES.

¹ The members of the unitary business group and their pending cases with the tax tribunal (if any) identified behind them in parentheses are as follows: Allied Insurance Company of America (21-000042 and 21-000608), Allied Property & Casualty Insurance Company; AMCO Insurance Company; Crestbrook Insurance Company (21-000043 and 21-000618); Depositors Insurance Company; Freedom Specialty Insurance Company (20-004745 and 21-000612); Harleysville Insurance Company (20-004747 and 21-000610); Harleysville Insurance Company of New Jersey; Harleysville Life Insurance Company (20-004746); Harleysville Preferred Insurance Company, Harleysville Worcester Insurance Company, National Casualty Company (21-000037 and 21-000614); Harleysville Preferred Insurance Company (21-000044 and 21-000609); Nationwide Agribusiness Insurance Company (21-000039 and 21-000611); Nationwide General Insurance Company; Nationwide Insurance Company of America; Nationwide Life & Annuity Insurance Company (20-000041 and 21-000617); Nationwide Life Insurance Company (21-000038 and 21-000616); Nationwide Mutual Insurance Company (21-000036 and 21-000607); Nationwide Property & Scottsdale Indemnity Company (21-000045 and 21-000615); Titan Indemnity Company, and Titan Insurance Company.

² The 2014 Statement contained the 2014 reference in this bracket and the 2015 Statement contained the 2015 reference in this bracket.

Each Schedule also advised the Department of Treasury:

Certain companies in the Nationwide unitary business group have excess premium tax credits available on line 20a and can utilize the benefits of the excess credits by transfer to offset premium tax liability of other unitary companies. Also, certain companies have amounts on line 38 which may also be transferred to other companies as needed to reduce or eliminate the retaliatory tax on a unitary basis.

Id. at ¶ 15.

Importantly, each Schedule was designed to aggregate the taxable premiums, credits and other tax attributes from each component member of the Petitioners' unitary business group and to apply the group's credits against the group's aggregate Michigan CIT tax liability in a manner that is consistent with the calculation method used in any other unitary business group filing. Each Schedule, which was required to effectively spread the aggregate tax liability and tax credits among the component members of the unitary business group (again, due to the Department's failure to provide a form to use to file a standard combined return, the effects of filing as a unitary business group had to be incorporated into separate filings) contained spreadsheets showing (i) the benefits (*i.e.*, credits) associated with assessments by the Michigan Automobile Insurance Placement Facility ("MAIPF") on participating members that were part of the unitary business group and the utilization of the resulting credits on Line 20(c) by the unitary business group on the amended returns³ and (ii) the amounts of "other assessments" on line 38B used in the Michigan retaliatory business tax calculation for the unitary business group. To ensure that the separate amended returns were recognized as a unitary business group combined filing, Mr. Wilkinson's May 13, 2016 letter was attached to each of the Schedules.

Consistent with Mr. Wilkinson's "there is no dispute" statement in his May 13 letter, the Michigan Department of Treasury (the "Department") received and processed the timely filed amended returns reflecting the unitary business group combined filing without disputing any issue. Indeed, \$3,296,949 in refunds for the 2014 and 2015 tax years to which the unitary business group was entitled under the combined filing were paid to Petitioners and the other

³ A credit for these amounts may be claimed under MCL 206.637.

component member insurance companies of the Nationwide Mutual unitary business group.

Unfortunately, the Department did not finish issuing all refunds for the 2014 and 2015 years. Rather, shortly after the majority of requested refunds for these years were delivered to Petitioners and the other members of the unitary business group, the Department reversed course and issued assessments, effectively seeking a return of the refunds previously paid, plus penalties and interest. The only explanation for this disregard of Michigan tax law lies in the Department's apparent decision to refuse to follow established Michigan tax law where it did not like the economic consequences of a unitary business group of insurance companies filing to "utilize the benefits, if any, of inclusion in a unitary business group, even though the insurance company is filing separately." In other words, Mr. Wilkinson's "no dispute" conclusion that an insurance company may utilize the benefits of inclusion in a unitary business group applies only if there are no benefits to be utilized. In contrast, in cases in which there are economic benefits to be utilized by being included in a unitary business group, then the Department would disregard the plain language of the applicable statutes, disavow Mr. Wilkinson's May 13 letter, and deny the unitary business group the opportunity to utilize those benefits. There is no rational or justifiable basis for this result-dependent distinction.

Moreover, not only would such a distinction be bad tax policy but it is also an unsustainable distortion of both longstanding Michigan tax law, and the general unitary business principle on which Michigan unitary business group filing requirements are based. In filing these actions, Petitioners' unitary business group seeks a correction of this plain error by the Department through the entry of a judgment reaffirming the correct and unambiguous advice provided by Tax Policy Director Lance Wilkinson that "an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in the unitary business group." Accordingly, Petitioners respectfully submit that the Tax Tribunal should hold that, under Michigan law, a unitary business group of insurance companies may file as a unitary business group for purposes of the Michigan CIT Act, vacate and cancel the assessments at issue in this litigation, and order the Department to allow the Petitioners' unitary business group

the benefits to which it is entitled as reflected in its unitary business group combined filings.

As will be clear below, this case focuses on whether, despite the plain language of MCL 206.611(6), which expressly includes insurance companies in its definition of the types of entities that may constitute a unitary business group, such a unitary business group of insurance companies is barred from calculating its tax liability in the manner required under Michigan law, including MCL 206.691, merely because the group is comprised of insurance companies. Neither MCL 206.611(6), nor MCL 206.691 contains any language suggesting this inharmonious result.

Notably, the Department never asserted, nor could it assert, that Petitioners and their affiliates failed to qualify as a unitary business group under the provisions of MCL 206.611(6). Similarly, the Department never asserted, nor could it assert, that Petitioners' unitary business group did not satisfy the statutory control and relationship tests as outlined in Revenue Administrative Bulletin 2018-12 ("RAB 2018-12"), copy attached as Exhibit 3. Instead, the Department now asserts that insurance companies can *never* be part of a unitary business group if there is a benefit to the unitary business group (importantly, the Department has not advised a unitary business group of insurance companies that it cannot be a unitary business group in other contexts, *i.e.*, in cases in which there is no benefit from a unitary filing). This result-based position is contrary to the plain language of applicable Michigan statutory law, the Department's instructions, and the Department's previous written guidance. Based on the undisputed facts, the Petitioners are members of a unitary business group as defined in MCL 206.611(6). Furthermore, the Michigan CIT Act specifically directs that a unitary business group must calculate its tax liability on a combined basis as if the entire group were a single entity. *See* MCL 206.691(1); RAB 2018-12 ("A UBG (unitary business group) is a single taxpayer under the CIT and must file a combined return."). Because Petitioners' unitary business group properly did this, summary disposition should be entered in favor of Petitioners.

II. Undisputed Material Facts

A. **UNITARY BUSINESS GROUP**

Petitioner Nationwide Mutual Insurance Company (“Nationwide Mutual”) is the parent and owns, directly or indirectly, more than 50% of the subsidiaries that constitute a unitary business group (together, the “Nationwide Group”).⁴ See Affidavit of Daniel Eppley (“Eppley”) ¶ 7 and Exhibits A (corporate org. charts); B (Form 851 Affiliations Schedule for 2014); and C (Form 851 Affiliations Schedule 851 for 2015), attached as Exhibit 4. The members of the Nationwide Group “have common Directors, officers, and management personnel that provide centralized oversight and management of operational decisions for such entities.” See Nationwide Mutual Supplemental Discovery Responses at Interrogatory No. 1, a copy of which is attached hereto as Exhibit 5. This is because “the Nationwide Mutual group of insurance companies has grown and expanded over the past 90 years and now consists of multiple, functionally integrated insurance companies that provide insurance products and services to customers across the United States.” See *id.* at Interrogatory No. 2. These undisputed facts demonstrate that, as a matter of law, Petitioners satisfy the control component for a unitary business group. See Exhibit 3 (RAB 2018-12).

Nationwide Mutual and each of the other members of the Nationwide Group are parties to the Third Amended and Restated Cost Sharing Agreement entered into effective as of January 1, 2014 (the “Cost Sharing Agreement”). See Exhibit 4 (Eppley) at Exhibit D. Under the Cost Sharing Agreement, the Nationwide entities share both operational services (§ 1(a)) and administrative services (§ 1(b)). Similarly, as explained in Nationwide Mutual’s annual report “[t]he Company and various affiliates share a home office, other facilities, equipment, common management and administrative services.” *Id.*, at 33. This is because “[t]he Nationwide affiliated companies are commonly owned and together engage in a functional integrated insurance and financial services business that includes sharing resources.” See Exhibit 5 at Interrogatory No. 2.

⁴ These entities are identified in footnote 1.

Nationwide Mutual and its subsidiaries participate in intercompany pooling arrangements for reinsurance pooling. *See* Exhibit 4 (Eppley) at Exhibit D pgs. 50-51. The cost sharing agreements and reinsurance result in a flow of value among the entities. In addition, the Nationwide entities file a consolidated federal income tax return. *See id.* at Exhibit E at NMIC-MI Dept. of Treasury_000760 (2014 Annual Statement of the Condition and Affairs of Nationwide Mutual Insurance Company); Exhibit F at NMIC-MI Dept. of Treasury_000017, 32 (2015 Annual Statement of the Conditions and Affairs of Nationwide Mutual Insurance Company). These undisputed facts demonstrate that Petitioners satisfy, as a matter of Michigan law, the relationship component of the unitary business group definition. *See* Exhibit 3 (RAB 2018-12).

There can be no dispute from the Department that the Nationwide Group comprises a unitary business group. Indeed, in response to Petitioners' Written Discovery, the Department conceded that it was without information or knowledge to dispute that Petitioners' unitary business group complied with the requisite tests of RAB 2018-12. *See* Department's Response to Interrogatory Number 10, a copy of which is attached as Exhibit 6. As such, it cannot now be heard to contest the fact that Petitioners meet the requisite tests under RAB 2018-12 and as such constitute a valid unitary business group under Michigan law.

B. COMBINED CIT RETURN

On February 19, 2016, Timothy Pratchler of PriceWaterhouseCoopers LLP emailed Lance Wilkinson, Administrator Tax Policy for the Department of Treasury, about whether a group of affiliated insurance companies is required to file a combined MI Form 4095 "that includes all related premium tax filers." *See* Exhibit 6 at Exhibit A at 2-3; Exhibit 1 (Wilkinson) at Deposition Exhibit 7. This followed up on an earlier live conversation between Mr. Wilkinson and Mr. Pratchler on this topic. *See* Exhibit 1 at 27:11-22. The Department then analyzed the issue related to whether a group of insurance companies could, or was required to file a combined return. *See id.* at 30:18-32:4. On May 13, 2016, Mr. Wilkinson, writing on behalf of the Department, responded to Mr. Pratchler's inquiry. *See* Exhibit 6 at Response to

Request for Admission Number 9; Exhibit 1 (Wilkinson) Deposition Exhibit 8. In that response letter, Mr. Wilkinson stated “an insurance company included in a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group.” *Id.* at 38:6-10; Deposition Exhibit 8. Mr. Wilkinson testified that the letter was an accurate statement of his understanding of the law at that time. *See id.* at 38:11-14. When he made that statement, Mr. Wilkinson was aware that insurance entities could claim certain tax credits under the CIT. *See id.* at 39:5-39-20. When asked if he currently disavows anything in that letter, Mr. Wilkinson testified “no” and reiterated “I still think that, you know, it’s correct.” *See id.* at 30:5-14.⁵

At the time Mr. Wilkinson sent the letter, the Department had not produced forms for insurance companies to use to file as a unitary business group. *See id.* at 42:1-4. Therefore, Mr. Wilkinson reached out the proper group at the Department to create just such a form. *See id.* at 43:11-16. In the absence of an approved form, the members of a unitary business group of insurance companies would need to file separate returns, but prepared on a unitary basis. *See id.* at 43:5-10. Mr. Pratschler subsequently provided Mr. Wilkinson a statement showing on a hypothetical basis how his clients would prepare a unitary return in the absence of an approved form. *See id.* at 48:2-14; 51:21-52:7; Deposition Exhibits 9 and 10. This statement involved a unitary group of seven insurance companies. *See id.* at 52:8-12; Deposition Exhibit 10. This schedule showed credits associated with MAIPF assessments being used as credits by the unitary business group, but with members of the group that had not individually paid the assessments being allocated credits. *See id.* at 53:3-15; Deposition Exhibit 10. Mr. Wilkinson understood that this meant attributes of the group were being used against taxes owed by other members of the group. *See id.* at 54:9-17. Mr. Wilkinson never informed Mr. Pratschler that attributes could not be shared as shown in the schedules and never warned him against filing returns on this basis. *See id.* at 55:18-25.⁶

⁵ When Mr. Wilkinson sent the letter, he was an administrator of the Tax Policy Division, he had the training to opine on corporate income tax matters on behalf of the Department, and his job responsibilities included responding to such requests. *See* Exhibit 6 at Response to Request for Admission Numbers 6, 7, and 8.

⁶ Mr. Wilkinson testified that, with the assistance of Angela Matelski and others, he prepared a draft recommendation to the Director of the Tax Policy Section addressing the use of benefits by a unitary business

For the 2014 and 2015 tax years, each of the members of the Nationwide Group initially filed a separate Michigan Premiums/Retaliatory Tax Return, Form 4905, calculating their tax liability on an individual company basis. In accordance with these returns, the Nationwide Group paid taxes of \$4,511,258. *See* Exhibit 2 (Shaner) at ¶ 8. The Nationwide Group subsequently filed amended tax returns in the manner approved by the Wilkinson Letter. Amended tax returns were filed on or about November 13, 2018. *See id.* at ¶ 9. The Department accepted the returns. The Statement attached to those amended returns showed that attributes were being applied at the unitary business group level in a manner that could be interpreted as being shared among the members of the group. After reviewing these materials, the Department processed and issued refunds of \$3,296,949 to the Nationwide Group for the 2014 and 2015 tax years. *See id.* at ¶ 19.

Subsequently, the Department reversed itself and rejected many of the amended returns filed by the Nationwide Group. The Department's new position is that "[t]here is no provision under Chapter 12 for insurance companies to calculate taxes and share credits on a group wide basis." *See* Exhibit 6 at Interrogatory Number 8. Instead, the Department now argues that "[e]ach insurance company, however, must determine its tax pursuant to Chapter 12 of the CIT Act regardless of whether it is a member of a unitary business group or not." *See id.* at Interrogatory Number 10.

On November 17, 2020, the Department denied Petitioners' refund requests and challenges to the assessments. *See* Exhibit A to Petitions. This challenge followed.

group comprised of insurance companies and that recommendation after its approval by the Director was then provided to the Chief Deputy Treasurer. *See* Wilkinson Trans. at 57:18-59:12. Counsel for the Department instructed Mr. Wilkinson to not answer questions about what the recommendation was and whether the Chief Deputy said to not issue the recommendation asserting these questions were barred by the deliberative process privilege. *See id.* at 59:4-13. Under Michigan law, the deliberative process privilege is only a qualified privilege and can be overcome by a showing of need. *See Truel v. City of Dearborn*, 291 Mich. App. 125, 136 (2010). Here, there is a strong need to obtain the recommendation as it will show that the Department itself believed that Michigan statutes required insurance companies to file as a unitary business group and use the benefits available in the manner shown in Mr. Pratschler's schedule, but refused to issue guidance on this for fear that it might negatively impact tax revenues. Alternatively, the Tax Tribunal should grant an inference for purposes of this litigation that the recommendation was to approve insurance companies filing as a unitary business group and use the benefits available in the manner shown in Mr. Pratschler's schedule.

III. Argument

A. *Standard for Summary Disposition*

A case, such as this one, is appropriate for summary disposition as “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.” MCR 2.116(C) (10). “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 2.1116(G)(5), in the light most favorable to the party opposing the motion.” *Michigan Assoc. of Home Builders v. City of Troy*, 504 Mich. 204, 211, 934 N.W.2d 713, 718 (2019). Then, “summary disposition under MCR 2.116(C)(1) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Greene v. A.P. Products, Ltd.*, 475 Mich. 502, 507, 717 N.W.2d 855, 859 (2006). A genuine issue of material fact only exists “when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds may differ.” *West v. General Motors Co.*, 469 Mich. 177, 183, 665 N.W.2d 468, 471 (2003).

B. *The Nationwide Group Qualifies as a Unitary Business Group*

According to the Michigan Court of Appeals “[a] unitary business group is not a separate and distinct legal entity, like a corporation, limited liability company, or partnership; rather, the group is purely a creation of tax law.” *D’Agostini Land Co. v. Dept. of Treasury*, 322 Mich.App. 545, 551 (Mich. Ct. App. 2018). The Court of Appeals explained that “Michigan, like several other states, has adopted the unitary-business-group concept in an effort to measure more accurately the related group’s taxable activities in the state.” *Id.* Under the plain language of the Michigan CIT Act, a unitary business group is “a group of United States persons that are corporations, *insurance companies*, or financial institutions ... 1 of which owns or controls, directly or indirectly, more than 50% of the ownership interest with voting rights ... and that has business activities or operations which result in a flow of value between or among members included in the unitary business group or has business activities or operations that are integrated

with, are dependent upon, or contribute to each other.” MCL 206.611(6) (emphasis added). Notably, the statute expressly **includes** insurance companies as entities that may be part of a unitary business group.

The undisputed facts in this case show that the Nationwide Group satisfies the requirements to constitute a unitary business group set forth in MCL 206.611(a). First, as shown on the corporate organization charts and the IRS Forms 851 for 2014 and 2015, Nationwide Mutual is the direct or indirect parent and owns or controls at least 50% of each of the other members of the Nationwide Group. This satisfies the ownership or control test for a unitary business group contained in MCLA 206.611(6).

Second, the undisputed facts show that there is a flow of value between or among the members of the Nationwide Group. The Cost Sharing Agreement provides for a flow of value among the members in connection with the provision of services for each other. Value also flows between the members of the group from their participation in a common reinsurance pool. These flows of value satisfy the value flow requirement for a unitary business group contained in MCL 206.611(6).

In addition, the members of the Nationwide Group satisfy the alternative to the flow of value test because they have operations that are integrated with, are dependent upon, or contribute to each other. It is undisputed that the members of the Nationwide Group share a home office, other facilities, equipment, common management and administrative services. This is because, as disclosed by Nationwide Mutual’s 2015 Report, the Nationwide entities “together engage in a functional integrated insurance and financial services business that includes sharing resources.” See Exhibit 5 at Interrogatory No. 4. These undisputed facts satisfy the alternative test under MCL 206.611(6) to flow of value, which is based on having integrated or dependent operations or operations that contribute to each other. Because the undisputed facts establish that the Nationwide Group satisfied the control test and both of the alternative flow of value and integration tests, reasonable minds may not differ and must conclude that Nationwide Group constitutes a unitary business group under MCL 206.611(6).

C. *The Rules for Unitary Business Groups Apply to All Chapters of the CIT Act*

Part 2 of the Income Tax Act of 1967, which establishes Michigan's corporate income tax, is divided into seven chapters. Chapters 10, 14, and 16 contain general rules and definitions. Chapters 11, 12, and 13 impose corporate taxes on general corporations, insurance companies, and financial institutions, respectively. Chapter 15 contains special rules about certain tax credits.

The definition of a unitary business group in MCLA 206.611 is part of chapter 10's general definitions that apply across the entire CIT Act. As part of the general rules on administration in chapter 16, MCLA 206.685(1) imposes a requirement to file tax returns. *See* MCL 206.685(1). MCLA 206.691(1) then directs (with an exception not relevant here) that "a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group." This section continues and provides that "each United States person included in a unitary business group shall be treated as a single person, and all transactions between those persons included in the unitary business group shall be eliminated from the corporate income tax base, the apportionment formulas, and for purposes of determining exemptions, credits, and the filing threshold under this part." Thus, the general provisions in chapter 16 for the administration of the corporate income tax specify that a unitary business group is to be taxed as a single person (*i.e.*, taxpayer) without regard to any separate legal entity distinctions, internal divisions, or transactions between the members of the group.

Nothing in MCL 206.606 or 206.691 indicates that these provisions do not apply across all chapters included in Part 2 of the CIT Act. Instead, applying MCL 206.606 and 206.691 regarding unitary business groups to all elements of Part 2 is consistent with their plain meaning, and with the overall structure of the CIT Act. Additional support for the conclusion that these provisions apply throughout the entirety of part 2 is provided by the definition of taxpayer as "a corporation, insurance company, financial institution, or unitary business group, whichever is applicable under each chapter, that is liable for a tax, interest, or penalty under this part." MCL 206.611(5). This definition plainly applies across all of the chapters of the CIT

Act; otherwise, the definition's delineation of specific exceptions to the definition's sweep would be nothing but surplusage. (E.g., "[f]or purposes of chapter 12, unless specifically included in the section, taxpayer does not include a corporation or a financial institution." Id.). Notably, this exception to the definition of a "taxpayer" does not remove a unitary business group from the definition, which reaffirms that taxation of a unitary business group of insurance companies is not precluded under chapter 12. It is also noteworthy that this definition of "taxpayer" in MCL 206.606(5) is immediately before the definition of "unitary business group" in MCL 206.606(6). Given this proximity, the definition of "unitary business group" applies to all chapters of the CIT Act in the same manner as the definition of "taxpayer" applies to all chapters of the CIT Act.

In the absence of explicit statutory text indicating that the unitary business group tax computation provisions in the CIT Act do not apply to the insurance companies tax contained in chapter 12, the unitary business group provisions in MCL 206.606 and 206.691 must be applied to the calculation of taxes for a unitary business group of insurance companies. This is not a novel interpretation; this correct interpretation was adopted by the Department in Mr. Wilkinson's 2016 letter to Mr. Pratschler stating that insurance companies could "utilize the benefits, if any, of inclusion in a unitary business group, even though the insurance company is filing separately." Similarly, an article summarizing the changes made to business taxation when the Corporate Income Tax was passed in 2011 concluded that a group of insurance companies could constitute a unitary business group. *See* Steven E. Grob, *Michigan Again Revises its Primary Business Tax, Along with Personal Income Tax Changes and Technical Corrections*, 21 J. Multistate Tax'n 6, 11 (2011), a true and correct copy of which is attached as Exhibit 7. In addition, the Department applied this interpretation correctly when it initially processed refund claims for parts of the Nationwide Group based on their amended returns calculating the group's tax liability as a unitary business group.

D. The Department is Wrong That Chapter 12 Bars a Unitary Business Group of Insurance Companies From Filing a Combined Return

The Department's position that a unitary business group of insurance companies is ineligible to calculate its Michigan CIT liability in the manner provided for by MCL 206.691 is not based on any language in that provision, or in any statement in chapter 12 that MCL 206.691 is not applicable. Instead, the Department's argument is that the language in MCL 206.635(1) that "each insurance company shall pay a tax" and the language in MCL 206.637 that "an insurance company may claim" MAIPF credits implicitly nullifies the plain, unambiguous language of MCL 206.606 and 206.691 and requires insurance company taxes to be calculated on an entity-by-entity basis, even for a unitary business group of insurance companies such as the Nationwide Group. The Department's argument is wrong for several reasons.

First, the Michigan Court of Appeals has already rejected the Department's attempted use of a singular term in a statute as a means to avoid an overriding, controlling statutory directive to apply tax on a unitary basis. In a recent decision that involves an issue that is startlingly similar to the issue in this matter, the Court of Appeals held that a taxing statute's referring to individual entities does not trump other statutory language regarding how a unitary business group must calculate its tax liability. *See TCF Nat'l Bank v. Dept. of Treasury*, 330 Mich.App. 596, 950 N.W.2d 469 (2019). The *TCF Bank* decision dealt with the application of Michigan's franchise tax on financial institutions under the Michigan Business Tax Act ("MBTA"), MCL 208.1101 *et seq.* *See TCF*, 330 Mich.App. at 599. Like the CIT Act, the MBTA included the concept of a unitary business group as a single taxpayer. *See id.* at 600 n.2. Also like the CIT Act, the MBTA required a unitary business group to file a combined tax return. *See id.* at 609 (discussing requirement to file a combined return in MCL 208.1511). Similar to the manner in which the CIT Act includes a unitary business group in the list of who may be a taxpayer, the MBTA included a statutory reference to a unitary business group of financial institutions. *See id.* at 607. In addition, in the same way MCL 206.635(1) imposes a

tax on “each insurance company,” MCL 208.1263 imposed a tax on “every financial institution.” *See id.* at 607-08.

In a haunting parallel to the Department’s arguments here, the Department argued in *TCF Bank* that the statutory reference to the singular “every financial institution” in the MBTA required that the tax calculations for financial institutions had to be performed on an entity-by-entity basis, essentially reading the unitary business group provisions out of the MBTA statute. *See id.* at 600-01. While the Department argued that the singular usage, “every financial institution,” prohibited taxing on a unitary basis, the Court of Appeals disagreed. The Court of Appeals held that the Department’s argument was “contrary to the Legislature’s intent that UBG’s must be recognized and treated as a single taxpayer, subject to taxation under the MBTA.” *Id.* at 613. *TCF Bank* Court’s logic and interpretation compels the conclusion that the parallel, virtually identical, language contained in the CIT Act authorizes and even requires Petitioners and their affiliates to file using a unitary business group tax and credit calculation.

Second, if a unitary business group is to be barred from benefitting from a tax credit to which a unitary business group’s component member is entitled, that credit denial must be specifically delineated in statutory language. The Court of Appeals has previously held that, if unitary business groups are not specifically identified as being excluded from utilizing the benefit of a tax credit at the unitary business group level, they must be allowed to claim the benefit of the tax credit on a unitary business group basis. *See D’Agostini*, 322 Mich.App at 561 (dealing with the small business credit). In reaching its conclusion the Court of Appeals specifically rejected the Department’s argument that the eligibility for the credit had to be established by looking at each member of the group on an individual basis. *See id.* As a result of the Court of Appeals decision in *D’Agostini*, the Legislature added a unitary business group limitation to the credit under MCL 206.671. No such limitation applies to MAIPF credits under MCL 206.637(1), and it is not the role of the courts or the Michigan Tax Tribunal to judicially graft such a limitation into the CIT Act. Accordingly, for purposes of the tax credits at issue in this litigation, the Tax Tribunal should rule, as a matter of law, that such credits must be applied

at the unitary business group level.

Third, the Department's interpretation violates basic rules of statutory construction. The Michigan legislature has specifically directed that in interpreting its statutory enactments, "[e]very word importing the singular number only may extend to and embrace the plural number." MCL 8.3b. For example, a statutory directive that the Secretary of Transportation require automakers to install a warning system in new cars to alert drivers "when a tire is significantly under-inflated" is only satisfied by a system capable of a separate warning for all tires (not only "a" single tire), so that a driver knows when two tires on the same side, or all four tires, are significantly under-inflated. See *Public Citizen, Inc. v Mineta*, 340 F.3d 39, 54 (2nd Cir. 2003). In this case, the Legislature's intent relative to unitary business group taxation compels the use of the plural because, while the statute requires each insurance company to pay a tax, the overall structure of the CIT Act requires each member of a unitary business group to be included in a combined return reporting the aggregate tax base, tax, and credits of the entire group, MCL 206.691(1), such that the entire group is treated as a single taxpayer. In addition, if the CIT Act were interpreted such that being "an insurance company" were the sole factor necessary to preclude unitary business group/combined reporting, the definitions in MCL 206.611(5), (6) and (7), and the requirements of MCL 206.691(1) and the affiliated group election of MCL 206.691(2) relating to insurance companies would be rendered meaningless and superfluous. Longstanding Michigan law requires that courts "avoid a construction that would render any part of the statute surplusage or nugatory." *Wickens v Oakwood Healthcare Sys*, 465 Mich. 53, 60, 631 NW2d 686 (2001). The way to avoid such a construction, and to allow for a harmonious interpretation of the different statutory provisions at issue, is to interpret the CIT Act applicable to insurance companies based on the plain language of the applicable statutes, which requires a unitary business group of insurance companies to calculate its premiums, tax, and tax credits at the unitary business group level using the combination methodology provided for in MCL 206.691, and reaffirmed in guidance provided by the Department in the Wilkinson Letter.

CONCLUSION

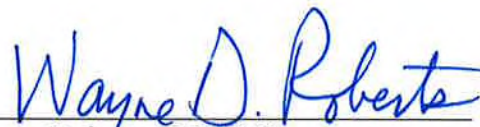
In conclusion, as a matter of undisputed fact and law, an insurance company that is a member of a unitary business group may utilize the benefits, if any, of inclusion in a unitary business group, even though the insurance company is filing separately. Petitioners, as a matter of undisputed fact, are members of a unitary business group of insurance companies. In addition, as another matter of undisputed fact, Petitioners filed unitary business group amended returns to utilize the benefits of tax credits and the tax calculation that resulted from the unitary business group combination. Accordingly, Petitioners are entitled to summary judgment declaring as a matter of law that they properly filed amended returns based on their status as component members of a unitary business group. Thus, the assessments against Petitioners for the 2014 and 2015 tax years must be vacated and canceled, and the Department must pay any outstanding refunds with interest.

Respectfully submitted,

BODMAN PLC

Dated: August 2, 2021

By:



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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 24

Nationwide
2014

Credits/Unitary Filing - Michigan Refund Report

Federal ID#	St Dom	Company Name	Tax Before Credits	Latest Return Credits	Tax Due After Credits	Addtl Credits Line 20c	Tax Due After Addtl Credits	Savings before Retal Tax	Dom St Taxes, Fees and Assmnts	Latest Return MI Taxes, Fees and	Latest Return Retal Tax	Latest Return Total Tax Due	New Addtl Assmnts Line 38B	New Retal Tax	New Total Tax Due	Refund
04-1989660	PA	Harleysville Worcester Ins Co	16,738	21,369	0	0	0	0	27,575	2,711	24,864	24,864	24,864	0	0	24,864
23-1580983	PA	Harleysville Life Ins Co	44,696	1,952	42,744	42,744	0	42,744	72,329	46,333	25,996	68,740		0	0	68,740
23-2253669	NJ	Harleysville Ins Co of NJ	0	125	0	0	0	0	100	275	0	0		0	0	0
23-2384978	PA	Harleysville Pref. Ins Co	50,830	23,655	27,175	27,175	0	27,175	82,182	53,691	28,491	55,666	55,666	0	0	55,666
27-0114983	OH	Allied Ins Co Of America	0	125	0	0	0	0	600	275	325	325		0	0	325
31-0970750	OH	Nationwide P&C Ins Co	152,276	12,778	139,498	139,498	0	139,498	202,988	155,905	47,083	186,581	186,581	0	0	186,581
31-1000740	OH	Nationwide Life & Ann Ins Co	550,374	28,508	521,866	521,866	0	521,866	614,520	556,417	58,103	579,969		0	0	579,969
31-1117969	OH	Scottsdale Indemnity Co	34,972	6,303	28,669	28,669	0	28,669	39,979	30,380	9,599	38,268	38,268	0	0	38,268
31-4156830	OH	Nationwide Life Ins Co	375,572	56,708	318,864	318,864	0	318,864	412,853	350,925	61,928	380,792		0	0	380,792
31-4177100	OH	Nationwide Mutual Ins Co	69,859	36,446	33,413	33,413	0	33,413	86,462	54,635	31,827	65,240	65,240	0	0	65,240
31-4425763	OH	Nationwide General Ins Co	0	125	0	0	0	0	600	275	325	325		0	0	325
38-0865250	WI	National Casualty Co	240,449	147,457	92,992	92,992	0	92,992	50,893	272,586	0	92,992	-128,701	0	0	92,992
38-3198542	MI	Harleysville Lake States Ins	341,595	442,871	0	0	0	0	0	0	0	0		0	0	0
41-0417250	PA	Harleysville Ins Co	104,270	42,265	62,005	62,005	0	62,005	167,614	115,860	51,754	113,759	113,759	0	0	113,759
42-1015537	IA	Nationwide Agribus. Ins Co	101,174	26,108	75,066	75,066	0	75,066	80,581	121,633	0	75,066	34,014	0	0	75,066
42-1201931	IA	Allied P&C Ins Co	303,354	662,912	0	-302,456	0	0	245,397	120,465	124,932	124,932	124,932	0	0	124,932
42-1207150	IA	Depositors Ins Co	242,550	38,663	203,887	203,887	0	203,887	195,799	259,302	0	203,887	140,384	0	0	203,887
42-6054959	IA	AMCO Ins Co	610,761	1,010,371	0	0	0	0	494,394	1,155,445	0	0	-661,051	0	0	0
68-0066866	OH	Crestbrook Ins Co	0	125	0	0	0	0	600	275	325	325		0	0	325
74-2286759	TX	Titan Indemnity Co	464,513	695,236	0	0	0	0	616,893	1,298,084	0	0	-681,191	0	0	0
75-6013587	OH	Freedom Specialty Ins Co	33,085	384	32,701	32,701	0	32,701	37,405	33,494	3,911	36,612		0	0	36,612
86-0619597	MI	Titan Ins Co	140,819	1,417,243	0	-1,276,424	0	0	0	933,164	0	0	-379,853	0	0	0
95-2130882	WI	Nationwide Ins Co of America	0	125	0	0	0	0	200	275	0	0		0	0	0
Total for 2014			3,877,887	4,671,854	1,578,880	0	0	1,578,880	3,429,964	5,562,405	469,463	2,048,343	-1,067,088	0	0	2,048,343

Nationwide
Attachment to Line 38B

Unitary Filing - Transfer of Line 38B Other Assessments / Michigan ACP

Statement attached to and made part of

FORM 4906 - 2014 INSURANCE COMPANY AMENDED RETURN FOR CORPORATE INCOME AND RETALIATORY TAXES

Tax Year	Federal ID#	Company Name	Dom St	26A. Dom St Tax	27B. Michigan Tax	Dom St Fees and Assessmnts	MI Fees and Assessmnts Excluding Line 38	Latest Return Line-38B Other Assessmnts	Corrected Line-38B Other Assessmnts	Transfer Other Assessmnts	38B. Other Assessmnts Used	39A..	39B.	40B. Retal Amount	41B. Tax Liability
												Dom St Tot Taxes, Fees, and Assessmnts	MI Tot Taxes, Fees, and Assessmnts		
2014	23-2253669	Harleysville Ins Co of NJ	NJ		0		275				0	100	275	0	0
2014	38-3198542	Harleysville Lake States Ins	MI		0		0				0	0	0	0	0
2014	95-2130882	Nationwide Ins Co of America	WI		0		275				0	200	275	0	0
2014 From	42-6054959	AMCO Ins Co	IA	494,294	0	100	38,201	1,117,244	1,117,244	-661,051	456,193	494,394	494,394	0	0
2014 From	38-0865250	National Casualty Co	WI	8,063	0	42,830	7,320	172,274	172,274	-128,701	43,573	50,893	50,893	0	0
2014 From	74-2286759	Titan Indemnity Co	TX	594,576	0	22,317	11,293	1,286,791	1,286,791	-681,191	605,600	616,893	616,893	0	0
2014 From	86-0619597	Titan Ins Co	MI		0		25	933,139	933,139	-379,853	553,286	0	553,311	0	0
2014 To	27-0114983	Allied Ins Co Of America	OH	250	0	350	275			325	325	600	600	0	0
2014 To	42-1201931	Allied P&C Ins Co	IA	245,297	0	100	13,262	107,203	107,203	124,932	232,135	245,397	245,397	0	0
2014 To	68-0066866	Crestbrook Ins Co	OH	250	0	350	275			325	325	600	600	0	0
2014 To	42-1207150	Depositors Ins Co	IA	195,699	0	100	7,454	47,961	47,961	140,384	188,345	195,799	195,799	0	0
2014 To	75-6013587	Freedom Specialty Ins Co	OH	37,055	0	350	793			36,612	36,612	37,405	37,405	0	0
2014 To	41-0417250	Harleysville Ins Co	PA	166,764	0	850	11,062	42,793	42,793	113,759	156,552	167,614	167,614	0	0
2014 To	23-1580983	Harleysville Life Ins Co	PA	71,479	0	850	3,589			68,740	68,740	72,329	72,329	0	0
2014 To	23-2384978	Harleysville Pref. Ins Co	PA	81,332	0	850	7,210	19,306	19,306	55,666	74,972	82,182	82,182	0	0
2014 To	04-1989660	Harleysville Worcester Ins Co	PA	26,725	0	850	1,091	1,620	1,620	24,864	26,484	27,575	27,575	0	0
2014 To	42-1015537	Nationwide Agribus. Ins Co	IA	80,481	0	100	12,768	33,799	33,799	34,014	67,813	80,581	80,581	0	0
2014 To	31-4425763	Nationwide General Ins Co	OH	250	0	350	275			325	325	600	600	0	0
2014 To	31-1000740	Nationwide Life & Ann Ins Co	OH	614,170	0	350	34,551			579,969	579,969	614,520	614,520	0	0
2014 To	31-4156830	Nationwide Life Ins Co	OH	412,503	0	350	32,061			380,792	380,792	412,853	412,853	0	0
2014 To	31-4177100	Nationwide Mutual Ins Co	OH	78,652	0	7,810	4,111	17,111	17,111	65,240	82,351	86,462	86,462	0	0
2014 To	31-0970750	Nationwide P&C Ins Co	OH	171,732	0	31,256	4,165	12,242	12,242	186,581	198,823	202,988	202,988	0	0
2014 To	31-1117969	Scottsdale Indemnity Co	OH	39,169	0	810	862	849	849	38,268	39,117	39,979	39,979	0	0
Total				3,318,741	0	110,923	191,193	3,792,332	3,792,332	0	3,792,332	3,429,964	3,983,525	0	0

Nationwide
Attachment to Line 20C
Unitary Filing - Transfer of Line 20c MAIPF

Statement attached to and made part of

FORM 4906 - 2014 INSURANCE COMPANY AMENDED RETURN FOR CORPORATE INCOME AND RETALIATORY TAXES

Tax Year	To/ From	Federal ID#	Company Name	Dom. St	19. Tax Before Credits	20a. MI WCPF	20b.. MI Basic PIA	Latest Return MAIPF	Corrected MAIPF	Transferred MAIPF	20c.. MAIPF Used	20d. PC Guar Assoc	20e.. LH Guar Assoc	21. Total L20 Credits	22b. Exam Fee Credit.	Total All Credits	25. Total Tax
2014		27-0114983	Allied Ins Co Of America	OH	0			0	0		0		0	0	125	125	0
2014		42-6054959	AMCO Ins Co	IA	610,761	4,716		996,633	996,633	0	996,633			1,001,349	9,022	1,010,371	0
2014		68-0066866	Crestbrook Ins Co	OH	0			0	0		0			0	125	125	0
2014		23-2253669	Harleysville Ins Co of NJ	NJ	0			0	0		0			0	125	125	0
2014		38-3198542	Harleysville Lake States Ins	MI	341,595	77,750		361,357	361,357		361,357			439,107	3,764	442,871	0
2014		04-1989660	Harleysville Worcester Ins Co	PA	16,738	20,056		1,188	1,188		1,188			21,244	125	21,369	0
2014		31-4425763	Nationwide General Ins Co	OH	0			0	0		0			0	125	125	0
2014		95-2130882	Nationwide Ins Co of America	WI	0			0	0		0			0	125	125	0
2014		74-2286759	Titan Indemnity Co	TX	464,513			689,602	689,602		689,602			689,602	5,634	695,236	0
2014	From	42-1201931	Allied P&C Ins Co	IA	303,354	2,057		657,306	657,306	-302,456	354,850			356,907	3,549	360,456	0
2014	From	86-0619597	Titan Ins Co	MI	140,819			1,413,284	1,413,284	-1,276,424	136,860			136,860	3,959	140,819	0
2014	To	42-1207150	Depositors Ins Co	IA	242,550	771		35,064	35,064	203,887	238,951			239,722	2,828	242,550	0
2014	To	75-6013587	Freedom Specialty Ins Co	OH	33,085			0	0	32,701	32,701		0	32,701	384	33,085	0
2014	To	41-0417250	Harleysville Ins Co	PA	104,270	3,684		37,914	37,914	62,005	99,919		0	103,603	667	104,270	0
2014	To	23-1580983	Harleysville Life Ins Co	PA	44,696			0	0	42,744	42,744		170	42,914	1,782	44,696	0
2014	To	23-2384978	Harleysville Pref. Ins Co	PA	50,830	1,236		21,883	21,883	27,175	49,058			50,294	536	50,830	0
2014	To	38-0865250	National Casualty Co	WI	240,449	606		143,764	143,764	92,992	236,756			237,362	3,087	240,449	0
2014	To	42-1015537	Nationwide Agribus. Ins Co	IA	101,174	3,549		21,356	21,356	75,066	96,422			99,971	1,203	101,174	0
2014	To	31-1000740	Nationwide Life & Ann Ins Co	OH	550,374			0	0	521,866	521,866		11,245	533,111	17,263	550,374	0
2014	To	31-4156830	Nationwide Life Ins Co	OH	375,572			0	0	318,864	318,864		40,690	359,554	16,018	375,572	0
2014	To	31-4177100	Nationwide Mutual Ins Co	OH	69,859	42		35,525	35,525	33,413	68,938			68,980	879	69,859	0
2014	To	31-0970750	Nationwide P&C Ins Co	OH	152,276	13		10,724	10,724	139,498	150,222		0	150,235	2,041	152,276	0
2014	To	31-1117969	Scottsdale Indemnity Co	OH	34,972			5,884	5,884	28,669	34,553		0	34,553	419	34,972	0
Total					3,877,887	114,480		4,431,484	4,431,484	0	4,431,484		52,105	4,598,069	73,785	4,671,854	

Nationwide
2015

Credits/Unitary Filing - Michigan Refund Report

Federal ID#	St Dom	Company Name	Tax Before Credits	Latest Return Credits	Tax Due After Credits	Addtl Credits Line 20c	Tax Due After Addtl Credits	Savings before Retal Tax	Dom St Taxes, Fees and Assmnts	Latest Return MI Taxes, Fees and	Latest Return Retal Tax	Latest Return Total Tax Due	New Addtl Assmnts Line 38B	New Retal Tax	New Total Tax Due	Refund
04-1989660	PA	Harleysville Worcester Ins Co	22,102	2,001	20,101	20,101	0	20,101	36,121	29,818	6,303	26,404	26,404	0	0	26,404
23-1580983	PA	Harleysville Life Ins Co	27,831	1,312	26,519	26,519	0	26,519	45,345	29,168	16,177	42,696		0	0	42,696
23-2253669	NJ	Harleysville Ins Co of NJ	0	125	0	0	0	0	0	275	0	0		0	0	0
23-2384978	PA	Harleysville Pref. Ins Co	60,570	21,839	38,731	38,731	0	38,731	97,776	69,975	27,801	66,532	66,532	0	0	66,532
27-0114983	OH	Allied Ins Co Of America	469	125	344	344	0	344	912	619	293	637		0	0	637
31-0970750	OH	Nationwide P&C Ins Co	151,202	13,965	137,237	137,237	0	137,237	201,042	156,105	44,937	182,174	182,174	0	0	182,174
31-1000740	OH	Nationwide Life & Ann Ins Co	729,865	19,345	710,520	710,520	0	710,520	815,549	749,234	66,315	776,835		0	0	776,835
31-1117969	OH	Scottsdale Indemnity Co	34,197	1,325	32,872	32,872	0	32,872	39,007	34,831	4,176	37,048	37,048	0	0	37,048
31-4156830	OH	Nationwide Life Ins Co	449,143	12,125	437,018	437,018	0	437,018	495,252	461,293	33,959	470,977		0	0	470,977
31-4177100	OH	Nationwide Mutual Ins Co	73,019	37,034	35,985	35,985	0	35,985	89,271	62,889	26,382	62,367	62,367	0	0	62,367
31-4425763	OH	Nationwide General Ins Co	714	125	589	589	0	589	1,258	864	394	983		0	0	983
38-0865250	WI	National Casualty Co	245,031	201,919	43,112	43,112	0	43,112	53,642	282,812	0	43,112	-186,058	0	0	43,112
38-3198542	MI	Harleysville Lake States Ins	307,839	386,988	0	-79,149	0	0	0	287,341	0	0	-144,933	0	0	0
41-0417250	PA	Harleysville Ins Co	128,869	49,428	79,441	79,441	0	79,441	206,914	153,463	53,451	132,892	132,892	0	0	132,892
42-1015537	IA	Nationwide Agribus. Ins Co	129,541	38,170	91,371	91,371	0	91,371	102,408	145,223	0	91,371	48,556	0	0	91,371
42-1201931	IA	Allied P&C Ins Co	404,466	147,673	256,793	256,793	0	256,793	326,454	481,515	0	256,793	101,732	0	0	256,793
42-1207150	IA	Depositors Ins Co	283,690	51,501	232,189	232,189	0	232,189	229,043	297,333	0	232,189	163,899	0	0	232,189
42-6054959	IA	AMCO Ins Co	546,058	1,141,340	0	-595,282	0	0	440,848	1,022,413	0	0	-581,565	0	0	0
68-0066866	OH	Crestbrook Ins Co	0	125	0	0	0	0	600	275	325	325		0	0	325
74-2286759	TX	Titan Indemnity Co	482,037	1,301,021	0	-818,984	0	0	638,237	1,433,816	0	0	-795,579	0	0	0
75-6013587	OH	Freedom Specialty Ins Co	35,714	373	35,341	35,341	0	35,341	40,350	36,111	4,239	39,580		0	0	39,580
86-0619597	MI	Titan Ins Co	122,763	934,724	0	-684,748	0	0	0	445,502	0	0	-445,502	0	0	0
95-2130882	WI	Nationwide Ins Co of America	0	125	0	0	0	0	200	275	0	0		0	0	0
Total for 2015			4,235,120	4,362,708	2,178,163	0	0	2,178,163	3,860,229	6,181,150	284,752	2,462,915	-1,332,033	0	0	2,462,915

Nationwide
Attachment to Line 38B

Unitary Filing - Transfer of Line 38B Other Assessments / Michigan ACP

Statement attached to and made part of

FORM 4906 - 2015 INSURANCE COMPANY AMENDED RETURN FOR CORPORATE INCOME AND RETALIATORY TAXES

Tax Year	Federal ID#	Company Name	Dom St	26A. Dom St Tax	27B. Michigan Tax	Dom St Fees and Assessmnts	MI Fees and Assessmnts Excluding Line 38	Latest Return Line-38B Other Assessmnts	Corrected Line-38B Other Assessmnts	Transfer Other Assessmnts	38B. Other Assessmnts Used	39A..	39B.	40B. Retal Amount	41B. Tax Liability
												Dom St Tot Taxes, Fees, and Assessmnts	MI Tot Taxes, Fees, and Assessmnts		
2015	23-2253669	Harleysville Ins Co of NJ	NJ	0	0	0	275				0	0	275	0	0
2015	95-2130882	Nationwide Ins Co of America	WI		0		275				0	200	275	0	0
2015 From	42-6054959	AMCO Ins Co	IA	440,748	0	100	32,624	989,789	989,789	-581,565	408,224	440,848	440,848	0	0
2015 From	38-3198542	Harleysville Lake States Ins	MI		0		20,584	266,757	266,757	-144,933	121,824	0	142,408	0	0
2015 From	38-0865250	National Casualty Co	WI	8,492	0	45,150	6,452	233,248	233,248	-186,058	47,190	53,642	53,642	0	0
2015 From	74-2286759	Titan Indemnity Co	TX	617,007	0	21,230	10,478	1,423,338	1,423,338	-795,579	627,759	638,237	638,237	0	0
2015 From	86-0619597	Titan Ins Co	MI		0		0	445,502	445,502	-445,502	0	0	0	0	0
2015 To	27-0114983	Allied Ins Co Of America	OH	528	0	384	275			637	637	912	912	0	0
2015 To	42-1201931	Allied P&C Ins Co	IA	326,354	0	100	12,549	212,173	212,173	101,732	313,905	326,454	326,454	0	0
2015 To	68-0066866	Crestbrook Ins Co	OH	250	0	350	275			325	325	600	600	0	0
2015 To	42-1207150	Depositors Ins Co	IA	228,943	0	100	7,312	57,832	57,832	163,899	221,731	229,043	229,043	0	0
2015 To	75-6013587	Freedom Specialty Ins Co	OH	40,000	0	350	770			39,580	39,580	40,350	40,350	0	0
2015 To	41-0417250	Harleysville Ins Co	PA	206,064	0	850	15,872	58,150	58,150	132,892	191,042	206,914	206,914	0	0
2015 To	23-1580983	Harleysville Life Ins Co	PA	44,495	0	850	2,649			42,696	42,696	45,345	45,345	0	0
2015 To	23-2384978	Harleysville Pref. Ins Co	PA	96,926	0	850	9,329	21,915	21,915	66,532	88,447	97,776	97,776	0	0
2015 To	04-1989660	Harleysville Worcester Ins Co	PA	35,271	0	850	2,689	7,028	7,028	26,404	33,432	36,121	36,121	0	0
2015 To	42-1015537	Nationwide Agribus. Ins Co	IA	102,308	0	100	12,382	41,470	41,470	48,556	90,026	102,408	102,408	0	0
2015 To	31-4425763	Nationwide General Ins Co	OH	804	0	454	275			983	983	1,258	1,258	0	0
2015 To	31-1000740	Nationwide Life & Ann Ins Co	OH	815,199	0	350	38,714			776,835	776,835	815,549	815,549	0	0
2015 To	31-4156830	Nationwide Life Ins Co	OH	494,902	0	350	24,275			470,977	470,977	495,252	495,252	0	0
2015 To	31-4177100	Nationwide Mutual Ins Co	OH	81,832	0	7,439	3,536	23,368	23,368	62,367	85,735	89,271	89,271	0	0
2015 To	31-0970750	Nationwide P&C Ins Co	OH	170,447	0	30,595	3,777	15,091	15,091	182,174	197,265	201,042	201,042	0	0
2015 To	31-1117969	Scottsdale Indemnity Co	OH	38,301	0	706	812	1,147	1,147	37,048	38,195	39,007	39,007	0	0
Total				3,748,871	0	111,158	206,179	3,796,808	3,796,808	0	3,796,808	3,860,229	4,002,987	0	0

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Nationwide
Attachment to Line 20C
Unitary Filing - Transfer of Line 20c MAIPF

Statement attached to and made part of

FORM 4906 - 2015 INSURANCE COMPANY AMENDED RETURN FOR CORPORATE INCOME AND RETALIATORY TAXES

Tax Year	To/ From	Federal ID#	Company Name	Dom. St	19. Tax Before Credits	20a. MI WCPF	20b.. MI Basic PIA	Latest Return MAIPF	Corrected MAIPF	Transferred MAIPF	20c.. MAIPF Used	20d. PC Guar Assoc	20e.. LH Guar Assoc	21. Total L20 Credits	22b. Exam Fee Credit.	Total All Credits	25. Total Tax
2015		68-0066866	Crestbrook Ins Co	OH	0			0	0		0			0	125	125	0
2015		23-2253669	Harleysville Ins Co of NJ	NJ	0			0	0		0			0	125	125	0
2015		95-2130882	Nationwide Ins Co of America	WI	0			0	0		0			0	125	125	0
2015	From	42-6054959	AMCO Ins Co	IA	546,058	5,241		1,129,227	1,129,227	-595,282	533,945			539,186	6,872	546,058	0
2015	From	38-3198542	Harleysville Lake States Ins	MI	307,839	44,614		338,530	338,530	-79,149	259,381			303,995	3,844	307,839	0
2015	From	74-2286759	Titan Indemnity Co	TX	482,037			1,295,794	1,295,794	-818,984	476,810			476,810	5,227	482,037	0
2015	From	86-0619597	Titan Ins Co	MI	122,763			933,139	933,139	-684,748	248,391			248,391	1,585	249,976	0
2015	To	27-0114983	Allied Ins Co Of America	OH	469			0	0	344	344			344	125	469	0
2015	To	42-1201931	Allied P&C Ins Co	IA	404,466	1,416		142,844	142,844	256,793	399,637			401,053	3,413	404,466	0
2015	To	42-1207150	Depositors Ins Co	IA	283,690	811		47,961	47,961	232,189	280,150			280,961	2,729	283,690	0
2015	To	75-6013587	Freedom Specialty Ins Co	OH	35,714			0	0	35,341	35,341			35,341	373	35,714	0
2015	To	41-0417250	Harleysville Ins Co	PA	128,869	3,615		44,640	44,640	79,441	124,081			127,696	1,173	128,869	0
2015	To	23-1580983	Harleysville Life Ins Co	PA	27,831			0	0	26,519	26,519			26,519	1,312	27,831	0
2015	To	23-2384978	Harleysville Pref. Ins Co	PA	60,570	1,109		20,158	20,158	38,731	58,889			59,998	572	60,570	0
2015	To	04-1989660	Harleysville Worcester Ins Co	PA	22,102	136		1,676	1,676	20,101	21,777			21,913	189	22,102	0
2015	To	38-0865250	National Casualty Co	WI	245,031	380		198,833	198,833	43,112	241,945			242,325	2,706	245,031	0
2015	To	42-1015537	Nationwide Agribus. Ins Co	IA	129,541	3,232		33,799	33,799	91,371	125,170			128,402	1,139	129,541	0
2015	To	31-4425763	Nationwide General Ins Co	OH	714			0	0	589	589			589	125	714	0
2015	To	31-1000740	Nationwide Life & Ann Ins Co	OH	729,865			0	0	710,520	710,520			710,520	19,345	729,865	0
2015	To	31-4156830	Nationwide Life Ins Co	OH	449,143			0	0	437,018	437,018			437,018	12,125	449,143	0
2015	To	31-4177100	Nationwide Mutual Ins Co	OH	73,019	167		36,081	36,081	35,985	72,066			72,233	786	73,019	0
2015	To	31-0970750	Nationwide P&C Ins Co	OH	151,202	9		12,242	12,242	137,237	149,479			149,488	1,714	151,202	0
2015	To	31-1117969	Scottsdale Indemnity Co	OH	34,197			931	931	32,872	33,803			33,803	394	34,197	0
Total					4,235,120	60,730		4,235,855	4,235,855	0	4,235,855			4,296,585	66,123	4,362,708	

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 25



User Name: Grant Semonin

Date and Time: Friday, July 18, 2025 2:31 PM EDT

Job Number: 258115090

Document (1)

1. [SCHOENING v. TOWNSHIP OF ORION](#)

Client/Matter: 000001-000002

Search Terms:

Search Type: Natural Language

Narrowed by:

Content Type

Narrowed by
-None-

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SCHOENING v. TOWNSHIP OF ORION

Court of Appeals of Michigan

September 15, 2005, Decided

No. 253887

Reporter

2005 Mich. App. LEXIS 2201 *; 2005 WL 2237699

PATRICK SCHOENING, Petitioner-Appellant, v TOWNSHIP OF ORION, Respondent-Appellee.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Tax Tribunal. LC No. 00-290554.

Disposition: Affirmed.

Judges: Before: Hoekstra, P.J., and Gage and Wilder, JJ.

Opinion

PER CURIAM.

Petitioner appeals as of right the decision of the Michigan Tax Tribunal denying his request for a rehearing of his tax assessment for residential real property. We affirm.

Petitioner owns a multi-level residence that contains 4,775 square feet of living area and includes an attached three-car garage on a 1-1/2 acre lakefront lot in Clarkston. Petitioner appealed the 2002 and 2003 tax assessments, and the tax tribunal upheld the values. The tax tribunal also rejected respondent's assertion that the true cash value (TCV) should be increased. Petitioner requested a rehearing, and the tax tribunal denied the request.

Plaintiff first argues that the tax tribunal's findings of fact were not supported by competent, material, and substantial evidence. Specifically, he argues that his property was overvalued because: (1) the assessment was based on items that were not features of his house; ¹ [*2] and (2) three of the houses in the comparable properties used in the assessment had four bedrooms and their values were not adjusted to account for the fact that his house only has three bedrooms.

In the absence of fraud, review of a tax tribunal decision is limited to determining whether the tribunal committed an error of law or adopted a wrong legal principle. [Danse Corp v Madison Heights](#), 466 Mich. 175, 178; 644 N.W.2d 721 (2002). The tribunal's findings of fact are conclusive if supported by competent, material, and substantial evidence on the whole record. [Const 1963, art 6, § 28](#); [Danse, supra at 178](#). Substantial evidence is "the amount of evidence that a [*3] reasonable mind would accept as sufficient to support a conclusion," but it may be "substantially less than a preponderance." [Inter Cooperative Council v Dep't of Treasury](#), 257 Mich App 219, 221; 668 N.W.2d 181 (2003), quoting [In re Payne](#), 444 Mich. 679, 692, 698; 514 NW2d 121 (1994).

¹ Plaintiff identifies the following items as errors: the number of walk-out basement doors, the number of basement garage door openers, the number of bathrooms with ceramic tile floors and tub alcoves, the number of two-fixture as opposed to three-fixture bathrooms, and the number of certain appliances.

The petitioner bears the burden of proof in establishing the TCV. [MCL 205.737\(3\)](#); [Great Lakes Div of Nat'l Steel Corp v Ecorse](#), 227 Mich. App. 379, 389; 576 N.W.2d 667 (1998). In the instant case, the tribunal found that petitioner did not satisfy the burden of proof because the single house sale that he cited as a comparable property was not sufficient to establish the subject property's market value or TCV. The tribunal also determined that petitioner failed to meet his burden because he failed to submit any description about the comparable properties or to make any adjustments necessary to achieve comparability.

In determining the correct assessment amount for real property, the tribunal must make an independent determination of the TCV, the usual price for which the property would [*4] sell. [Great Lakes Div, supra at 389-390](#). The three accepted methods of valuation include the capitalization-of-income approach, the cost-less-depreciation approach, and the market approach. [Id. at 390](#). The tribunal must employ the method that most accurately determines the TCV, and it is not bound to accept the parties' theories of valuation. [Id. at 389-390](#).

In the instant case, the tribunal stated that it "recognizes the market approach with support from the cost-less-depreciation method to be the most accurate and thus the best indication of the property's true cash value." The tribunal reviewed and analyzed respondent's market analysis and found that it adequately supported an assessed value (AV) of \$482,170 for 2002 and \$496,740 for 2003 and a TCV of \$964,340 for 2002 and \$993,480 for 2003. The evidence presented by respondent, the five comparable properties with adjustments, was sufficient to support the tribunal's conclusion regarding the property's AV and TCV. See [Inter Cooperative Council, supra at 221](#).

Petitioner argues that the valuation was not based on competent evidence because respondent incorrectly [*5] included \$18,000 worth of items in its TCV estimate for 2002 and three comparable properties were not adjusted to account for the different number of bedrooms. To preserve an issue for appellate review, it must be properly raised at trial. [Napier v Jacobs](#), 429 Mich 222, 227; 414 N.W.2d 862 (1987). Because petitioner did not argue this issue at the hearing, he waived it on appeal, and we decline to review it.

Petitioner also argues that the tribunal did not make any direct findings of fact or conclusions of law, but merely adopted the findings of the hearing referee. The purpose of the tax tribunal's opinion is to facilitate appellate review, but only a concise statement of facts and conclusions of law is required. [MCL 205.751\(1\)](#); [Great Lakes Division, supra at 402](#). The opinion and judgment contained sufficient findings of fact, as the hearing referee summarized both parties' contentions regarding the valuation of the property and made specific findings with respect to the TCV and AV.

Petitioner, citing [Consolidated Aluminum Corp v Dep't of Treasury](#), 206 Mich. App. 222, 238; 521 N.W.2d 19 (1994), [*6] argues that the findings of fact were inadequate because the order denying his request for a rehearing does not specifically adopt or refer to the hearing referee's proposed judgment. However, the pertinent statute requires only that tribunal members rule on requests for a rehearing and decide whether good cause is demonstrated. [MCL 205.762\(3\)](#); [Shapiro Bag Co v Grand Rapids](#), 217 Mich. App. 560, 564; 552 N.W.2d 185 (1996). The statute does not require that the tribunal provide a statement of facts. See [MCL 205.762\(3\)](#). Here, the tribunal ruled on petitioner's request for a rehearing, determining that he had not demonstrated good cause for a rehearing. The tribunal stated that it had considered the matter and found no error of law or material fact. It also stated that the evidence set forth in the request for the rehearing had been considered by the hearing referee and did not "provide a basis for a rehearing." The tribunal properly denied petitioner's request for a rehearing because evidence that petitioner failed to produce at the hearing cannot be used to establish good cause for a rehearing.

Next, [*7] petitioner contends that the tribunal committed an error of law or adopted a wrong principle because it applied an incorrect economic condition factor (ECF) when it calculated the TCV of his property. It is the province of the tax tribunal to apply its expertise to the facts of each case to determine the appropriate method of arriving at the TCV of the subject property. [Edward Rose Bldg Co v Independence Twp](#), 436 Mich. 620, 631-632; 462 N.W.2d 325 (1990). The petitioner has the burden of proof in establishing the TCV of the property. [MCL 205.737\(3\)](#). Because the TCV is calculated using the ECF, it follows that the petitioner also has the burden of establishing that the ECF used by respondent was calculated incorrectly.

Here, petitioner did not present any evidence to rebut respondent's ECF calculation. Petitioner provided his own ECF calculation, which the tribunal determined was incorrect because it was based on the sale of only one house. Pursuant to the Michigan State Tax Commission Assessor's Manual, one sale is insufficient for calculating an ECF. Petitioner contends that the tribunal made an error of law when it adopted [*8] respondent's ECF calculation without requiring a detailed explanation of the formula used to calculate the ECF. However, this was not error because respondent did not have the burden of establishing that its TCV calculation was correct. Petitioner also argues that he should be provided the opportunity to challenge respondent's ECF calculation. This argument is meritless because petitioner was afforded a full evidentiary hearing on respondent's valuation of his property. Petitioner had the opportunity to establish his proposed ECF and TCV, but failed to meet his statutory burden of proof.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

End of Document

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 26

2007 Mich. Tax LEXIS 14

Larry J. Winget & Alicia J. Winget, Petitioners, v Michigan Department of Treasury, Respondent.

State of Michigan -- Michigan Tax Tribunal

April 4, 2007

Michigan Tax Tribunal Opinions

Reporter

2007 Mich. Tax LEXIS 14 *

MTT Docket No. 319852

April 4, 2007

Core Terms

notice, was, final notice, mail, final assessment, treasury, issuance, tax due, refund, has, due process, tribunal, bureau, summary disposition, section, initial assessment, informed decision, subject to appeal, right to appeal, toll, date of issuance, tax year, mislead, penalty assessment, sufficient information, inaccurately

Panel: Tribunal Judge Presiding: Jack Van Coevering

Opinion By: Per Curiam

Opinion

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

On June 15, 2006 Respondent, Michigan Department of Treasury, filed a Motion for Summary Disposition under MCR 2.116(C)(4). Petitioners responded in opposition and requested oral argument. The request for oral argument was granted by Order dated October 5, 2006. A hearing was held on November 28, 2006, with Assistant Attorney General Timothy J. Haynes representing Respondent and Attorney Thomas J. Kenny representing Petitioners.

The parties ask the Tribunal to consider the Department's practice of correcting its final notices of assessment based on information taxpayers submit after the initial notices of final assessment have become "final" under Section 22 of the Revenue Act, MCL 205.22, and are no longer subject to appeal. Respondent asserts that the Tribunal lacks jurisdiction to hear Petitioners' appeal because Petitioners failed to timely appeal the initial final notices of assessments within the 35-day limitation period provided in Section 22. On the other hand, Petitioners assert that a "corrected final assessment" is subject to appeal [*2] under MCL 205.22 and that Respondent's actions either tolled the statute of limitations contained in MCL 205.22 or deprived Petitioners of their constitutionally required fair notice.

The Department utilizes Form C 4541F for the issuance of what the Department describes as a "BILL FOR TAXES DUE (Final Assessment)." On the form, immediately beneath the title, is a capitalized statement, "SEE BACK FOR APPEAL, PHONE AND CORRESPONDENCE INFORMATION." The top right corner of the form contains boxes for, *inter alia*, "Assessment No." and "Date Issued." Beneath these boxes is a section entitled "BILL SUMMARY."

Other sections include: "DETAIL OF LIABILITY" and "REASON FOR TAX BILL." The back side of the form contains general information describing collections practice, appeal information regarding the Michigan Tax Tribunal and Michigan Court of Claims, and an explanation of penalties.

Affidavits from Respondent's Administrative Services Bureau establish that the Department generally records a minimum of two dates relevant to the issuance of assessments. The assessments are pre-printed with a "Date Issued." The Department also records the actual mailing date. For each of the assessments [*3] issued in this case, the "Date Issued" occurred after the date of mailing. For example, the initial final notices of assessment contained a "Date Issued" (September 20, 2004) that was five days after the date the notices were actually mailed (September 15, 2004). The corrected final notices of assessment contained four relevant dates: a pre-printed, retroactive "Date Issued" of September 20, 2004; an issuance date recorded in Respondent's mailing system as May 17, 2005; the date on which the corrected final notices were actually mailed, May 16, 2005; and the Department's Bureau of Tax and Economic Policy inexplicable determination that the corrected final notices had been issued on May 26, 2005. The two underpayment penalty assessments have two recorded dates. The penalty assessments were mailed on June 28, 2005, but contained a pre-printed "Date Issued" of July 5, 2005.

The parties generally agree on the chronology of events comprising the jurisdictional dispute. They disagree on the issuance date for the corrected assessments.

	Chronology	Date(s)	Dispute
1.	Petitioners filed income tax returns for the 2001 and of Intent to 2002 tax years.		No
	Respondent adjusted the returns and issued Notices		dispute.
2.	Assess.		No
	Respondent, by its Administrative Services Bureau, issued two	9/15/04;	dispute.
3.	final notices of assessment, with a "Date Issued" of "9/20/04."	9/20/04	No
	Petitioner did not appeal the two final notices of assessment but		dispute.
4.	instead submitted additional information to Respondent, through Respondent's Customer Services Bureau.		
	Respondent, by its Administrative Services Bureau, issued two	5/16/05;	Disputed.
5.	"corrected" final notices of assessment containing a "Date	5/17/05;	
	Issued" of "9/20/04."	5/26/05.	
	Respondent, by the Director of its Customer Services Bureau,	5/20/05	No
	sent Petitioners a letter, dated May 20, 2005 and stating, in		dispute.
6.	important part: "The Department will issue assessments to reflect justments made after the second review. ... You will receive		

	Chronology	Date(s)	Dispute
	separate assessments for underpayment penalties."		
	Respondent, by its Administrative Services Bureau, issued	6/28/05;	No
7.	separate final notices of assessment for underpayment penalties, claiming Petitioners failed to file estimated returns for the 2001 and the 2002 tax years. The new final notices of assessment contained a "Date Issued" of "07/05/05." Petitioners filed a request for an informal conference.	7/05/05 7/1/05	dispute. No
8.	Respondent, by its Bureau of Tax and Economic Policy, denied the request for informal conference for four assessments,	8/8/05	dispute. No
9.	describing the "Date Issued" for the Intents to Assess as "05/26/2005." Petitioners' accountant sent an appeal letter to the Michigan Tax	8/9/05	No
10.	Tribunal at the Michigan Department of Treasury's address. Petitioners filed a Petition with the Michigan Tax Tribunal	8/25/05	dispute. No
11.	appealing assessments M393828 and M393829.		dispute.

[*4]

For the 2001 tax year, Respondent "corrected" the final notices of assessment from its initial assessment of \$ 902,041.30 to a "corrected" assessment of \$ 237,165.53. The 2001 assessment total included interest but did not include an assessment of penalties. For the 2002 tax year, Respondent's "correction" resulted in an increase from the initial assessment of \$ 154,878.40 to a "corrected" assessment of \$ 786,389.82. On both the initial and the "corrected" final notices of assessment, inserted in the box and space labeled "Penalty" was the figure "0.00."

Penalties were, however, assessed. Though issued as new, separate assessments, Respondent assessed penalties for failure to pay estimated tax for the two years at issue. As reflected in the May 20, 2006 letter from Respondent's Bureau of Customer Services, Respondent's second review added a "2210 Interest/Penalty," which, for the 2001 tax year, totaled an additional \$ 73,244.00 and for the 2002 tax year totaled an additional \$ 186,166.00. The two underpayment penalty assessments were separately issued.

RESPONDENT'S ARGUMENT

In support of its motion ¹, Respondent asserts that the initial assessments, containing the "Date [*5] Issued" of September 20, 2004, are not subject to appeal because the assessments were not appealed within 35 days of the "Date Issued." The corrected assessments, according to Respondent, relate back to the initial assessment date and merely serve to "correctly calculate" the tax. The Department made the "corrections" as a "courtesy" to Petitioners, but was "under no obligation" to correct the assessments. At the least, according to Respondent, "only the difference between the amount of the original and corrected assessments should be subject to appeal." Respondent rejected Petitioners' claim that the statute of limitations was tolled. Respondent asserted that it had complied with Due Process requirements as the notice was sent to Petitioners' last known address and the Department was under no obligation to provide an issuance date of the notice of final assessment.

[*6]

PETITIONERS' CONTENTIONS

In support of their response ², Petitioners argued that their Petition to the Tribunal falls within the Tribunal's jurisdiction for three reasons. Petitioners first argued that Respondent's actions tolled the statute of limitations, since, after Petitioners submitted additional information, the Department reviewed the information and ultimately reduced the assessment. In their brief, Petitioners cited two cases: *Cracchiolo v Department of Treasury*, unpublished *per curiam* decision of the Court of Appeals, decided August 30, 1996 (Dk. No. 183955); [*Curis Big Boy*](#)

¹ Along with the Brief in Support of Respondent's Motion for Summary Disposition, Respondent included the following Exhibits:

1. *Exhibit 1*: Affidavit of Bruce D. Hanses (regarding the procedures for sending and receiving mail)
 - a. Michigan Department of Treasury Collections Division -- State Treasury Accounts Receivable, Assessment Certified Mail Log for 09/13/04.
 - b. Michigan Department of Treasury Collections Division -- State Treasury Accounts Receivable, Assessment Certified Mail Log for 05/16/05.
 - c. Michigan Department of Treasury Collections Division -- State Treasury Accounts Receivable, Assessment Certified Mail Log for 06/27/05.
2. *Exhibit 2*: Affidavit of Luann Pfeifer (regarding procedures for recording returned certified mail)
3. *Exhibit 3*: Final notice of assessment Bill for Taxes Due for Taxable Period 2001 09/20/04.
4. *Exhibit 4*: Final notice of assessment Bill for Taxes Due for Taxable Period 2002 09/20/04.
5. *Exhibit 5*: Corrected Final notice of assessment Bill for Taxes Due 09/20/04 for Taxable Period 2001.
6. *Exhibit 6*: Corrected Final notice of assessment Bill for Taxes Due 09/20/04 for Taxable Period 2002.
7. *Exhibit 7*: *Altman Management Co v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2001 (Docket No. 216912).

² Along with their Brief in Opposition to Respondent's Motion for Summary Disposition, Petitioners included the following exhibits:

1. *Exhibit 1*: Final notice of assessment Bill for Taxes Due for Taxable Period 2001 09/20/04.
2. *Exhibit 2*: Corrected final notice of assessment Bill for Taxes Due 09/20/04 for Taxable Period 2001; corrected final notice of assessment Bill for Taxes Due 09/20/04 for Taxable Period 2002.
3. *Exhibit 3*: Letter from Department of Treasury to Ms. Ann L. Hartman, Petitioners' Accountant, dated May 20, 2005.
4. *Exhibit 4*: Letter from the Department of Treasury Office of Hearings Bureau of Tax & Economic Policy.
5. *Exhibit 5*: *Cracchiolo v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued August 30, 1996 (Docket No. 183955).

[*v Department of Treasury, 206 Mich App 139; 520 NW2d 369 \(1994\)*](#), for the proposition that continuing negotiation beyond the filing period tolled the statute of limitations.

[*7]

Petitioners' second argument asserted that they were entitled to appeal a "second notice of a final assessment." Petitioners' final argument was that they were denied due process of law when they "did not receive adequate notice of [their] appeal rights because the date of the bill was clearly backdated to September 20, 2004."

CONCLUSIONS OF LAW

In the Tribunal, motions for summary disposition are governed by MCR 2.116. *Occidental Dev LLC v Van Buren Twp*, MTT Dkt. No. 292745, March 4, 2004. A motion for summary disposition brought under MCR 2.116(C)(4) entitles the moving party to summary disposition if the court lacks subject matter jurisdiction and the moving party is entitled to judgment or partial judgment as a matter of law.

MCL 205.22 and the Tribunal's Subject Matter Jurisdiction.

In tax matters, statutes of limitations serve a constitutionally permissible purpose of assuring that governments can limit the fiscal uncertainty of litigation. [*McKesson Corp v Div of Alcoholic Beverages and Tobacco, 496 US 18, 45; 110 SCt 2238; 110 LEd2d 17 \(1990\)*](#); see [*American States Ins Co v Dep't of Treas, 220 Mich App 586; \[*8\] 560 NW2d 644 \(1996\)*](#). We agree with Respondent that the Tribunal's subject matter jurisdiction is granted by law, not by the parties or by courts. "It cannot be conferred by consent, by conduct or by waiver or by estoppel." [*Bishop v Wilkins, 207 Mich 537, 543; 174 NW 602 \(1919\)*](#). It can also not be extended by settlement discussions. See [*Waterman v Bailey, 111 Mich. 571, 69 NW 1109 \(1897\)*](#); see also [*In re AMB, 248 Mich App 144, 166; 640 NW2d 262 \(2001\)*](#) (emphasis added) and the cases cited therein. Petitioners' unpublished case, *Cracchiolo v Department of Treasury*, unpublished *per curiam* decision of the Court of Appeals, decided August 30, 1996 (Docket No. 183955), lacks both precedential and persuasive value. Allowing settlement discussions to toll matters that are "final," "not reviewable in any court" and "conclusive" under Section 22(4) and (5), conflicts with the plain language of Section 22(4) ³, conflicts with a statutory prohibition on compromise in Section 28(1)(f), and continues litigation [*9] contrary to the purpose of Section 22. ⁴ What appellate remedies exist for taxpayers are found solely by a strict reading of the Revenue Act with an understanding of the due process objectives the statutes are intended to serve. Equitable tolling does not exist.

To discern and give effect to legislative intent, Section 22 must be read consistent with the general purpose sought to be accomplished. [*Roberts Tobacco Co v Michigan Dept of Revenue, 322 Mich 519, 34 NW2d 54 \(1948\)*](#). [*10] The Revenue Act provides taxpayers two remedies for disputing a tax liability: a pre-deprivation remedy for contesting the assessment under Section 22, and a post-deprivation remedy for pursuing a "claim for refund" under Sections 22, 27a(2) and 30(2). See, [*McKesson Corp, supra*](#); see also *Brian A Bolden v Dep't of Treas*, MTT Dkt. No. 313745 (March 16, 2006). Section 22 covers both dispute methods. Section 22 states, in important part, as follows:

(1) A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days, or the court of claims within 90 days after the assessment, decision, or order. ...

(2) An appeal under this section shall be perfected as provided under the tax tribunal act...

* * *

³ Section 22(4) states that an assessment "...if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack." The language emphatically and unequivocally conflicts with the concept of tolling.

⁴ The interpretation of tolling is also bad policy. It would inhibit the Department's ability to assist taxpayers let alone respond to them lest these overtures be construed to reopen final assessments on issues extraneous to the assessment itself.

- (4) The assessment, or order *of the department*, if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal or other method of direct or collateral attack.
- (5) An assessment is final, conclusive and not subject to further challenge after 90 days after the issuance of [*11] the assessment, decision, or order *of the department*, and a person is not entitled to a refund of any tax, interest, or penalty paid pursuant to an assessment unless the *aggrieved person* has appealed the assessment in the manner provided by this section. MCL 205.22; italicized emphasis added.

The general purpose of Section 22 is to provide *to taxpayers* a limited right to appeal. The plain language of these provisions does not apply to the Department, which has no need to appeal its own decision, but to a "taxpayer aggrieved" or an "aggrieved person." Thus, the determination in Subsections 4 and 5 of Section 22 that "the assessment, decision, or order of the department" is "final" only applies to the taxpayer's right of appeal. Subsections 4 and 5 do not limit the Department's assessment process. The subsections contain no restrictions on the Department's ability to engage in discussions with the taxpayers regarding a notice of final assessment. They contain no language limiting the Department's ability to cancel an assessment that has become final or to correct an assessment that has become final whether the correction is an increase or decrease.

However, while [*12] Section 22 does not limit the Department's authority to assess, for the same reason, Section 22 is not driven by the Department's specific assessment practices or the Department's determination of whether its assessment is "final" under Section 21. The phrase "an assessment, decision, or order of the department" does not reference a specific assessment practice and refers to no specific type or title of departmental "assessment, decision or order." Because the phrase includes assessments for deficiency and claims for refund, it includes an array of documents, such as: a letter denying a taxpayer's request for refund, an audit notice of refund, a notice of adjustment to a return, a denial of credit carryforward, a "decision and order" of the Department's hearings division (see MCL 205.21(2)(e)), or "the "final notice of assessment," (MCL 205.21(2)(f)). ⁵ [*13]

While a corrected final notice of assessment falls within the plain language of the phrase "assessment, decision or order," rules of statutory construction support a broad reading of the phrase. When the legislature has available specific terms within a statute (such as, "final notice of assessment") and chooses instead to use general terms (such as, "assessment, decision or order"), it intends the general terms to be more encompassing than the scope of the specific terms. This rule of statutory construction has unique force when the statute at issue is a tax statute designed to extend constitutional protections to the taxpayer. Doubtful tax statutes are construed in favor of the taxpayer. *FM Sibley Lumber Co v Dep't of Treas*, 311 Mich 654, 660; 19 NW2d 132 (1945). Statutes designed to protect constitutional rights are construed broadly to achieve their remedial purpose. Section 22's phrase "an assessment, decision or order" includes both a "final assessment" and a "corrected final assessment." Both are subject to appeal.

The Department's obligation to correct erroneous assessments.

We reject Respondent's argument that [*14] it is not under an obligation to correct assessments that the Department has conceded are erroneous.

The powers of administrative agencies are limited to those conferred expressly or those that, by necessary or fair implication, effectuate the authority expressly granted. *In re Quality of Service Standards for Regulated Telecommunication Services*, 204 Mich App 607, 613; 516 NW2d 142 (1994); see *Roberts Tobacco Co v Dep't of Revenue*, 322 Mich 519, 34 NW2d 54 (1948). The authority expressly granted should be liberally construed in light of the purposes for which it was created. *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582, 590; 50 NW2d 322 (1951). Powers may not be extended by implication beyond what may be necessary for their just and reasonable execution. *Id.*

⁵ Though prior to 2006, Section 21 provided that a "decision and order" or a "final notice of assessment" are "subject to appeal in Section 22," Section 21 did not make this remedy exclusive. And, when Section 21 was amended to include an audit notice of refund, the phrase in Section 22 was not amended. 2006 PA 8, 9, 10 and 11. The obvious reason is that the scope of the phrase in Section 22 is broader than the "parts" identified in Section 21.

Section 3 of the Revenue Act provides the Department with the powers and obligations "in connection with taxes due." MCL 205.3. The Department may only assess "taxes due." Its obligation to correct and its authority to cancel, modify and reissue [*15] an assessment are necessary powers incidental to its authority to assess "taxes due." See [FM Sibley Lumber Co v Dep't of Rev, 311 Mich 654, 659; 19 NW2d 132 \(1945\)](#). The Department's obligation to correct an assessment is also consistent with its statutory mandate in Section 30(1) of the Revenue Act. See [Roberts Tobacco Co, supra at 530](#). Section 30(1) sets out the Department's unconditioned obligation to "credit or refund an overpayment of taxes; taxes, penalties and interest erroneously assessed and collected ...[or] unjustly assessed, excessive in amount or wrongfully collected...." MCL 205.30(1). If the Department must refund payments made under erroneous assessments that are "final" under Section 22, they are also prohibited from collecting erroneous assessments regardless of their finality under Section 22.

While the Department's duties to correct assessments and to refund any excess in Section 30(1) are not rights of taxpayers, but obligations of the Department,⁶ the Department alone determines how best to utilize its resources in carrying out this obligation. It must independently [*16] determine whether the assessment was excessive. Taxpayers seeking to compel the Department's commitment of resources to review its decision or to contest the Department's determinations have a choice of either an appeal under Section 22 or a claim for refund under Sections 22, 27a(2) and 30(2).⁷ Once the Department does exercise its discretion and finds an assessment was erroneous and issues a new assessment that action is subject to appeal under Section 22. To the Department's credit, it appears to have instinctively understood its obligation to correct its assessment when it made the corrections in this case. Since by the Department's own admission, the initial assessment was inaccurate, it is invalid. Issuance of the corrected final notices of assessment in May, 2005 extended to Petitioners a right of appeal under Section 22.

[*17]

The procedural due process requirements of Section 22.

Section 21 of the Revenue Act establishes the statutory procedure that the Department must follow before issuing what Section 21 describes as a "final notice of assessment." The process progresses from a "letter of inquiry," to a dispute process, which begins with a "notice of intent to assess" the tax. Section 21 requires that the notice of intent to assess contain both the amounts believed due and the reason for the deficiency. The section requires that the [*18] final notice of assessment "shall include a statement advising the person of a right to appeal." MCL 205.21(2)(f). These provisions serve to provide the taxpayer with notice that satisfies the demands of the Due Process Clause. See [Auer v Dep't of Treas, 137 Mich App 353, 357 NW2d 696 \(1984\)](#); US Const Am XIV, § 1; 1963 Mich Const Art I, § 17.

"Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." [McKesson Corp, supra at 36](#). The requirement of notice in the Due Process Clause is to ensure that taxpayers have "a fair opportunity to challenge the accuracy and legal validity of their tax obligation." [McKesson Corp, supra at 39](#). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself

⁶ Indeed, to the extent that taxation may not be doubtful, the Department may be obligated to resolve claims it believes are doubtful rather than subject them to litigation. The resolution of doubtful claims is not a compromise of tax. [Galperin v Dep't of Treas, 327 Mich 556; 42 NW2d 823 \(1950\)](#).

⁷ They must pick one. Each appellate option has a specific statute of limitations that exclude piggy-backing the two options, i.e., pursuing a claim for refund after an unsuccessful appeal of an assessment, the effect of which would nullify both statutes of limitations. See [Vicoa Inc v Director, Division of Taxation, 400 A 2d 105, 108 \(NJ Super Ct App Div 1979\)](#). Attempts to couple the two options are also contrary to MCL 205.21(5). Attempts to appeal collection actions taken after an unsuccessful assessment appeal are erroneous for the same reason.

whether to appear or default, acquiesce or contest." [Mullane v Central Hanover Bank & Trust Co, 339 US 306, 314; 70 S Ct 652; \[*19\] 94 L Ed 865 \(1950\)](#).⁸ Notice, therefore, must meet a threshold standard of sufficiency.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. [Mullane, supra at 314](#); citations omitted.

[*20]

Depending on the particular circumstances of the case, the substance of the notice must, on the face of the notice, enable the taxpayer to make a reasonably informed decision based on the information supplied in the notice. [Alan v Wayne County, 388 Mich 210, 351; 200 NW2d 628 \(1972\)](#).

The notice... must contain enough information so that it can be told from its face in plain and understandable language that the notice concerns some particular right or obligation respecting the subject matter of the notice; the notice must explain the nature of the right (or obligation) and what is required to exercise it and the consequence of not exercising it;

regarding the subject matter of the notice there must be enough information so that a meaningfully informed decision respecting the right can reasonably be made from information supplied in plain language on the face of the notice.

Alan v Wayne County, supra at 352; segmentation added.

The Michigan Supreme Court in *Alan* concluded that a bond notice was misleading because it misinformed taxpayers of the consequence of their timely objection. Similarly, the United [*21] States District Court in Massachusetts held that a social security claimant was denied the requisite notice when she received a denial of benefits letter that assured the claimant that she could file another claim "at any time" when in fact she faced a four-year deadline. [Butland v Bower, 673 F Supp 638 \(D Mass 1987\)](#). The harm, according to the Court, was that "claimants with valid entitlements might wrongly abandon their claims ... and not assert them until it was too late." [Butland, supra at 641](#). The same harm was found to exist in a tax notice that only advised taxpayers of one of the two available methods of appeal. [Latin Express Service, Inc v State of Department of Revenue, 660 So 2d 1059, 1060 \(Fla Dist Ct App 1995\)](#).

In service to these purposes, the "assessment, decision, or order of the Department" in Section 22 must fairly permit taxpayers to "challenge the *accuracy and legal validity* of their tax obligation." [McKesson Corp, supra at 39](#); emphasis added. A "meaningfully informed decision" regarding an appeal under Section 22 requires that the "assessment, [*22] decision, or order of the Department" must, on its face, contain: 1) sufficient information of the set of facts and reasons causing the deficiency; 2) the amounts of the deficiencies, sufficient to allow a reasonable estimate of liability from those facts; 3) a reliable means of determining the taxpayer's appeal period, and 4) an explanation of the right to appeal. While other forms of communication with the taxpayer may be helpful, none are adequate practically, legally or constitutionally to serve these purposes. Taxpayers are not required to navigate the

⁸ [Grannis v Ordean, 234 US 385, 394; 34 S Ct 779; 58 L Ed 1363 \(1914\)](#). See [City of West Covina v Perkins, 525 US 234, 240; 119 S Ct 678; 142 L Ed 2d 636 \(1999\)](#) (stating that a primary purpose of notice is to ensure that the opportunity for a hearing is meaningful); [LaChance v Erickson, 522 US 262, 266; 118 S Ct 753; 139 L Ed 2d 695 \(1998\)](#) (stating that the core of due process is notice and an opportunity to be heard). Similarly, Michigan courts have emphasized the purpose of notice, which is to give the opposing party an opportunity to be heard. See [In re Freid \(State Report Title: State Bar v Freid\), 388 Mich 711, 715; 202 NW2d 692 \(1972\)](#) (stating that it is a fundamental rule of due process that a person must have notice of the charges against him); [Laird v Rinckey, 371 Mich 96, 98; 123 NW2d 243 \(1963\)](#) (stating that due process requires notice so that opportunity is afforded to attend and present a claim or defense); [Mudge v Macomb County, 458 Mich 87, 101; 580 NW2d 845 \(1998\)](#) (stating that a person must "be given the opportunity to be heard in a meaningful manner").

Department's automated telephone answering systems, search through different bureaus and track the Department's internal processes to locate a person with authority who can discuss the basis for the Department's assessment; and meanwhile watch their constitutional right of appeal dwindle to insignificance. The initial and the corrected notices in this matter failed this test.

First, the Department's notices of final assessment failed to apprise Petitioners of the reasons for the Department's adjustments. The initial assessment stated,

Your return was adjusted from available information. You failed to respond to our request [*23] for additional information or failed to provide all information. MI-1040

This statement is of no consequence⁹. It does not state the reasons for calculating the specific "taxes due" and provides no basis for Petitioners to "challenge the *accuracy and legal validity* of their tax obligation." [McKesson Corp. supra at 39](#); emphasis added. The "corrected" final notice of assessment was an improvement but remained defective. It stated:

You failed to respond to our request for additional information or failed to provide all information. Your return was adjusted from available information. Inter-company unitary approach disallowed.

The first two sentences, inasmuch as they repeat the uninformative mantra of the initial final notice of assessment, were incorrect. They were written after Petitioners had contacted the Department and supplied the Department with actual [*24] documentation, and after the Department had reviewed the information and sent out a two-page letter discussing the information Petitioners had supplied. Regarding the additional statement, "inter-company unitary approach disallowed," we note that the statement would likely be understood by most multi-state state and local attorneys and representatives. That level of expertise, however, is not the standard.¹⁰

[T]o comport with due process the notice must be phrased with the general legal sophistication of its beneficiaries in mind. As phrased it must not make any misleading or untrue statement; or fail to explain, or omit any fact which would be important to the taxpayer or elector in deciding to exercise his right. In short, the notice may not be misleading under all the circumstances.

* * *

Although persons sophisticated in the law, such as lawyers, judges and elected officials, might well realize, or at least suspect, that they have rights under statutes other than those set forth in a public notice, the average resident of Union Township reading the notice might well conclude that his only right, at least until the date and time of the public hearing, was to attend the [*25] public hearing and voice his objections. ...

Not only must the notice comply with the requirements of the statute, it must not be worded in such a way that it precludes the people affected from discovering or exercising other rights they may have under other applicable statutes.

[Trussell v Decker, 147 Mich App 312, 323-324; 382 NW2d 778 \(1985\)](#); citations omitted.¹¹

[*26]

Moreover, given the initial inaccurate sentences, the additional statement was vague. It suggests that the disallowed unitary approach was one of several other reasons for the deficiency. The "risk [of erroneous deprivation] significantly increases as the notice given becomes less detailed and more vague" and it is that

⁹ A similarly insufficient statement is the summary statement that the liability was the result of an audit.

¹⁰ The United States Supreme Court has explained that the "notice required will vary with circumstances and conditions." *Jones v Flowers*, US __, __; [126 S Ct 1708, 1714](#); [164 L Ed 2d 415 \(2006\)](#) (citation omitted).

¹¹ The Court of Appeals held that a township notice of hearing to approve a special assessment was unclear as to the source of proposed project - whether by petition or proposed by the township - and that it suggested, inaccurately, that the only opportunity to object would be at the hearing - as opposed to written objections

increased risk which makes this notice inadequate. Association of Community Organization for Reform Now (ACORN) v Federal Emergency Management Agency (FEMA), 2006 WL 3424993 at 6 (DDC 2006). Because of its inaccuracy, the vagueness of the second "corrected" notice increases the risk that Petitioners would not understand the basis of the assessment and be able to make a "meaningfully informed decision" as to whether to appeal.

Second, both notices of final assessment were misleading as they inaccurately advised Petitioners that no penalty was assessed. In fact, as a result of the Department's subsequent review of Petitioners' records, the Department assessed substantial failure to file penalties for the same tax years. The likelihood of a penalty assessment was equally apparent from facts of the initial notice. Ultimately, the new assessments [*27] were issued ten months after the initial assessment. The staggered issuance of assessments over a ten-month period, issued to the same taxpayer from the same set of facts, and concerning the same basis for deficiency, precludes a "meaningfully informed decision" as to whether to appeal. A taxpayer might very well conclude not to spend the time and money appealing a tax-only deficiency. Many taxpayers would take a very different view when penalties, particularly of the size assessed in this case, are imposed. The Department's action of waiting for the initial tax-only assessments to become "final" under Section 22(5) before issuing the substantial failure to file penalties completely undermined the taxpayers' statutory appellate remedy. As in *Butland*, the harm here is that claimants facing likely penalty assessments would abandon the initial appeal, believing that the Department would not assess penalties, "until it was too late." *Butland, supra at 641*.

But the "corrected" assessment was misleading for another important reason. The notice was back-dated to the initial assessment issuance date. On its face, the notice was beyond the appeal period [*28] of MCL 205.22, was issued as "final," and, contrary to the law, informed the taxpayers that it was not subject to appeal. Respondent's alternative argument that only the "corrected" portion would be subject to appeal is unavailing since, on its face, the "corrected" notice misled the taxpayers as to all liabilities. Notice that deters the exercise of an appeal right either by intimidation or simple confusion is a denial of due process. *Mayhew v Cohen, 604 F Supp 850, 857 857 (DC PA 1984)*. The "corrected" assessment failed to provide Petitioners their statutory due process rights.

Date of issuance under Section 22.

Section 22, subsection (1), specifies the days of appeal period "after the assessment, decision, or order." Subsection (5) deems the assessment final "90 days after the *issuance* of the assessment, decision, or order of the Department." A plain and ordinary interpretation of these provisions is that the date of issuance must be included on the "assessment, decision or order of the department." More important, constitutionally sufficient notice must provide the taxpayer sufficient information from which the taxpayer can "reasonably" [*29] make a "meaningfully informed decision respecting the right" to challenge the assessment. *Alan, supra at 352*. A decision to appeal could not be made without knowledge of the appeal period on the face of the document.

The word "issuance," when used to determine the commencement of the statute of limitations, is generally the date of mailing. *Attorney General v Public Service Comm, 172 Mich App 778; 432 NW2d 437 (1988)*. For the two assessments before us, however, the date of issuance on the notice was as much as five days in advance of the actual date of mailing. We hold that, consistent with the constitutional requirements, the date of issuance for purposes of a notice of final assessment is the later of the "Date Issued" contained on the notice or the actual date of mailing. While a statutory construction of the term "issued" would support the date of mailing, due process requirements would require that a later date contained on the notice of final assessment be used as the date of issuance to the extent that reliance on a later notice date would mislead the taxpayer in miscalculating its appellate rights. Constitutionally [*30] adequate notice must not mislead its recipient about that data's significance. *Mayhew v Cohen, supra at 857*.

Beyond these reasons, we note that the Department's method of issuance has benefits to the Department and the taxpayer and is consistent with one of the purposes of the notice of final assessment, namely, to provide sufficient information for the taxpayer to "reasonably" make a "meaningfully informed decision." First, it may be administratively difficult, if not impossible, for the Department to ensure that each notice is actually mailed on the date of issuance. The volume of mailings is likely considerable. Portions of the mailing process are beyond the

Department's control. Second, for the taxpayer, the advance date of issuance ameliorates problems with mail delivery and ensures that the taxpayer actually receives close to the full statutory 35- or 90-day appellate period. The Department's practice substantially eliminates the need for the taxpayer to contact the Department and get internal Departmental records establishing the actual mailing date at a likely cost to the taxpayer.

Remedy and Conclusion

Respondent's initial final notice [*31] of assessment is invalid for two independent reasons. First, by Respondent's own admission, it was inaccurately excessive and, as such, exceeded the Department's statutory authority. Second, it failed to meaningfully inform Petitioners of the basis for assessment and misled Petitioners as to their potential exposure for failure to file penalties. Petitioners lacked sufficient information necessary to make a meaningfully informed decision as to whether to appeal. As such, the assessment, if otherwise valid, was not "final" under Section 22 and did not terminate Petitioners' right to appeal.

The corrected final notice of assessment is invalid because it denied Petitioners a right to appeal. The corrected final notice was, contrary to fundamental precepts of due process, backdated to preclude any appeal. The corrected notice also misinformed Petitioners of the likelihood of a penalty assessment premised on the same facts under review. The parties agree that Petitioners were confused as to their appellate rights. The confusion, however, is a symptom of due process violations contained on the face of both the initial and the corrected final notices. The violation of due process extends [*32] to the very purpose of the Tribunal's subject matter jurisdiction, namely, granting taxpayers an opportunity to be heard. Lacking sufficient information, the "corrected" notice was not "final" and did not terminate Petitioners' right of appeal. Respondent's motion for summary disposition is denied.

JUDGMENT

IT IS ORDERED that, for the reasons stated above, Respondent's Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that the parties shall, within 45 days of the issuance of this order, either file the completed proposed scheduling order attached to this order, or, Petitioners shall notify the Tribunal of the need to convene a scheduling conference.

Load Date: 2014-06-23

Michigan Tax Tribunal Opinions

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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 27

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

Pars Ice Cream Company, Inc.,
Petitioner,

v

MTT Docket No. 332949

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Patricia L. Halm

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION UNDER
MCR 2.116(C)(10)

ORDER DENYING PETITIONER'S MOTION FOR ORAL ARGUMENT

The issue in this case is whether Pars Ice Cream Company, Inc. (Petitioner) may be held liable for sales tax assessed by the Michigan Department of Treasury (Respondent) for "Ice Cream¹" products it sold in bulk to mobile vendors for the period April 1, 2000, through June 30, 2003. Respondent argues that these sales are sales for resale and, as such, Petitioner was required under MCL 205.67² to keep records of these sales, including completed exemption certificates. Respondent also argues that Petitioner knowingly sold Ice Cream to mobile vendors that were not licensed under the General Sales Tax Act (GSTA). In response, Petitioner argues that it was not required to keep the records required under MCL 205.67 as Article IX, Section 8 of Michigan's Constitution exempts from sales tax food for human consumption and that it did not knowingly sell Ice Cream to unlicensed mobile vendors.

¹ Specifically, ice cream, ice cream bars, popsicles, and other frozen, ice cream-related food products.

² MCL 205.67 was repealed on January 9, 2009.

On April 16, 2007, Respondent issued Assessment No. M566947, which included \$775,042 in tax, \$278,174.10 in interest, and \$77,504 in penalty³. For the reasons set forth herein, the Tribunal finds that while Petitioner did not maintain the records it was required to maintain under MCL 205.67, it did not knowingly sell Ice Cream to unlicensed mobile vendors. As such, Petitioner is not liable for sales tax on the transactions at issue. Petitioner's Motion for Summary Disposition is granted and Assessment No. M566947 is cancelled.

PETITIONER'S MOTION FOR SUMMARY DISPOSITION

Petitioner filed this Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Petitioner asserts that there are no material facts in dispute and that it is entitled to Summary Disposition as a matter of law. In support of this Motion, Petitioner filed an affidavit of Ms. Shelley Traywick, who was employed by Petitioner and who was also an officer of Petitioner during the time period at issue. Petitioner requests that Assessment No. M566947 be cancelled in its entirety. Petitioner also requests oral argument on its Motion.

Petitioner is a Michigan corporation engaged in the sale and delivery of Ice Cream. Petitioner also makes retail sales of non-food items, including dry ice, for which it remits sales tax. (Petitioner's Brief, p6) Petitioner's principal place of business is 17853 Conant, Detroit, Michigan. At issue in this case are the Ice Cream sales made from the "Cash-and-Carry" area of Petitioner's facility located at 12900 Greenfield Road in Detroit, Michigan. From this location, "[Petitioner] sold boxes of Ice Cream containing multiple servings, often in bulk quantities. . .to many types of customers from the general public, including retail stores, restaurants, convenience stores, churches, schools, businesses, individuals, and independent contractors who operated ice cream vendor trucks in the city of Detroit." Petitioner asserts that these sales were

³ Interest continues to accrue pursuant to MCL 205.23.

indisputably sales of food for human consumption and not sales of prepared food for immediate consumption as defined in MCL 205.54g. While Respondent agrees with this statement (see Stipulation of Facts, #6 and #8), Respondent asserts that, pursuant to MCL 205.67, Petitioner was required to collect and maintain resale exemption certificates from its mobile vendor customers. MCL 205.67 provides, in pertinent part:

(1) A person liable for any tax imposed under this act shall keep accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires. If an exemption from sales tax is claimed because the sale is for resale or for any of the other exemptions or deductions granted under this act, a record shall be kept of the name and address of the person to whom the sale is made, the date of the sale, the article purchased, the type of exemption claimed, the amount of the sale, and if that person has a sales tax license, the sales tax license number. . . A person *knowingly* making a sale of tangible personal property for the purpose of resale at retail to another person not licensed under this act is liable for the tax imposed under this act unless the transaction is exempt under the provisions of section 4k . . . If the taxpayer fails to file a return or to maintain or preserve proper records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the department may assess the amount of the tax due from the taxpayer based on the information that is available or that may become available to the department. (Emphasis added.)

Petitioner does not agree that it was required to maintain the records required under MCL 205.67 for the Ice Cream sales at issue.

There is no authority to support [Respondent's] assertion that [Petitioner] must provide additional statutory exemption claims, such as resale exemption claims, for its sales of food. In fact, [Respondent's] own administrative guidance clearly provides that exemption certificate provisions do not apply to transactions for the sale of food that is not prepared food intended for immediate consumption. Revenue Administrative Bulletin ("RAB") 2002-15 (06/10/2002). (Petitioner's Brief in Support of its Motion for Summary Disposition⁴, p11)

[Respondent's] misguided efforts to shift tax collection responsibility onto [Petitioner] in this case [violates] the Michigan Constitution and should not be

⁴ Hereinafter, Petitioner's Brief in Support of its Motion for Summary Disposition will be denoted as "Petitioner's Brief."

allowed. If Ice Cream sold by [Petitioner] ultimately is resold by one of its customers in a taxable manner, the seller in the taxable transaction would be responsible to collect any applicable sales tax and [Respondent's] sole remedy for assessment of sales tax is against such seller. MCL 205.52. (Petitioner's Brief, p13)

Even if it were found to be subject to MCL 205.67, Petitioner argues that it did not "knowingly" sell to a person not licensed under the GSTA. According to Petitioner, the term "knowingly" is not defined in the GSTA.

In cases in which a term is not defined in the statute, the term is given its plain and common meaning and a court may use dictionary definitions to ascertain that meaning. The commonly understood meaning for the term "knowingly" is:

With knowledge; consciously, intelligently, willfully, intentionally, purposefully. (*Black's Law Dictionary*, (6th ed 1990))

In a knowing manner; with awareness, deliberateness, or intention. (*Webster's Third New International Dictionary of the English Language* (Unabridged 1967)) (Citations omitted.) (Petitioner's Brief, p16)

Petitioner also argues that "[t]o impose liability under MCL 205.67, the statute specifically requires the seller to have knowledge both that (1) the sale is for purposes of resale, and (2) the sale is made to an unlicensed entity or person." (Petitioner's Brief, p16) Petitioner relies on *Arbor Sales v Department of Treasury*, 104 Mich App 181; 304 NW2d 522 (1981), in support of this argument.

As it pertains to the facts of this case, Petitioner states that:

To the extent that any particular sale was made to an Ice Cream vendor, [Petitioner] did not know it was making, and certainly did not intend to make, a sale for purposes of resale to a person who did not have a Michigan sales tax license. To the contrary, [Petitioner] knew that any Ice Cream vendor operating in the City of Detroit was required to possess both a Detroit vendor's license and a Michigan sales tax license to operate in the City. . . Under the City of Detroit's well-documented and longstanding licensing ordinance for ice cream vendors, all such vendors were required to possess a valid Michigan sales tax licenses before they could obtain the Detroit vendor's license, and [Petitioner] knew about this requirement. (Petitioner's Brief, pp17-18)

In support of these assertions, Petitioner relies on the affidavit submitted by Ms. Traywick.

Petitioner's next argument concerns statutory interpretation. In that regard, Petitioner argues that its "sales of food for human consumption represent a different category of sales that are not subject to the provisions of the Michigan Sales Tax Act." (Petitioner's Brief, p6)

According to Petitioner:

The Michigan Constitution expressly prohibits [Respondent] from charging or collecting sales or use tax on sales of food for human consumption, except sales of prepared food intended for immediate consumption. Const 1963, Art IX, §8. This Constitutional prohibition against taxing food sales does not distinguish between retail and wholesale sales of food for human consumption. The Constitutional provision contains no exception to the nontaxability of sales of food for human consumption other than the exception for sales of prepared food intended for immediate consumption.

Food sales transactions constitute one of the only two specific types of sales (food and drugs) that qualify for total exclusion from the Michigan Sales and Use Tax Acts. The Michigan Court of Appeals considered this Constitutional prohibition and held that it applies based on the nature of the product (i.e., the nature of the prescription drug or food that is not prepared food intended for immediate consumption) being sold and not the nature of the sale or the intended use of the product. *Syntex Laboratories, Inc v Department of Treasury*, 188 Mich App 383; 470 NW2d 665 (1991). (Petitioner's Brief, pp7-8)

Because the Constitution "excludes" these sales, "[t]his is not a case in which [it] is claiming an exemption from the Sales Tax Act; [Petitioner] is not required to claim a statutory exemption for its sales of food because no sales tax can be charged or collected on such sales under the Michigan Constitution." (Petitioner's Brief, p9) Moreover, because there is no claim of exemption, Petitioner argues that the GSTA "must be interpreted strictly against the taxing jurisdiction and in favor of the taxpayer." In support of this argument, Petitioner cites *Stege v Department of Treasury*, 252 Mich App 183; 651 NW2d 164 (2002), and *In re Dodge Brothers*, 241 Mich 665; 217 NW 77 (1928), wherein the Michigan Supreme Court held:

Tax exactions. . . must rest upon legislative enactment, and collecting officers can only act within express authority conferred by law. Tax collectors must be able to point to such express authority so that it may be read when it is questioned in court. The scope of tax laws may not be extended by implication or forced construction. Such laws may be made plain, and the language thereof, if dubious, is not resolved against the taxpayer. (*Id.*, p669)

Petitioner's final argument is that Respondent is precluded from asserting a theory of liability in its Answer to the Petition that it did not make during the assessment process.

"Throughout the audit and assessment process, the Department's basis for assessing sales tax on [Petitioner's] sales of food for human consumption consistently and exclusively has been MCL 205.67." (Petitioner's Brief, p19) However, as an affirmative defense, Respondent asserts that:

"Petitioner is further liable for the taxes assessed for the sales by the unlicensed retail vendors pursuant to the terms of MCL 205.51(2)." Petitioner argues that, in asserting this affirmative defense, its right to have notice of the reason for the assessment process was violated. This right to notice is found in MCL 205.21(2)(b). "These requirements are intended to protect taxpayers from the type of late assertion of alternative arguments that [Respondent] is attempting to make with its purported 'Affirmative Defense' in this case." (Petitioner's Brief, pp19-20)

Petitioner submitted the following exhibits in support of its Motion for Summary Disposition:

- A. A copy of the parties' "First Stipulation of Facts."
- B. A copy of the Informal Conference Recommendation issued by Respondent's Office of Hearings.
- C. An affidavit of Shelley Traywick.
- D. Copies of pages from *Black's Law Dictionary*, (6th ed rev), containing the definition of "knowingly."

- E. Copies of pages from *Webster's Third International Dictionary*, containing the definition of "knowingly."

RESPONDENT'S POSITION

Respondent's Answer to Petitioner's Motion for Summary Disposition was not filed within the time allotted under TTR 230. As such, it is not considered in determining the outcome of Petitioner's Motion. However, the Tribunal will consider, as necessary, information presented in Respondent's Informal Conference Recommendation.

STIPULATION OF FACTS

The parties filed a Stipulation of Facts in which they agreed upon the following facts:

1. Petitioner, Pars, is a Michigan corporation with its principal place of business located at 17853 Conant, Detroit, Michigan.
2. [Petitioner] is wholly owned by Mr. Davoud Sadeghi.
3. Defendant, the Michigan Department of Treasury. . , is an administrative department of the State of Michigan that is statutorily charged with responsibility for the collection of taxes, MCL 205.1, which includes the responsibility for the administration and enforcement of the Michigan General Sales Tax act, MCL 205.54 et seq. (the "Sales Tax Act").
4. [Petitioner] sells and often delivers ice cream, ice cream bars, popsicles and other frozen, ice cream-related food products (collectively "Ice Cream") to distributors, grocery stores, gas stations, convenience stores, wholesale clubs and other wholesale and retail sellers of Ice Cream and to the general public.
5. [Respondent] conducted a sales tax audit of [Petitioner] covering the audit period beginning April 1, 2000 through June 30, 2003 (the "Audit Period").
6. During the Audit Period, [Petitioner] was engaged in the sale, in bulk, of Ice Cream for consumption off premises.
7. During the Audit Period, [Petitioner] sold boxes of Ice Cream containing multiple servings, often in bulk quantities, on a cash-and-carry basis in one separate area of its Detroit facility at 12900 Greenfield Road, Detroit, Michigan (the "Cash-and-Carry" area) to many types of customers from the general public, including retail stores, restaurants, convenience stores, churches, schools, businesses, individuals, and independent contractors who operated ice cream vendor trucks in the city of Detroit.

8. All Ice Cream sold by [Petitioner] from the Cash-and-Carry area of [Petitioner's] Detroit facility on Greenfield Road during the Audit Period was food for human consumption.
9. After completing its audit of [Petitioner], [Respondent] determined that [Petitioner] owed Michigan sales tax on a specified amount of its sales of Ice Cream from the Cash-and-Carry area.
10. All sales of Ice Cream that [Respondent] determined to be taxable during the Audit Period were made by [Petitioner] from the Cash-and-Carry area of [Petitioner's] Detroit facility on Greenfield Road.
11. The Department's stated basis for the assessment was that, under MCL 205.67, [Petitioner] was liable for sales tax on its sales of Ice Cream from the Cash-and-Carry area because [Petitioner] failed to obtain resale exemption certificates for such sales of Ice Cream that the Department determined were made to independent contractors who operated ice cream vendor trucks in the city of Detroit.

FINDINGS OF FACT

The Tribunal adopts the facts stipulated to by the parties. Additionally, the Tribunal finds that Petitioner is licensed under the GSTA. Petitioner sells non-food tangible personal property, including dry ice, for which it remits sales tax. Finally, the assessment at issue is known as Assessment No. M566947 and is for the period April 1, 2000, through June 30, 2003. Respondent issued the Final Bill for Taxes Due on April 16, 2007. The amount at issue includes \$775,042.00 in sales tax, \$77,504 in penalty, and \$278,174.10 in interest, which continues to accrue pursuant to MCL 205.23, for a total of \$1,130,720.10 as of the date of the Final Bill.

MOTIONS FOR SUMMARY DISPOSITION

In this case, Petitioner filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10), which provides the following ground upon which a summary disposition motion may be based: "Except as to the amount of damages, 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." There is no specific tribunal rule governing motions for summary disposition. As such,

pursuant to TTR 111(4), the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such a motion.

The Michigan Supreme Court, in *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), 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.

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).

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. (Citations omitted.) (*Id.*, pp361-363)

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. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991). On the other hand, under MCR 2.116(I)(2), “[i]f it appears to

the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.”

CONCLUSIONS OF LAW

The authority to levy sales and use taxes is established in Article IX, Section 8 of Michigan’s Constitution, which states:

Except as provided in this section, the Legislature shall not impose a sales tax on retailers at a rate of more than 4% of their gross taxable sales of tangible personal property.

Beginning May 1, 1994, the sales tax shall be imposed on retailers at an additional rate of 2% of their gross taxable sales of tangible personal property not exempt by law and the use tax at an additional rate of 2%. The proceeds of the sales and use taxes imposed at the additional rate of 2% shall be deposited in the state school aid fund established in section 11 of this article. The allocation of sales tax revenue required or authorized by sections 9 and 10 of this article does not apply to the revenue from the sales tax imposed at the additional rate of 2%.

No sales tax or use tax shall be charged or collected from and after January 1, 1975 on the sale or use of prescription drugs for human use, or on the sale or use of food for human consumption except in the case of prepared food intended for immediate consumption as defined by law. This provision shall not apply to alcoholic beverages. (Emphasis added.) (Const 1963, art 9, §8).

The Legislature implemented this Constitutional provision through enactment of the General Sales Tax Act (GSTA), being MCL 205.51 *et seq*, and the Use Tax Act (UTA), being MCL 205.94 *et seq*. During the tax years at issue, the GSTA mandated that:

[T]here is levied upon and there shall be collected from all persons engaged *in the business of making sales at retail*, as defined in *section 1*, an annual tax for the privilege of engaging in that business equal to 6% of the *gross proceeds* of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act. (Emphasis added.) (MCL 205.52(1))

Thus, the tax base of a person in the business of making retail sales is that person’s gross proceeds.

Section 1 contains several definitions of “sales at retail.” In this case, the applicable definition is:

[A] transaction by which the ownership of tangible personal property is transferred for consideration, if the transfer is made in the ordinary course of the transferor’s business and is made to the transferee for consumption or use, or for any purpose *other than for resale*. . . . (Emphasis added.) (MCL 205.51(1)(b))

There is no dispute that Petitioner is in the business of making sales at retail as defined in MCL 205.51(1)(b). Some of these sales are sales of dry ice, while other sales are sales of Ice Cream. It is also undisputed that most of Petitioner’s Ice Cream sales are sales for resale. Therefore, Petitioner’s tax base includes all of its retail sales made for any purpose other than for resale.

Like most other taxes, there are things that may be deducted or excluded from a person’s sales tax base. As it pertains to the GSTA for the 2003 tax year, these deductions and exclusions are found in Sections 4 through 4aa, being MCL 205.54 through MCL 205.54aa. Of significance in this case is Section 4g, which implements Article IX, Section 8. Section 4g states, in pertinent part:

- (1) *A person subject to tax* under this act may *exclude* from the amount of the *gross proceeds* used for the computation of the tax 1 or more of the following:

- (3) “*Food for human consumption*” means all food and drink items, including bottled water, intended primarily for human consumption except beverages with an alcohol content of $\frac{1}{2}$ of 1% or more by volume, tobacco and tobacco products, and prepared food intended for immediate consumption. Food for human consumption includes live animals purchased with the intent to be slaughtered for human consumption.

- (4) “*Prepared food intended for immediate consumption*” means a *retail sale* of 1 or more of the following:

- (e) Food or drink heated or cooled mechanically, electrically, or by other artificial means to an average temperature above 75 degrees Fahrenheit or

below 65 degrees Fahrenheit before sale and *sold from a mobile facility* or vending machine, except milk, nonalcoholic beverages in a sealed container and fresh fruit. (Emphasis added.) (MCL 205.54g)

As previously stated, the parties have agreed that Ice Cream is food for human consumption. (Stipulation of Facts, #8) The parties have also agreed that Petitioner sells Ice Cream in bulk for consumption somewhere other than Petitioner's premises; in other words, not for immediate consumption. (Stipulation of Facts, #6) Therefore, pursuant to MCL 205.54g(1) and (3), Petitioner may exclude from its gross proceeds revenue it receives from sales of Ice Cream.

While Petitioner agrees that its sales of Ice Cream are not subject to tax, Petitioner arrives at that conclusion through a different means. According to Petitioner, sales of food for human consumption "represent a different category of sales" not subject to the GSTA as these sales are *excluded* from tax pursuant to Michigan's Constitution. (Petitioner's Brief, p6) In other words, it is Petitioner's position that because the Constitution *excludes* sales of food for human consumption from sales tax, they are never included in the sales tax base and should not be considered as a tax exemption.

While Petitioner's argument is novel, the Tribunal must disagree. The Tribunal finds Petitioner's characterization of the treatment of food for human consumption as an "exclusion" versus an "exemption" to be nothing more than form over substance. Both terms have the same result; something is removed from the tax base. Furthermore, to be excluded from something, such as sales tax, there has to be "something" to be excluded from. The GSTA has been in existence since 1933 (1933 PA 167). Food for human consumption was subject to tax until 1974, when Article IX, Section 8 of Michigan's 1963 Constitution was amended to exempt prescription drugs for human use and food for human consumption, except prepared food

intended for immediate consumption, from tax. This constitutional amendment required a statutory amendment, which, as previously discussed, is found in MCL 205.54g. Thus, the GSTA was in place long before the exemption for food for human consumption.

Moreover, the fact that a tax exemption is granted in the Constitution and is subsequently enacted into law does not elevate the exemption into a “super exemption” category. For example, Article IX, Section 4 of Michigan’s Constitution exempts religious and educational nonprofit organizations from real and personal property taxes. These exemptions are found in Sections 7n and 7o of the General Property Tax Act, being MCL 211.7n and MCL 211.7o. These exemptions have not been treated any differently by Michigan courts than have the multitude of property tax exemptions that have the “misfortune” of being mere statutory exemptions, such as the exemption of property used for clinics, hospitals, or public health purposes found in MCL 211.7r.

The Tribunal finds Petitioner’s reliance on *Syntex, supra*, misplaced. In *Syntex*, the sole issue was whether sample drugs given to physicians were subject to use tax. The Department of Treasury argued that they were because these drugs were, in turn, given to the physicians’ patients without a *prescription* and, as such, were not exempt from tax. The court disagreed, holding that a written prescription was not required for the drugs to be considered prescription drugs. Of importance to this case are two statements made by the court’s conclusion. First, in discussing art 9, §8, the court stated: “The *exemption* apparently was adopted to eliminate the burden and inequity a regressive tax on food and drugs impose on low-income and elderly persons.” (*Id.*, p390) The court’s second pertinent statement is found in its conclusion. The court stated: “In conclusion, the art 9, §8 sales and use tax *exemption* for ‘prescription drugs’ applies to petitioner’s use of drug samples in its solicitation process.” (Emphasis added.) (*Id.*,

p391) Thus, the Court of Appeals recognized that Article 9, Section 8 *exempted* prescription drugs for humans and food for immediate consumption from sales and use tax.

Finally, the Tribunal's conclusion that an "exclusion" from tax means the same as an "exemption" from tax is supported by the fact that in 2004 the Legislature amended MCL 205.54g to read:

(1) The following are exempt from the tax under this act:

(a) Sales of drugs for human use that can only be legally dispensed by prescription or food or food ingredients, except prepared food intended for immediate human consumption. (2004 PA 173)

It appears that there are two reasons why Petitioner makes the argument that sales of food for human consumption "represent a different category of sales" and should not be considered a tax exemption: (1) to bolster its position that it is not subject to MCL 205.67, and (2) to require the statute to be construed in its favor. Petitioner does not wish to be subject to MCL 205.67 because, if it were, it would be subject to specific record keeping requirements, including records involving sales for resale, and could be held liable for the tax. In pertinent part, MCL 205.67 provides:

(1) A person liable for *any tax imposed under this act* shall keep accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires. *If an exemption from sales tax is claimed because the sale is for resale or for any of the other exemptions or deductions granted under this act*, a record shall be kept of the name and address of the person to whom the sale is made, the date of the sale, the article purchased, the type of exemption claimed, the amount of the sale, and if that person has a sales tax license, the sales tax license number. . .A person *knowingly* making a sale of tangible personal property for the purpose of resale at retail to another person not licensed under this act is liable for the tax imposed under this act unless the transaction is exempt under the provisions of section 4k . . .If the taxpayer fails to file a return or to maintain or preserve proper records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, *the department may assess the amount of the tax due from the taxpayer*

based on the information that is available or that may become available to the department. (Emphasis added.)

Even if Petitioner's claim that revenue from sales of food for human consumption is excluded, not exempted, from the GSTA was found to have merit, it is undisputed that Petitioner is liable for tax imposed under the GSTA. Therefore, given the plain meaning of the first sentence of the statute, Petitioner is required to keep the records specified in MCL 205.67.

Assuming, for example, that Petitioner was not liable for any tax imposed under the GSTA, would Petitioner still be subject to the requirements of MCL 205.67? The answer is clearly "yes." The second sentence of MCL 205.67 provides that if an exemption is claimed because of a sale for resale, or for any other exemption or deduction, a record must be kept. In this case, it could be argued both that Petitioner's sales to the mobile vendors were sales for resale under MCL 205.51(1)(b), and that food for human consumption is an exemption or deduction under MCL 205.54g. As such, even if Petitioner was not required to maintain the records specified in the first sentence of MCL 205.67, it was required to maintain the records required under the second sentence. This conclusion is supported by the Court of Appeals decision in *Arbor Sales, Inc v Department of Treasury*, 104 Mich App 181; 304 NW2d 522 (1981).

Petitioner's second reason for arguing that sales of food for human consumption "represent a different category of sales" and are an "exclusion" from tax, not an "exemption" also fails. In making this argument, Petitioner is attempting to have the GSTA construed in its favor. This is due to the fact that the manner in which an issue involving a tax statute is construed is the opposite of that in which a tax exemption claim is construed. As summarized by Justice Cooley:

[I]t is a well-settled principle that, when a specific privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and **an alleged grant of exemption will be strictly construed** and cannot be made out by inference or implication but **must be beyond reasonable doubt**. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant. *Michigan Bell Telephone Company v Department of Treasury*, 229 Mich App 200, 207; 582 NW2d 770 (1998), quoting *Detroit v Detroit Commercial College*, 322 Mich 142, 149; 33 NW2d 737 (1948), quoting 2 Cooley, Taxation (4th ed), §672, p 1403.

As previously discussed, the Tribunal finds that food for human consumption is an exemption, not an exclusion, from tax. Therefore, because this case involves a tax exemption, the GSTA shall be construed strictly against Petitioner and in favor of Respondent.

Having determined that sales of food for human consumption do not represent a different category of sales and that Petitioner did not comply with the recordkeeping requirements of MCL 205.67, it must next be determined whether Petitioner *knowingly* sold Ice Cream to mobile vendors who were not licensed under the GSTA. Petitioner asserts that it did not. In support of this statement, Petitioner relies on the affidavit of Ms. Traywick. According to Ms. Traywick:

- During the Audit Period, I knew, and [Petitioner] knew, that customers purchasing Ice Cream from the Cash-and-Carry Area who might resell some of the Ice cream in a taxable manner in Detroit would have been required to possess both a Detroit vendor's license and a Michigan sales tax license.

- During the Audit Period, I knew, and [Petitioner] knew, that Ice Cream truck vendors who purchased Ice Cream from the Cash-and-Carry Area for resale in Detroit were subject to Detroit city licensing requirements, which were public information and required all Ice Cream vendors to provide proof of both a current health department inspection and a current and valid Michigan sales tax license; I knew about the Detroit city vendor license requirements set forth in the Detroit License Requirements publications.
- During the Audit Period, [Petitioner] did not knowingly make any sales for purposes of resale to any Ice Cream truck vendors who did not possess a Michigan sales tax license.

Submitted with Ms. Traywick's affidavit was a copy of the City of Detroit's "Requirements for Securing/Renewal of Vendor License." This document clearly requires a vendor to bring a copy of the vendor's Michigan sales tax license when applying for a license. In addition, a separate document lists eight items which are required to obtain a vendor's license from the City of Detroit, one of which is the vendor's Michigan sales tax license.

From the Informal Conference Recommendation, it appears that Respondent's position is that "[t]he standard of 'knowingly' making sales to unlicensed vendors is met because the Petitioner had knowledge that the items would be resold as food for immediate consumption." (Recommendation, p8) Petitioner disagrees, asserting that for it to "knowingly" make these sales, it would also have to have known that the sale was made to an unlicensed person. Petitioner relies on *Arbor Sales, supra*, in support of this argument.

Having reviewed the applicable statutory language, the Tribunal finds that it is not enough, as Respondent argues, to only have knowledge that the item would be resold as food for immediate consumption. MCL 205.67 also requires knowledge that the sale is made to a person not licensed under the GSTA. In this case, the Tribunal finds Petitioner's reliance on the City of Detroit's licensing requirements as an indication that the mobile vendors who purchased the Ice Cream from Petitioner were licensed under the GSTA to be reasonable. As such, the Tribunal

finds that Petitioner did not knowingly make sales to persons not licensed under the GSTA.

Because Petitioner did not knowingly make sales to unlicensed persons, Petitioner is not liable for the tax imposed under the GSTA.

The next issue to be resolved is whether Petitioner has shown reasonable cause to waive the penalty assessed by Respondent. Pursuant to MCL 205.59(1): “The tax imposed by this act shall be administered by the commissioner pursuant to 1941 PA 122, MCL 205.1 to 205.31, and this act.” MCL 205.1 *et seq* is known as The Revenue Act. It is this Act, specifically MCL 205.23, in which Respondent is authorized to assess the penalty at issue. MCL 205.23 provides, in pertinent part:

[I]f any part of the deficiency or an excessive claim for credit is due to negligence, but without intent to defraud, a penalty of \$10.00 or 10% of the total amount of the deficiency in the tax, whichever is greater, plus interest as provided in subsection (2), shall be added. The penalty becomes due and payable after notice and informal conference as provided in this act. If a taxpayer subject to a penalty under this subsection demonstrates to the satisfaction of the department that the deficiency or excess claim for credit was due to reasonable cause, the department shall waive the penalty. MCL 205.23(3).

Thus, the statute provides an opportunity for the penalty to be waived if reasonable cause is shown. Pursuant to Rule 205.1012:

- (1) Negligence is the lack of due care in failing to do what a reasonable and ordinarily prudent person would have done under the particular circumstances. The standard for determining negligence is whether the taxpayer exercised ordinary care and prudence in preparing and filing a return and paying the applicable tax in accordance with the statute. The facts and circumstances of each case will be considered.
- (2) When the department imposes a negligence penalty, the department bears the burden of establishing facts to support a finding of negligence and the taxpayer bears the burden of establishing facts that will negate a finding of negligence. The taxpayer shall file a written statement that explains, in detail, the facts which are relied upon to defeat the penalty and which constitute reasonable cause. 1999 AC, R 205.1012(2).

According to the Informal Conference Recommendation, Respondent imposed the penalty because Petitioner did not obtain exemption certificates. The affidavit of Ms. Traywick explains, in detail, the facts it relied upon in not obtaining the exemption certificates. The Tribunal finds that these facts present reasonable cause for not obtaining the exemption certificates. Moreover, the Tribunal finds that Petitioner did not fail to do what a reasonable and ordinarily prudent person would have done under the circumstances. Petitioner knew of the licensing requirements of the City of Detroit, which require a Michigan sales tax license. It was reasonable for Petitioner to believe that the mobile vendors at issue, who operated in the City of Detroit, were licensed. For these reasons, the Tribunal finds that the negligence penalty assessed against Petitioner is waived.

The final issue to be resolved is whether Respondent's Affirmative Defense under MCL 205.52(2) may be considered given Petitioner's claim that it did not have notice of this argument in the proceedings below. In *Montgomery Ward*, the petitioner was assessed for a single business tax liability. The petitioner appealed this assessment to the Court of Claims wherein the respondent filed "an amended answer and counterclaim, in which it presented a new and alternate theory of liability." (*Id.*, p677) The petitioner filed a motion for summary disposition, arguing that:

. . .the counterclaim filed by [respondent] set forth an additional theory of recovery of taxes due from [petitioner] that was based on a completely different set of operative facts than the first assessment. [The petitioner] claims that the defendant's filing of a completely different claim violated its rights to notice of assessment, the right to an informal conference, the amount of tax, interest and penalty, and the reasons and authority for the assessment. According to [the petitioner], the denial of these rights clearly violated the mandatory statutory protections provided by the revenue act. (*Id.*, p682)

The Court of Claims agreed and granted the petitioner's motion for summary disposition. The respondent appealed this decision to the Court of Appeals.

In its decision, the Court of Appeals discussed the revenue act and MCL 205.21(2) in particular. Pursuant to this statute, the Department of Treasury must provide a person to whom a tax liability has been assessed the opportunity to an informal conference and a written decision. The Court also discussed the Court of Claims' decision, wherein the Court of Claims "found that [the respondent] had failed to [provide the petitioner this opportunity] before bringing its counterclaim, that it therefore had failed to exhaust its administrative remedies before bringing its counterclaim, and that the court was without subject-matter jurisdiction." (*Id.*, p683)

The Court of Appeals upheld the Court of Claims' decision, stating:

In reaching this decision, the court reasoned that pursuant to *Bechtel Power Corp v Dep't of Treasury*, 128 Mich App 324, 340 NW2d 297 (1983), revenue statutes must be construed against the taxing authority, that the mandatory directives of the Single Business Tax Act and the revenue act required defendant to grant these procedural rights to plaintiff, and that the Court of Claims Act and the revenue act, because they deal with the same subject matter, must be construed in the event of a conflict to preserve the meaning and intent of each other so that neither denies the effectiveness of the other.

This reasoning is especially persuasive because otherwise defendant could "counterclaim" any amount on any theory for the tax years in question. Defendant argues that there is no problem with lack of notice because the counterclaim deals with the same set of "operative facts." This is not much assurance to a taxpayer if any liability alleged to have accrued within a given tax year is considered to have arisen from the same set of "operative facts." Under such circumstances, a taxpayer could be ambushed at the appellate level with an entirely new theory of tax liability and be forced to defend against a much larger tax liability than that from which it originally appealed.

The procedural situations of taxpayer appeal cases are not analogous to the situation in which the typical "counterclaim" arises. In taxpayer appeal cases, the plaintiff's or taxpayer's claim is for relief from a tax assessment imposed by the treasury. If counterclaims are allowed, the defendant would be allowed to assert additional claims against the plaintiff, and the plaintiff would be forced to defend itself without the procedural safeguards considered necessary in the revenue act for imposing tax assessments. (Citation omitted.) (*Id.*, pp683-684)

A review of Respondent's Informal Conference Recommendation reveals no discussion regarding Respondent's MCL 205.51(2) argument. As such, it cannot be said that Respondent

provided Petitioner with the requisite notice of its position that Petitioner was liable for sales tax under MCL 205.21(2), an opportunity to have this issue considered at an informal conference, and a written decision as to Respondent's position. Given this, the Tribunal finds that Respondent's claim of Affirmative Defense under MCL 205.21(2) will not be considered.

With its Motion for Summary Disposition, Petitioner filed a request for oral argument. The Tribunal finds that sufficient information has been provided and that oral argument is not necessary.

Therefore,

IT IS ORDERED that Petitioner's Motion for Summary Disposition under MCR 2.116(C)(10) is GRANTED.

IT IS FURTHER ORDERED that the tax, interest, and penalty assessed against Petitioner under Assessment No. M566947 is CANCELLED.

IT IS FURTHER ORDERED that Petitioner's request for oral argument is DENIED.

These Orders resolve all pending claims in this matter and close this case.

MICHIGAN TAX TRIBUNAL

Entered: June 28, 2011

By: Patricia L. Halm

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 28

Pars Ice Cream Co. v. Dep't of Treasury

Court of Appeals of Michigan

August 14, 2012, Decided

No. 305148

Reporter

2012 Mich. App. LEXIS 1579 *; 2012 WL 3322630

PARS ICE CREAM COMPANY, INC, Petitioner-Appellee, v DEPARTMENT OF TREASURY, Respondent-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Michigan Tax Tribunal. LC No. 00-332949.

Judges: Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

Opinion

PER CURIAM.

The Department of Treasury ("DOT") appeals as of right the Michigan Tax Tribunal's ("MTT") grant of summary disposition¹ in favor of Pars Ice Cream Company, Inc. ("Pars"). We affirm.

Pars is a Michigan corporation engaged in the business of selling ice cream in bulk. The DOT issued an assessment to Pars for taxes, interest and penalties totaling \$1,130,720.10, due on April 16, 2007. Pars appealed to the MTT. The parties filed a stipulation of facts, which the MTT adopted. On March 31, 2008, Pars moved for summary disposition.² The DOT's response was due within 14 days.³ On May 19, 2008, the DOT filed its brief in response to Pars's motion for summary disposition ("MSD"), 35 days after the filing deadline. The MTT granted Pars's MSD on June 28, 2011.

The DOT argues that the MTT abused its discretion when it rejected its response to Pars's MSD as untimely. We disagree. The decision to accept or reject an untimely brief is generally reviewed for an abuse of discretion.⁴ An abuse of discretion occurs when the court's decision falls [*2] outside the range of "reasonable and principled outcome[s]."⁵

¹ [MCR 2.116\(C\)\(10\)](#).

² *Id.*

³ Former Mich Admin Code, R 205.1230.

⁴ See [Kemerko Clawson, LLC v RxIV Inc, 269 Mich App 347, 349; 711 NW2d 801 \(2005\)](#).

⁵ [Maldonado v Ford Motor Co, 476 Mich 372, 388; 719 NW2d 809 \(2006\)](#).

The DOT cites two cases in support of its assertion that the MTT abused its discretion: *Totman v Royal Oak School District*⁶ and *Richter v Department of Natural Resources*.⁷ This case, however, is distinguishable from both *Totman* and *Richter*. *Totman* addresses when dismissal of an appeal for failure to file a brief constitutes an abuse of discretion,⁸ while *Richter* considers whether acceptance of an untimely filed brief constitutes an abuse of discretion.⁹

Therefore, we find the DOT's reliance on these cases unpersuasive. The parties do not dispute that during the relevant time period Rule 205.1230(1) provided that "[w]ritten opposition, if any, to motions shall be filed within 14 days after service." The DOT filed its untimely responsive brief on May 19, 2008, 49 days after [*3] Pars filed its MSD, and 35 days after the filing deadline. While the MTT refused to consider the contents of the DOT's response, the MTT did consider the DOT's arguments contained in the informal conference recommendation. Additionally, case law does not require that the MTT accept the untimely brief. Because the MTT's failure to accept the late brief does not fall outside the range of "reasonable and principled outcome[s]," the MTT's decision was not an abuse of discretion.¹⁰

The DOT also claims that its late response should have resulted in default proceedings, which the DOT would have been permitted to cure. Mich Admin Code, R 205.1247(1) states that a party's failure to follow MTT rules "may" result in the commencement of default proceedings. Additionally, Rule 205.1247(4) indicates that failure to comply with the rules is cause for "the scheduling of a default hearing." Pars did not move for default, and the MTT did not commence default proceedings as a result of the late filing. Because the initiation of default proceedings is permissive and not mandatory,¹¹ the DOT's argument must fail.

Although [*4] not included in its statement of the issues, the DOT briefly argues in its reply brief on appeal that the MTT failed to consider information contrary to the affidavit of Shelley Traywick that was contained in the informal conference recommendation in the light most favorable to the DOT to determine whether it created a genuine issue of material fact. The MTT stated in its order granting Pars's MSD that it "consider[ed], as necessary, information presented in [the DOT's] Informal Conference Recommendation" in determining the outcome of Pars's motion. The order also states that the evidence was considered "in the light most favorable to the party opposing the motion."¹² Because the DOT's contention is not supported by the record, the argument lacks merit. Moreover, we find that because the MTT considered the DOT's assertions in the informal conference recommendation when deciding Pars's MSD, the MTT "secure[d] the just, speedy, and economical determination" of the case and "avoid[ed] the consequences of error that does not affect the substantial rights of the parties."¹³

Affirmed.

/s/ Michael J. Talbot

⁶ *Totman v Royal Oak Sch Dist*, 135 Mich App 121; 352 NW2d 364 (1984).

⁷ *Richter v Dep't of Natural Resources*, 172 Mich App 658; 432 NW2d 393 (1998).

⁸ *Totman*, 135 Mich App at 124-126.

⁹ *Richter*, 172 Mich App at 661-662.

¹⁰ *Maldonado*, 476 Mich at 388.

¹¹ See *Oakland Co v State of Mich*, 456 Mich 144, 154 n 10; 566 NW2d 616 (1997).

¹² *Sherry v East Suburban Football League*, 292 Mich App 23, 27; 807 NW2d 859 (2011) [*5] (citation and quotation omitted).

¹³ *MCR 1.105*.

/s/ Kurtis T. Wilder

/s/ Michael J. Riordan

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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 29

INCOME TAX ACT OF 1967 (EXCERPT)
Act 281 of 1967

206.611 Definitions; T to U.

Sec. 611. (1) "Tangible personal property" means that term as defined in section 2 of the use tax act, 1937 PA 94, MCL 205.92.

(2) "Tax" means the tax imposed under this part, including interest and penalties under this part, unless the term is given a more limited meaning in the context of this part or a provision of this part.

(3) "Tax-exempt person" means an organization that is exempt from federal income tax under section 501(a) of the internal revenue code, except the following:

(a) An organization exempt under section 501(c)(12) or (16) of the internal revenue code.

(b) An organization exempt under section 501(c)(4) of the internal revenue code that would be exempt under section 501(c)(12) of the internal revenue code but for its failure to meet the requirement in section 501(c)(12) that 85% or more of its income must consist of amounts collected from members.

(4) "Tax year" means the calendar year, or the fiscal year ending during the calendar year, upon the basis of which the tax base of a taxpayer is computed under this part. If a return is made for a fractional part of a year, tax year means the period for which the return is made. Except for the first return required by this part, a taxpayer's tax year is for the same period as is covered by its federal income tax return. A taxpayer that has a 52- or 53-week tax year beginning not more than 7 days before the end of any month is considered to have a tax year beginning on the first day of the subsequent month. A person included in a unitary business group that joins or departs the unitary business group other than at the end of that person's federal tax year shall have a tax year beginning with its federal income tax period and ending on the date of joining or departing the unitary business group, and another tax year beginning on the date immediately after joining or departing the unitary business group and ending with its federal income tax period. If the term tax year in this part is used in reference to 1 or more previous or preceding tax years and those referenced tax years are before January 1, 2012, then those referenced tax years are deemed those same tax years during which former 1975 PA 228 or the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, applied.

(5) "Taxpayer" means a corporation, insurance company, financial institution, or unitary business group, whichever is applicable under each chapter, that is liable for a tax, interest, or penalty under this part. For purposes of chapters 11 and 14, taxpayer does not include an insurance company or a financial institution. For purposes of chapter 12, unless specifically included in the section, taxpayer does not include a corporation or a financial institution. For purposes of chapter 13, taxpayer does not include a corporation or an insurance company.

(6) "Unitary business group" means a group of United States persons that are corporations, insurance companies, or financial institutions, other than a foreign operating entity, 1 of which owns or controls, directly or indirectly, more than 50% of the ownership interest with voting rights or ownership interests that confer comparable rights to voting rights of the other members, and that has business activities or operations which result in a flow of value between or among members included in the unitary business group or has business activities or operations that are integrated with, are dependent upon, or contribute to each other. Unitary business group includes an affiliated group that makes the election to be treated, and to file, as a unitary business group under section 691(2).

(7) "United States person" means that term as defined in section 7701(a)(30) of the internal revenue code.

(8) "Unrelated business activity" means, for a tax-exempt person, business activity directly connected with an unrelated trade or business as defined in section 513 of the internal revenue code.

History: Add. 2011, Act 38, Eff. Jan. 1, 2012;—Am. 2011, Act 170, Eff. Jan. 1, 2012;—Am. 2013, Act 266, Imd. Eff. Dec. 30, 2013.

Compiler's note: Enacting section 1 of Act 266 of 2013 provides:

"Enacting section 1. This amendatory act is effective for tax years that begin after December 31, 2012."

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APPELLEES' APPENDIX

TAB 30

INCOME TAX ACT OF 1967 (EXCERPT)
Act 281 of 1967

206.691 Filing of combined return by unitary business group.

Sec. 691. (1) Except as otherwise provided under section 680(3), a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group. Each United States person included in a unitary business group or included in a combined return shall be treated as a single person, and all transactions between those persons included in the unitary business group shall be eliminated from the corporate income tax base, the apportionment formulas, and for purposes of determining exemptions, credits, and the filing threshold under this part. If a United States person included in a unitary business group or included in a combined return is subject to the tax under chapter 12 or 13, any corporate income attributable to that person shall be eliminated from the corporate income tax base and any sales attributable to that person shall be eliminated from the apportionment formula under this part.

(2) A person that is part of an affiliated group may elect without the consent of the department to have all of the persons that are included in that affiliated group to be treated as a unitary business group. A taxpayer that elects to file as a unitary business group pursuant to this subsection shall compute its tax under this part in accordance with all other provisions of this part that apply to a unitary business group. The taxpayer shall make the election under this subsection on a form or in a format as prescribed by the department that is to be filed in a timely manner with the taxpayer's annual return. Each person included in the affiliated group is deemed to have agreed to be bound by the election made under this subsection and any renewal of that election and to have waived any objection to its inclusion in the affiliated group and treatment as a unitary business group. Each person that subsequently enters the affiliated group after the tax year for which the election is made is deemed to have consented to the application of and is bound by the election and to have waived any objection to its inclusion in the affiliated group and treatment as a unitary business group. An election made pursuant to this subsection is irrevocable and binding for and applicable to the tax year for which it is made and for the next 9 tax years. The election shall remain in effect for the time period in which the ownership requirements under this section are met irrespective of whether a federal consolidated group to which the unitary business group belongs discontinues the filing of a federal consolidated return or whether the common parent changes due to a reverse acquisition or acquisition by a related person. Upon the expiration of the election after it has been in effect for 10 tax years, an election may be renewed for another 10 tax years, without the consent of the department; provided however, that in the case of a nonrenewal a new election under this subsection is not permitted in any of the immediately following 3 tax years. The renewal shall be made on a form or in a format as prescribed by the department that is to be filed in a timely manner with the taxpayer's annual return after the completion of a 10-year period for which an election under this subsection was in place.

History: Add. 2011, Act 38, Eff. Jan. 1, 2012;—Am. 2012, Act 70, Imd. Eff. Mar. 29, 2012;—Am. 2013, Act 266, Imd. Eff. Dec. 30, 2013;—Am. 2014, Act 14, Imd. Eff. Feb. 25, 2014.

Compiler's note: Enacting section 1 of Act 266 of 2013 provides:

"Enacting section 1. This amendatory act is effective for tax years that begin after December 31, 2012."

Enacting section 1 of Act 14 of 2014 provides:

"Enacting section 1. This amendatory act is effective for tax years that begin after December 31, 2013."

STATE OF MICHIGAN
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APPELLEES' APPENDIX

TAB 31

MICHIGAN LEGISLATURE

Michigan Compiled Laws Complete Through PA 5 of 2025

Senate adjourned until Tuesday, July 29, 2025 10:00 AM

House adjourned until Wednesday, July 23, 2025 1:30 PM

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MCL - Section 8.3b

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[R.S. of 1846](#)

[R-S-1846-8-1-1](#)

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Revised Statutes of 1846 (EXCERPT) CHAPTER 1. OF THE STATUTES.

8.3b Singular and plural; gender.

Sec. 3b.

Every word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number. Every word importing the masculine gender only may extend and be applied to females as well as males.

History: Add. 1959, Act 189, Imd. Eff. July 22, 1959

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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 32

INCOME TAX ACT OF 1967 (EXCERPT)
Act 281 of 1967

206.680 Election to pay tax imposed by Michigan business tax act; duration; taxpayer as member of unitary business group; separate return; annual return; "certificated credit" defined.

Sec. 680. (1) Notwithstanding any other provision of this part, except as otherwise provided in subsection (2) for a certificated credit under section 435 or 437 of the Michigan business tax act, 2007 PA 36, MCL 208.1435 and 208.1437, or in subsection (5) for a certificated credit under section 431 of the Michigan business tax act, 2007 PA 36, MCL 208.1431, a taxpayer that has been approved to receive, has received, or has been assigned a certificated credit that has not been fully claimed or paid prior to January 1, 2012 may, for the taxpayer's first tax year ending after December 31, 2011 only, elect to file a return and pay the tax imposed by the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, in lieu of the tax imposed by this part. An election under this subsection shall continue for the period prescribed in section 500(1) of the Michigan business tax act, 2007 PA 36, MCL 208.1500.

(2) A taxpayer with a certificated credit under section 435 or 437 of the Michigan business tax act, 2007 PA 36, MCL 208.1435 and 208.1437, which certificated credit may be claimed in a tax year ending after December 31, 2011 may elect to pay the tax imposed by the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, in the tax year in which that certificated credit or any unused carryforward may be claimed in lieu of the tax imposed by this part.

(3) A taxpayer that is a member of a unitary business group and that has a certificated credit under sections 431 and 434(2) and (5) of the Michigan business tax act, 2007 PA 36, MCL 208.1431 and 208.1434, is not required to file a combined return as a unitary business group and may elect to file a separate return and pay the tax, if any, under the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601.

(4) A taxpayer that elects to pay the tax imposed by the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, under this section is not required to file an annual return under this part.

(5) A taxpayer that acquires, pursuant to the modification of an existing written agreement approved by a resolution of the Michigan strategic fund board on November 27, 2018 and the subsequent transfer of that written agreement, a certificated credit authorized by the Michigan economic growth authority in 2004 under section 431 of the Michigan business tax act, 2007 PA 36, MCL 208.1431, may, for the first tax year ending after October 1, 2018 only, elect to file the return and pay the tax imposed by the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, in lieu of the tax imposed by this part as long as the Michigan economic growth authority or its successor determines that the modification and subsequent transfer of that credit reduces the total amount of the credit. However, if the first tax year ending after October 1, 2018 ends before the effective date of the amendatory act that added this subsection and the taxpayer has already filed a return for that tax year under this part, then the taxpayer may, if within the statute of limitations period prescribed under section 27a of 1941 PA 122, MCL 205.27a, elect under this subsection to file the return and pay the tax imposed by the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, for that tax year by filing the necessary amended return under this part and filing an original return as provided under section 505 of the Michigan business tax act, 2007 PA 36, MCL 208.1505. An election under this subsection shall continue for the period prescribed in section 500 of the Michigan business tax act, 2007 PA 36, MCL 208.1500.

(6) As used in this section, "certificated credit" means that term as defined in section 107 of the Michigan business tax act, 2007 PA 36, MCL 208.1107.

History: Add. 2011, Act 38, Eff. Jan. 1, 2012;—Am. 2012, Act 70, Imd. Eff. Mar. 29, 2012;—Am. 2019, Act 92, Imd. Eff. Oct. 10, 2019.

Compiler's note: Enacting section 1 of Act 92 of 2019 provides:

"Enacting section 1. This amendatory act is retroactive and effective for tax years beginning after December 31, 2017."

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NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

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APPELLEES' APPENDIX

TAB 33

INCOME TAX ACT OF 1967 (EXCERPT)
Act 281 of 1967

206.607 Definitions; F to M.

Sec. 607. (1) "Federal taxable income" means taxable income as defined in section 63 of the internal revenue code, except that federal taxable income shall be calculated as if section 168(k) and section 199 of the internal revenue code were not in effect.

(2) "Flow-through entity" means an entity that for the applicable tax year is treated as a subchapter S corporation under section 1362(a) of the internal revenue code, a general partnership, a trust, a limited partnership, a limited liability partnership, or a limited liability company, that for the tax year is not taxed as a corporation for federal income tax purposes. Flow-through entity does not include any entity disregarded or treated as a corporation under section 699.

(3) "Foreign operating entity" means a United States corporation that satisfies each of the following:

(a) Would otherwise be a part of a unitary business group that has at least 1 corporation included in the unitary business group that is taxable in this state.

(b) Has substantial operations outside the United States, the District of Columbia, any territory or possession of the United States except for the Commonwealth of Puerto Rico, or a political subdivision of any of the foregoing.

(c) At least 80% of its income is active foreign business income as defined in section 871(l)(1)(B)(ii) of the internal revenue code.

(4) "Gross receipts" means the entire amount received by the taxpayer from any activity whether in intrastate, interstate, or foreign commerce carried on for direct or indirect gain, benefit, or advantage to the taxpayer or to others except for the following:

(a) Proceeds from sales by a principal that the taxpayer collects in an agency capacity solely on behalf of the principal and delivers to the principal.

(b) Amounts received by the taxpayer as an agent solely on behalf of the principal that are expended by the taxpayer for any of the following:

(i) The performance of a service by a third party for the benefit of the principal that is required by law to be performed by a licensed person.

(ii) The performance of a service by a third party for the benefit of the principal that the taxpayer has not undertaken a contractual duty to perform.

(iii) Principal and interest under a mortgage loan or land contract, lease or rental payments, or taxes, utilities, or insurance premiums relating to real or personal property owned or leased by the principal.

(iv) A capital asset of a type that is, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated cost recovery by the principal for federal income tax purposes, or for real property owned or leased by the principal.

(v) Property not described under subparagraph (iv) purchased by the taxpayer on behalf of the principal and that the taxpayer does not take title to or use in the course of performing its contractual business activities.

(vi) Fees, taxes, assessments, levies, fines, penalties, or other payments established by law that are paid to a governmental entity and that are the legal obligation of the principal.

(c) Amounts that are excluded from gross income of a foreign corporation engaged in the international operation of aircraft under section 883(a) of the internal revenue code.

(d) Amounts received by an advertising agency used to acquire advertising media time, space, production, or talent on behalf of another person.

(e) Notwithstanding any other provision of this section, amounts received by a taxpayer that manages real property owned by the taxpayer's client that are deposited into a separate account kept in the name of the taxpayer's client and that are not reimbursements to the taxpayer and are not indirect payments for management services that the taxpayer provides to that client.

(f) Proceeds from the taxpayer's transfer of an account receivable if the sale that generated the account receivable was included in gross receipts for federal income tax purposes. This subdivision does not apply to a taxpayer that during the tax year both buys and sells any receivables.

(g) Proceeds from any of the following:

(i) The original issue of stock or equity instruments.

(ii) The original issue of debt instruments.

(h) Refunds from returned merchandise.

(i) Cash and in-kind discounts.

(j) Trade discounts.

(k) Federal, state, or local tax refunds.

(l) Security deposits.

(m) Payment of the principal portion of loans.

(n) Value of property received in a like-kind exchange.

(o) Proceeds from a sale, transaction, exchange, involuntary conversion, or other disposition of tangible, intangible, or real property that is a capital asset as defined in section 1221(a) of the internal revenue code or land that qualifies as property used in the trade or business as defined in section 1231(b) of the internal revenue code, less any gain from the disposition to the extent that gain is included in federal taxable income.

(p) The proceeds from a policy of insurance, a settlement of a claim, or a judgment in a civil action less any proceeds under this subdivision that are included in federal taxable income.

(5) "Insurance company" means an authorized insurer as defined in section 108 of the insurance code of 1956, 1956 PA 218, MCL 500.108. Insurance company does not include a health maintenance organization authorized under chapter 35 of the insurance code of 1956, 1956 PA 218, MCL 500.3501 to 500.3573.

(6) "Internal revenue code" means the United States internal revenue code of 1986 in effect on January 1, 2018 or, at the option of the taxpayer, in effect for the tax year.

(7) "Member", when used in reference to a flow-through entity, means a shareholder of a subchapter S corporation, a partner in a general partnership, a limited partnership, or a limited liability partnership, a member of a limited liability company, or a beneficiary of a trust that is a flow-through entity.

History: Add. 2011, Act 38, Eff. Jan. 1, 2012;—Am. 2011, Act 182, Imd. Eff. Jan. 1, 2012;—Am. 2011, Act 306, Eff. Jan. 1, 2012;—Am. 2018, Act 32, Imd. Eff. Feb. 21, 2018;—Am. 2018, Act 38, Imd. Eff. Feb. 28, 2018;—Am. 2024, Act 177, Imd. Eff. Dec. 23, 2024.

Compiler's note: Enacting section 1 of Act 32 of 2018 provides:

"Enacting section 1. This amendatory act is retroactive and effective for tax years that begin on and after January 1, 2016."

STATE OF MICHIGAN
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NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

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Respondent-Appellant.

Supreme Court No. 167608

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APPELLEES' APPENDIX

TAB 34

MICHIGAN BUSINESS TAX ACT (EXCERPT)
Act 36 of 2007

***** 208.1101 THIS SECTION IS REPEALED BY ACT 90 OF 2019 EFFECTIVE FOR TAX YEARS THAT
BEGIN AFTER DECEMBER 31, 2031 *****

208.1101 Short title; legislative intent.

Sec. 101. (1) This act shall be known and may be cited as the "Michigan business tax act".

(2) It is the intent of the legislature that the tax levied under this act and the various credits available under this act will serve to improve the economic condition of this state, foster continued and diverse economic growth in this state, and enable this state to compete fairly and effectively in the world marketplace for economic development opportunities that will provide for and protect the health, safety, and welfare of the citizens of this state, now and in the future.

History: 2007, Act 36, Eff. Jan. 1, 2008.

Compiler's note: Enacting section 1 of Act 36 of 2007 provides:

"Enacting section 1. This act takes effect January 1, 2008 and applies to all business activity occurring after December 31, 2007."

Enacting section 1 of Act 39 of 2011 provides:

"Enacting section 1. The Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, is repealed effective on the date that the secretary of state receives a written notice from the department of treasury that the last certificated credit or any carryforward from that certificated credit has been claimed."

Popular name: MBT

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APPELLEES' APPENDIX

TAB 35

INCOME TAX ACT OF 1967 (EXCERPT)
Act 281 of 1967

206.685 Annual or final return; filing; form and content; remittance of final liability; calculation; extension.

Sec. 685. (1) An annual or final return shall be filed with the department in the form and content prescribed by the department by the last day of the fourth month after the end of the taxpayer's tax year. Any final liability shall be remitted by the annual due date of the taxpayer's annual or final return, excluding any extension of time to file the return as provided under subsections (2) and (3). A taxpayer, other than a taxpayer subject to the tax imposed under chapter 12 or 13, whose apportioned or allocated gross receipts are less than \$350,000.00 does not need to file a return or pay the tax imposed under this part. The apportioned or allocated gross receipts of a flow-through entity shall be imputed to each of its members based upon the same percentage that each member's proportionate share of distributive income is to the total distributive income of the flow-through entity. A taxpayer whose tax liability under this part is less than or equal to \$100.00 does not need to file a return or pay the tax imposed under this part.

(2) If a taxpayer has apportioned or allocated gross receipts for a tax year of less than 12 months, the threshold amount of \$350,000.00 in subsection (1) shall be multiplied by a fraction, the numerator of which is the number of months in the tax year and the denominator of which is 12.

(3) The department, upon application of the taxpayer and for good cause shown, may extend the date for filing the annual return. Interest at the rate under section 23(2) of 1941 PA 122, MCL 205.23, shall be added to the amount of the tax unpaid for the period of the extension. The state treasurer shall require with the application payment of the estimated tax liability unpaid for the tax period covered by the extension.

(4) If a taxpayer is granted an extension of time within which to file the federal income tax return for any tax year, the filing of a copy of the request for extension together with a tentative return and payment of an estimated tax with the department by the due date provided in subsection (1) shall automatically extend the due date for the filing of an annual or final return under this part until the last day of the eighth month following the original due date of the return. Interest at the rate under section 23(2) of 1941 PA 122, MCL 205.23, shall be added to the amount of the tax unpaid for the period of the extension.

History: Add. 2011, Act 38, Eff. Jan. 1, 2012;—Am. 2011, Act 184, Eff. Jan. 1, 2012.

STATE OF MICHIGAN
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APPELLEES' APPENDIX

TAB 36

INCOME TAX ACT OF 1967 (EXCERPT)
Act 281 of 1967

206.643 Imposition of tax on insurance company; tax year; annual return; calculation of estimated payment; disclosure.

Sec. 643. (1) An insurance company is subject to the tax imposed by this chapter or by section 476a of the insurance code of 1956, 1956 PA 218, MCL 500.476a, if applicable, whichever is greater.

(2) The tax year of an insurance company is the calendar year.

(3) Notwithstanding section 685, an insurance company shall file the annual return required under this part before March 2 after the end of the tax year, and an automatic extension under section 685(3) is not available.

(4) For the purpose of calculating an estimated payment required by section 681, the greater of the amount of tax imposed on an insurance company under this chapter or under section 476a of the insurance code of 1956, 1956 PA 218, MCL 500.476a, shall be considered the insurance company's tax liability for the immediately preceding tax year.

(5) The requirements of section 28(1)(f) of 1941 PA 122, MCL 205.28, that prohibit an employee or authorized representative of, a former employee or authorized representative of, or anyone connected with the department from divulging any facts or information obtained in connection with the administration of a tax, do not apply to disclosure of a tax return required by this section.

History: Add. 2011, Act 38, Eff. Jan. 1, 2012.

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COMPANY, ET AL.,

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Respondent-Appellant.

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APPELLEES' APPENDIX

TAB 37

THE INSURANCE CODE OF 1956 (EXCERPT)
Act 218 of 1956

500.476a Alien or foreign insurers; deposit of securities or making certain payments; computation; revocation of certificate of authority; purpose of section; domestic insurer owned or controlled by alien or foreign insurer; domestic insurer as alien or foreign insurer; compliance; taxes subject to MCL 208.22d or MCL 208.1243; administration of tax; disclosure of tax return.

Sec. 476a. (1) Beginning August 3, 1987, whenever, by a law in force outside of this state or country, a domestic insurer or agent of a domestic insurer is required to make a deposit of securities for the protection of policyholders or otherwise, or to make payment for taxes, fines, penalties, certificates of authority, valuation of policies, or otherwise, or a special burden or other burden is imposed, greater in the aggregate than is required by the laws of this state for a similar alien or foreign insurer or agent of an alien or foreign insurer, the alien or foreign insurer of that state or country is required, as a condition precedent to its transacting business in this state, to make a like deposit for like purposes with the state treasurer of this state, and to pay to the revenue commissioner for taxes, fines, penalties, certificates of authority, valuation of policies, and otherwise an amount equal in the aggregate to the charges and payments imposed by the laws of the other state or country upon a similar domestic insurer and the agents of a domestic insurer, regardless of whether a domestic insurer or agent of a domestic insurer is actually transacting business in that state or country. For fire department or salvage corps taxes or other local taxes the amount shall be computed by the revenue commissioner by dividing the total of the payments made by domestic insurers in that state or country by the gross premium received by domestic insurers in that state or country less return premiums. The commissioner shall revoke the certificate of authority of an alien or foreign insurer refusing for 30 days to make payment of fees or taxes as required by this chapter. Except as provided in subsections (3) and (4), for purposes of this section, an insurer organized under the laws of a state or country other than these United States shall be considered an insurer of the state in which its general deposit for the benefit of its policyholders is made.

(2) The purpose of this section is to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes.

(3) Subsection (4) does not apply to a domestic insurer that is owned or controlled, directly or indirectly, by an alien or foreign insurer who prior to 1998 and with the commissioner's approval did not keep books, records, and files or true copies thereof in this state.

(4) For purposes of this section, the state treasurer, after consultation with the commissioner, shall determine that a domestic insurer is an alien or foreign insurer domiciled in a state or country determined by the state treasurer if the insurer does not comply with all of the following:

(a) Maintain its principal place of business in this state.

(b) Maintain in this state officers and personnel responsible for and knowledgeable of the company's operation, books, records, administration, and annual statement.

(c) Conduct in this state a substantial portion of its underwriting, sales, claims, legal, and, if applicable, medical operations relating to Michigan policyholders and certificate holders.

(d) Comply with section 5256(1)(a) and (2) through (6). The commissioner shall inform the state treasurer when a domestic insurer is not in compliance with section 5256(1)(a) or (2) through (6).

(5) Taxes collected pursuant to this section are subject to section 22d of the former single business tax act, 1975 PA 228, or section 243 of the Michigan business tax act, 2007 PA 36, MCL 208.1243.

(6) The state treasurer shall administer the tax prescribed by this section in the manner provided in 1941 PA 122, MCL 205.1 to 205.31.

(7) The requirements of section 28 of 1941 PA 122, MCL 205.28, that prohibit an employee or an authorized representative or former employee or authorized representative or anyone connected with the department of treasury from divulging any facts or information obtained in connection with the administration of taxes, do not apply to disclosure of the tax return prescribed in this act.

History: Add. 1987, Act 261, Imd. Eff. Dec. 28, 1987;—Am. 1990, Act 256, Imd. Eff. Oct. 15, 1990;—Am. 1998, Act 121, Imd. Eff. June 10, 1998;—Am. 2007, Act 187, Imd. Eff. Dec. 21, 2007.

Constitutionality: Neither Michigan's retaliatory tax nor the 1988 amendment to that tax violates the state or federal constitutions. The retaliatory tax, and the amendments of it, are rationally related to the legitimate governmental purpose of promoting Michigan insurers in other states. Because the tax and its amendments do not violate equal protection, they also do not violate the Michigan Constitution's Uniformity of Taxation Clause (Const. 1963, art 9, § 3). TIG Ins Co Inc v Treasury, 464 Mich 548; 629 NW2d 402 (2000).

Popular name: Act 218

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APPELLEES' APPENDIX

TAB 38

INCOME TAX ACT OF 1967 (EXCERPT)
Act 281 of 1967

206.635 Tax on insurance company; imposition and levy; direct premiums; qualified health insurance policies; exemption.

Sec. 635. (1) Except as otherwise provided under subsection (4) or (6), each insurance company shall pay a tax determined under this chapter.

(2) The tax imposed by this chapter on each insurance company shall be a tax equal to 1.25% of gross direct premiums written on property or risk located or residing in this state. However, beginning on January 1, 2019, for gross direct premiums attributable to qualified health insurance policies the tax imposed shall be a tax equal to 0.95% through December 31, 2019, and for the 2020 tax year and each tax year after 2020, the tax rate for those gross direct premiums attributable to qualified health insurance policies shall be determined as provided under subsection (7). Direct premiums do not include any of the following:

- (a) Premiums on policies not taken.
- (b) Returned premiums on canceled policies.
- (c) Receipts from the sale of annuities.
- (d) Receipts on reinsurance premiums if the tax has been paid on the original premiums.

(e) The first \$190,000,000.00 of disability insurance premiums written in this state, other than credit insurance and disability income insurance premiums, of each insurance company subject to tax under this chapter. This exemption shall be reduced by \$2.00 for each \$1.00 by which the insurance company's gross direct premiums from insurance carrier services in this state and outside this state exceed \$280,000,000.00.

(3) The tax calculated under this chapter is in lieu of all other privilege or franchise fees or taxes imposed by this part or any other law of this state, except taxes on real and personal property, taxes collected under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, and taxes collected under the use tax act, 1937 PA 94, MCL 205.91 to 205.111, and except as otherwise provided in the insurance code of 1956, 1956 PA 218, MCL 500.100 to 500.8302.

(4) The tax imposed and levied under this chapter does not apply to an insurance company authorized under chapter 46 or 47 of the insurance code of 1956, 1956 PA 218, MCL 500.4601 to 500.4673 and 500.4701 to 500.4747.

(5) For a taxpayer subject to the tax imposed under chapter 11, that portion of the tax base attributable to the services provided by an attorney-in-fact to a reciprocal insurer pursuant to chapter 72 of the insurance code of 1956, 1956 PA 218, MCL 500.7200 to 500.7234, is exempt from the tax imposed by that chapter.

(6) The tax imposed and levied under this chapter does not apply to a health maintenance organization authorized under chapter 35 of the insurance code of 1956, 1956 PA 218, MCL 500.3501 to 500.3573.

(7) By October 1, 2020 and each October 1 thereafter, the department shall determine the tax rate to be imposed on gross direct premiums attributable to qualified health insurance policies for that calendar year as follows:

(a) Calculate the total liability for all taxpayers after all credits for qualified health insurance policies under this chapter and section 476a of the insurance code of 1956, 1956 PA 218, MCL 500.476a, for the prior calendar year.

(b) Calculate the total liability for all taxpayers after all credits for qualified health insurance policies under this chapter at a rate of 1.25% and section 476a of the insurance code of 1956, 1956 PA 218, MCL 500.476a, for the prior calendar year.

(c) Determine the actual amount of savings for the prior year as a result of the rate reduction under subsection (2) by subtracting the amount determined under subdivision (a) from the amount determined under subdivision (b).

(d) Determine the amount of savings above the savings limit for the prior calendar year, by subtracting \$18,000,000.00 from the amount determined under subdivision (c).

(e) Determine the current year savings limit by subtracting the sum of the amounts determined under subdivision (d) for each calendar year beginning on and after January 1, 2019 from \$18,000,000.00.

(f) Calculate the rate reduction for the current calendar year by dividing the amount determined under subdivision (e) by the amount of prior year gross direct premiums attributable to qualified health insurance policies written by taxpayers with no liability under section 476a of the insurance code of 1956, 1956 PA 218, MCL 500.476a, for the prior calendar year.

(g) Calculate the tax rate for the current calendar year by subtracting the amount determined under subdivision (f) from 0.0125.

(8) The state treasurer shall develop a method to account for changes in tax liability occurring after the calculation of the immediately succeeding calendar year's rate.

(9) As used in this section, "qualified health insurance policies" means policies written on risk located or residing in this state that are 1 of the following types of policies:

(a) Comprehensive major medical, regardless of whether the policy is eligible for a health savings account or purchased on the health insurance marketplace.

(b) Student.

(c) Children's health insurance program.

(d) Medicaid.

(e) Employer comprehensive, regardless of whether the policy is eligible for a health savings account or purchased on the health insurance marketplace.

(f) Multiple employer associations or trusts and any other employer associations and trusts.

History: Add. 2011, Act 38, Eff. Jan. 1, 2012;—Am. 2018, Act 31, Imd. Eff. Feb. 21, 2018;—Am. 2018, Act 222, Imd. Eff. June 26, 2018.

Compiler's note: Enacting section 1 of Act 31 of 2018 provides:

"Enacting section 1. This amendatory act is retroactive and effective for tax years that begin on and after January 1, 2016."

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 39

INCOME TAX ACT OF 1967 (EXCERPT)
Act 281 of 1967

206.637 Tax credit; calculation; assessments of insurance company from immediately preceding tax year; payments to Michigan automobile insurance placement facility attributable to assigned claims plan.

Sec. 637. (1) Except as otherwise provided under subsection (3), an insurance company may claim a credit against the tax imposed under this chapter in the following amounts:

(a) Amounts paid to the Michigan worker's compensation placement facility pursuant to chapter 23 of the insurance code of 1956, 1956 PA 218, MCL 500.2301 to 500.2352.

(b) Amounts paid to the Michigan basic property insurance association pursuant to chapter 29 of the insurance code of 1956, 1956 PA 218, MCL 500.2901 to 500.2954.

(c) Amounts paid to the Michigan automobile insurance placement facility pursuant to chapter 33 of the insurance code of 1956, 1956 PA 218, MCL 500.3301 to 500.3390.

(d) Amounts paid to the property and casualty guaranty association pursuant to chapter 79 of the insurance code of 1956, 1956 PA 218, MCL 500.7901 to 500.7949.

(e) Amounts paid to the Michigan life and health insurance guaranty association pursuant to chapter 77 of the insurance code of 1956, 1956 PA 218, MCL 500.7701 to 500.7780.

(2) The assessments of an insurance company from the immediately preceding tax year shall be used in calculating the credits allowed under this section for each tax year.

(3) For the 2016 tax year only, an insurance company shall only include in the calculation of a credit under this section 35% of the amounts paid to the Michigan automobile insurance placement facility that are attributable to the assigned claims plan approved under chapter 31 of the insurance code of 1956, 1956 PA 218, MCL 500.3101 to 500.3179. For tax years beginning on and after January 1, 2017, an insurance company shall not include in the calculation of a credit under this section amounts paid to the Michigan automobile insurance placement facility that are attributable to the assigned claims plan approved under chapter 31 of the insurance code of 1956, 1956 PA 218, MCL 500.3101 to 500.3179.

History: Add. 2011, Act 38, Eff. Jan. 1, 2012;—Am. 2016, Act 278, Imd. Eff. July 1, 2016.

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COMPANY, ET AL.,

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APPELLEES' APPENDIX

TAB 40

INCOME TAX ACT OF 1967 (EXCERPT)
Act 281 of 1967

206.641 Amounts paid pursuant to MCL 418.352; tax credit; refund of excess amount.

Sec. 641. (1) For amounts paid pursuant to section 352 of the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.352, an insurance company subject to the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941, may claim a credit against the tax imposed under this chapter for the tax year in an amount equal to the amount paid during that tax year by the insurance company pursuant to section 352 of the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.352, as certified by the director of the bureau of worker's disability compensation pursuant to section 391(6) of the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.391.

(2) An insurance company claiming a credit under this section may claim a portion of the credit allowed under this section equal to the payments made during a calendar quarter pursuant to section 352 of the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.352, against the estimated tax payments made under section 681. Any credit in excess of an estimated payment shall be refunded to the insurance company on a quarterly basis within 60 calendar days after receipt of a properly completed estimated tax return. Any subsequent increase or decrease in the amount claimed for payments made by the insurance company shall be reflected in the amount of the credit taken for the calendar quarter in which the amount of the adjustment is finalized.

(3) The credit under this section is in addition to any other credits the insurance company is eligible for under this chapter.

(4) Any amount of the credit under this section that is in excess of the tax liability of the insurance company for the tax year shall be refunded, without interest, by the department to the insurance company within 60 calendar days of receipt of a properly completed annual return required under this part.

History: Add. 2011, Act 38, Eff. Jan. 1, 2012.

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APPELLEES' APPENDIX

TAB 41

INCOME TAX ACT OF 1967 (EXCERPT)
Act 281 of 1967

206.693 Administration of tax; conflicting provisions; rules; forms; additional tax liability; statistics detailing distribution of tax receipts.

Sec. 693. (1) The tax imposed by this part shall be administered by the department of treasury pursuant to 1941 PA 122, MCL 205.1 to 205.31, and this part. If a conflict exists between 1941 PA 122, MCL 205.1 to 205.31, and this part, the provisions of this part apply.

(2) The department may promulgate rules to implement this part pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

(3) The department shall prescribe forms for use by taxpayers and may promulgate rules in conformity with this part for the maintenance by taxpayers of records, books, and accounts, and for the computation of the tax, the manner and time of changing or electing accounting methods and of exercising the various options contained in this part, the making of returns, and the ascertainment, assessment, and collection of the tax imposed under this part.

(4) The tax imposed by this part is in addition to all other taxes for which the taxpayer may be liable.

(5) The department shall prepare and publish statistics from the records kept to administer the tax imposed by this part that detail the distribution of tax receipts by type of business, legal form of organization, sources of tax base, timing of tax receipts, and types of deductions. The statistics shall not result in the disclosure of information regarding any specific taxpayer.

History: Add. 2011, Act 38, Eff. Jan. 1, 2012.

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Petitioner-Appellee,

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APPELLEES' APPENDIX

TAB 42

REVENUE DIVISION OF DEPARTMENT OF TREASURY (EXCERPT)
Act 122 of 1941

205.21 Failure or refusal to make return or payment; obtaining information on which to base assessment; audit; rules; procedure; determination of refund as result of audit; appeal; frivolous protest; penalty; claim for refund; audits commenced after September 30, 2014; report; applicability of settlement process established under subsection (2)(e).

Sec. 21. (1) If a taxpayer fails or refuses to make a return or payment as required, in whole or in part, or if the department has reason to believe that a return made or payment does not supply sufficient information for an accurate determination of the amount of tax due, the department may obtain information on which to base an assessment of the tax. By its duly authorized agents, the department may examine the books, records, and papers and audit the accounts of a person or any other records pertaining to the tax. A taxpayer who has been audited by the department or its agent or a taxpayer whose books, records, and papers have been examined by the department shall, upon request, be provided a complete copy in printed or electronic format of the complete audit work papers and the audit report of findings. Any audit performed by the department or its duly authorized agents under section 3(a) shall be performed in accordance with auditing standards which shall include, but are not limited to, confidentiality, technical training, independence, due professional care, planning, supervision, understanding of the entity audited including internal control and an assessment of risk, audit evidence and documentation, sampling and sampling projections, and elements of the audit report of findings. The department shall promulgate administrative rules on audit standards within 1 year of the date of enactment of the amendatory act that added this sentence.

(2) In carrying out this section, the department and the taxpayer shall comply with the following procedure:

(a) The department shall send to the taxpayer a letter of inquiry stating, in a courteous and nonintimidating manner, the department's opinion that the taxpayer needs to furnish further information or owes taxes to the state, and the reason for that opinion. A letter of inquiry shall also explain the procedure by which the person may initiate communication with the department to resolve any dispute. This subdivision does not apply in any of the following circumstances:

- (i) The taxpayer files a return showing a tax due and fails to pay that tax.
- (ii) The deficiency resulted from an audit of the taxpayer's books and records by this state.
- (iii) The taxpayer otherwise affirmatively admits that a tax is due and owing.

(b) If the dispute is not resolved within 30 days after the department sends the taxpayer a letter of inquiry or if a letter of inquiry is not required pursuant to subdivision (a), the department, after determining the amount of tax due from a taxpayer, shall give notice to the taxpayer of its intent to assess the tax. The notice shall include the amount of the tax the department believes the taxpayer owes, the reason for that deficiency, and a statement advising the taxpayer of a right to an informal conference, the requirement of a written request by the taxpayer for the informal conference that includes the taxpayer's statement of the contested amounts and an explanation of the dispute, and the 60-day time limit for that request.

(c) If the taxpayer serves written notice upon the department within 60 days after the taxpayer receives a notice of intent to assess, remits the uncontested portion of the liability, and provides a statement of the contested amounts and an explanation of the dispute, the taxpayer is entitled to an informal conference on the question of liability for the assessment.

(d) Upon receipt of a taxpayer's written notice, the department shall set a mutually agreed upon or reasonable time and place for the informal conference and shall give the taxpayer reasonable written notice not less than 20 days before the informal conference. The notice shall specify the intent to assess, type of tax, and tax year that is the subject of the informal conference. The informal conference provided for by this subdivision is not subject to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, but is subject to the rules governing informal conferences as promulgated by the department in accordance with the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. The taxpayer may appear or be represented by any person before the department at an informal conference, and may present testimony and argument. At the party's own expense and with advance notice to the other party, a taxpayer or the department, or both, may make an audio recording of an informal conference. A taxpayer who has made a timely request for an informal conference may at any time withdraw that request by filing written notice with the department. Upon receipt of the request for withdrawal from the informal conference process, the department shall issue a decision and order of determination and, where appropriate, a final assessment, from which a taxpayer may seek an appeal as provided under section 22.

(e) After a timely request for an informal conference has been made under subdivision (c), the taxpayer and the department may seek to settle any or all issues in dispute by submitting a written settlement offer to

the other party in accordance with the following:

(i) The taxpayer shall submit a written settlement offer no later than 21 days after the informal conference. The settlement offer must identify the issues in dispute to be settled, the amount of the settlement offer, and the factual and legal bases supporting the taxpayer's settlement offer, and include any supporting documents. The state treasurer or the state treasurer's designee or designees shall review the settlement offer and the department's recommendation regarding the offer. The state treasurer or the state treasurer's designee or designees shall determine whether to accept, reject, or counter the settlement offer. The department shall notify the taxpayer in writing of the department's acceptance, rejection, or counter-offer. If the department does not accept the taxpayer's offer, the department shall include in its written notification the factual and legal bases for the department's rejection or counter-offer. The taxpayer may accept, reject, or counter the department's counter-offer and proceed in accordance with subparagraph (iii).

(ii) The informal conference referee or the administrator of the department's hearings division or its successor unit may submit a written report to the state treasurer or the state treasurer's designee or designees that identifies the relevant facts and issues involved in the dispute, the factual and legal bases supporting settlement of any or all of the issues, and a settlement recommendation. Doubt as to collectability shall not be a reason for settlement under this subdivision. If the state treasurer or the state treasurer's designee or designees determines to pursue a settlement, the department shall notify the taxpayer in writing of the department's settlement offer, to be determined by the state treasurer or the state treasurer's designee or designees. The department's written settlement offer shall include the factual and legal bases supporting the department's settlement offer. The taxpayer, in writing, may accept, reject, or counter the department's settlement offer and proceed in accordance with subparagraph (iii).

(iii) If the department rejects the taxpayer's settlement offer or counter-offer or the taxpayer rejects the department's settlement offer or counter-offer, the informal conference process shall proceed as provided under this section unless the taxpayer files a written notice to withdraw the request for an informal conference as provided in subdivision (d). If the department accepts the taxpayer's settlement offer or counter-offer or the taxpayer accepts the department's settlement offer or counter-offer, the department and the taxpayer shall execute a written agreement outlining all of the terms of the settlement. If the agreement settles all of the issues in dispute, then the written agreement is also the taxpayer's written notice to withdraw its request for an informal conference. Then the department shall, where appropriate, issue a final assessment that reflects the agreement and the agreed-upon amount of liability as to the settled issues. The department's final assessment issued under this subdivision is not subject to challenge or appeal under this act or reviewable in any court by mandamus, appeal, or other method of direct or collateral attack. With respect to any issues in dispute that are not included in the settlement agreement, the informal conference process shall proceed as provided under this section unless the taxpayer files a written notice to withdraw the request for an informal conference as provided in subdivision (d).

(iv) The taxpayer's and the department's settlement offers, counter-offers, and responses to those offers and counter-offers, the disposition of a settlement offer or counter-offer under this subdivision, and settlement agreements, may not be offered by any party in any proceeding before the Michigan tax tribunal, the court of claims, or any court of competent jurisdiction as proof of the validity of the department's decision, order, or assessment, or of the proper amount of the taxpayer's tax liability.

(v) Settlement offers, counter-offers, responses thereto, settlement agreements, and reports of the informal conference referee, the administrator, or the department related to settlements under this subdivision are exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and may not be obtained through discovery in any proceeding.

(f) Except for those issues that were settled pursuant to subdivision (e), after the informal conference, the department shall render a decision and order in writing, setting forth the reasons and authority, and shall assess the tax, interest, and penalty found to be due and payable. The decision and order are limited to the subject of the informal conference as included in the notice under subdivision (d).

(g) If the taxpayer does not protest the notice of intent to assess within the time provided in subdivision (c), the department may assess the tax and the interest and penalty on the tax that the department believes are due and payable. An assessment under this subdivision or subdivision (f) is final and subject to appeal as provided in section 22. The final notice of assessment shall include a statement advising the person of a right to appeal.

(3) If as a result of an audit it is determined that a taxpayer is owed a refund, the department shall send a notice to the taxpayer stating the amount of the refund the department believes is owed to the taxpayer as a result of the audit. The notice shall inform the taxpayer of his or her appeal rights. If the taxpayer disputes the findings of the audit, the taxpayer may serve written notice upon the department in the same manner as provided for in subsection (2)(c) and the taxpayer is entitled to the same informal conference and subsequent appeals as provided for in this section.

(4) If a protest to the notice of intent to assess the tax is determined by the department to be a frivolous protest or a desire by the taxpayer to delay or impede the administration of taxes administered under this act, a penalty of \$25.00 or 25% of the amount of tax under protest, whichever is greater, shall be added to the tax.

(5) During the course of the informal conference under subsection (2)(d), the taxpayer by written notice may convert his or her contest of the assessment to a claim for a refund. The written notice shall be accompanied by payment of the contested amount. The informal conference shall continue and the department shall render a decision and issue an order regarding the claim for refund.

(6) For audits commenced after September 30, 2014, the department must complete fieldwork and provide a written preliminary audit determination for any tax period no later than 1 year after the period provided for in section 27a(2) without regard to the extension provided for in section 27a(3). The limitation described in this subsection does not apply to any tax period in which the department and the taxpayer agreed in writing to extend the statute of limitations described in section 27a(2).

(7) For audits commenced after September 30, 2014, unless otherwise agreed to by the department and the taxpayer, the final assessment issued under subsection (2)(g) must be issued within 9 months of the date that the department provided the taxpayer with a written preliminary audit determination unless the taxpayer, for any reason, requests reconsideration of the preliminary audit determination or the taxpayer requests an informal conference under subsection (2)(c). A request for reconsideration by a taxpayer permits, but does not require, the department to delay the issuance of a final assessment under subsection (2)(g).

(8) The department shall publish semiannually on the department's website a report containing the following information:

(a) The aggregate amount of the department's original determinations of liability attributed to settlements entered into during the reporting period.

(b) The aggregate settled amount of liability attributed to the settlements entered into during the reporting period.

(c) If the total number of settlements between taxpayers and the department entered into during the reporting period is 5 or more, include the actual number of settlements. If the number of settlements is less than 5, the department shall state "less than 5".

(9) Except as otherwise provided under this subsection, the settlement process established under subsection (2)(e) only applies to taxes subject to administration under this act. The settlement process established under subsection (2)(e) does not apply to matters arising under the general property tax act, 1893 PA 206, MCL 211.1 to 211.155, the state real estate transfer tax act, 1993 PA 330, MCL 207.521 to 207.537, the tobacco products tax act, 1993 PA 327, MCL 205.421 to 205.436, the health insurance claims assessment act, 2011 PA 142, MCL 550.1731 to 550.1741, and the city income tax act, 1964 PA 284, MCL 141.501 to 141.787.

History: Add. 1980, Act 162, Eff. Sept. 17, 1980;—Am. 1986, Act 58, Eff. May 1, 1986;—Am. 1991, Act 83, Imd. Eff. July 18, 1991;—Am. 1993, Act 13, Imd. Eff. Apr. 1, 1993;—Am. 2002, Act 657, Imd. Eff. Dec. 23, 2002;—Am. 2006, Act 8, Eff. Oct. 1, 2006;—Am. 2006, Act 9, Eff. Oct. 1, 2006;—Am. 2006, Act 10, Eff. Oct. 1, 2006;—Am. 2006, Act 11, Eff. Oct. 1, 2006;—Am. 2014, Act 3, Imd. Eff. Feb. 6, 2014;—Am. 2014, Act 35, Imd. Eff. Mar. 20, 2014;—Am. 2017, Act 215, Imd. Eff. Dec. 20, 2017.

Compiler's note: Enacting section 4 of Act 162 of 1980 provides:

"Section 4. This amendatory act shall take effect 90 days after signature by the Governor. All new appeals from an assessment, decision or order of the department shall be made to the tax tribunal effective with the effective date of this act. An appeal to the state board of tax appeals filed prior to the effective date of this act shall proceed as follows:

"(a) A matter which has not been heard on or before January 1, 1981, shall be transferred to the tax tribunal as of January 1, 1981.

"(b) A matter which has been heard on or before January 1, 1981 shall be completed by the board and a decision issued before December 31, 1981.

"(c) An appeal having been filed in any court of record in this state prior to January 1, 1981 shall proceed in those courts until a decision is rendered. Appeals filed after January 1, 1981 shall be in accordance with this amendatory act."

Act 138 of 1981 purported to amend enacting sections 3 and 4 of Act 162 of 1980 to read as follows:

"Section 3. Sections 7, 8, and 9 of Act No. 122 of the Public Acts of 1941, as amended, being sections 205.7, 205.8, and 205.9 of the Compiled Laws of 1970, are repealed effective September 30, 1982.

"Section 4. (1) This amendatory act shall take effect September 16, 1980. All new appeals from an assessment, decision or order of the department shall be made to the tax tribunal effective September 16, 1980. An appeal to the state board of tax appeals filed prior to September 16, 1980 shall proceed as follows:

"(a) A matter which has not been heard, and submitted to the board for decision, on or before January 1, 1982 shall be transferred to the tax tribunal as of January 1, 1982.

"(b) A matter which has been heard, and submitted to the board for decision, on or before January 1, 1982 shall be completed and a decision issued before September 30, 1982.

"(2) An appeal having been filed in any court of record in this state prior to January 1, 1981 shall proceed in those courts until a decision is rendered. Appeals filed after January 1, 1981 shall be in accordance with this amendatory act."

However, the provisions of Act 162 of 1980 had already taken effect prior to October 29, 1981, the effective date of Act 138 of 1981.

Enacting sections 2 and 3 of Act 58 of 1986 provide:

"Section 2. The changes in penalties and interest affected by this amendatory act shall take effect July 1, 1986.

"Section 3. Except for section 31 and the provisions of enacting section 2, this amendatory act shall take effect May 1, 1986."

Popular name: Revenue Act

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APPELLEES' APPENDIX

TAB 43

REVENUE DIVISION OF DEPARTMENT OF TREASURY (EXCERPT)
Act 122 of 1941

205.8 Letters and notices sent to taxpayer's official representative.

Sec. 8. If a taxpayer files with the department a written request that copies of letters and notices regarding a dispute with that taxpayer be sent to the taxpayer's official representative, the department shall send the official representative, at the address designated by the taxpayer in the written request, a copy of each letter or notice sent to that taxpayer. A taxpayer shall not designate more than 1 official representative under this section for a single dispute.

History: Add. 1993, Act 14, Imd. Eff. Apr. 1, 1993.

Compiler's note: Former MCL 205.8, which pertained to the state board of tax appeals, was repealed by Act 37 of 1976, Eff. Dec. 31, 1977, Act 162 of 1980, Eff. Dec. 31, 1981, and by Act 138 of 1981, Eff. Sept. 30, 1982.

Popular name: Revenue Act

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 44

ADMINISTRATIVE PROCEDURES ACT OF 1969 (EXCERPT)
Act 306 of 1969

24.207 "Rule" defined.

Sec. 7. "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. Rule does not include any of the following:

- (a) A resolution or order of the state administrative board.
- (b) A formal opinion of the attorney general.
- (c) A rule or order establishing or fixing rates or tariffs.
- (d) A rule or order pertaining to game and fish and promulgated under parts 401, 411, and 487 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.40101 to 324.40120, 324.41101 to 324.41105, and 324.48701 to 324.48740.
- (e) A rule relating to the use of streets or highways, the substance of which is indicated to the public by means of signs or signals.
- (f) A determination, decision, or order in a contested case.
- (g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.
- (h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.
- (i) A declaratory ruling or other disposition of a particular matter as applied to a specific set of facts involved.
- (j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.
- (k) Unless another statute requires a rule to be promulgated under this act, a rule or policy that only concerns the inmates of a state correctional facility and does not directly affect other members of the public, except that a rule that only concerns inmates that was promulgated before December 4, 1986, is a rule and remains in effect until rescinded but shall not be amended. As used in this subdivision, "state correctional facility" means a facility or institution that houses an inmate population under the jurisdiction of the department of corrections.
- (l) A rule establishing special local watercraft controls promulgated under former 1967 PA 303. A rule described in this subdivision may be rescinded as provided in section 80113(2) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.80113.
- (m) All of the following, after final approval by the certificate of need commission under section 22215 of the public health code, 1978 PA 368, MCL 333.22215, or the statewide health coordinating council under former section 22217 of the public health code, 1978 PA 368:
 - (i) The designation, deletion, or revision of covered medical equipment and covered clinical services.
 - (ii) Certificate of need review standards.
 - (iii) Data reporting requirements and criteria for determining health facility viability.
 - (iv) Standards used by the department of health and human services in designating a regional certificate of need review agency.
 - (v) The modification of the 100 licensed bed limitation for extended care services programs set forth in section 22210 of the public health code, 1978 PA 368, MCL 333.22210.
- (n) A policy developed by the department of health and human services under section 6(3) of the social welfare act, 1939 PA 280, MCL 400.6, setting income and asset limits, types of income and assets to be considered for eligibility, and payment standards for administration of assistance programs under that act.
- (o) A policy developed by the department of health and human services under section 6(4) of the social welfare act, 1939 PA 280, MCL 400.6, to implement requirements that are mandated by federal statute or regulations as a condition of receipt of federal funds.
- (p) The provisions of an agency's contract with a public or private entity including, but not limited to, the provisions of an agency's standard form contract.
- (q) A policy developed by the department of health and human services under the authority granted in section 111a of the social welfare act, 1939 PA 280, MCL 400.111a, to implement policies and procedures necessary to operate its health care programs in accordance with an approved state plan or in compliance with state statute.
- (r) A minimum standard approved or established under authority granted by the Michigan indigent defense commission act, 2013 PA 93, MCL 780.981 to 780.1003.

(s) Scoring criteria and the definitions of overburdened community and significantly overburdened community developed by the department of environment, Great Lakes, and energy under the authority granted under parts 53 and 54 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.5301 to 324.5316 and 324.5401 to 324.5418.

History: 1969, Act 306, Eff. July 1, 1970;—Am. 1986, Act 243, Imd. Eff. Dec. 4, 1986;—Am. 1988, Act 333, Imd. Eff. Sept. 30, 1988;—Am. 1988, Act 363, Imd. Eff. Dec. 16, 1988;—Am. 1989, Act 288, Imd. Eff. Dec. 26, 1989;—Am. 1995, Act 224, Eff. Mar. 28, 1996;—Am. 1996, Act 489, Eff. Mar. 31, 1997;—Am. 1999, Act 262, Eff. Apr. 1, 2000;—Am. 2000, Act 216, Imd. Eff. June 27, 2000;—Am. 2011, Act 52, Imd. Eff. June 8, 2011;—Am. 2016, Act 444, Imd. Eff. Jan. 4, 2017;—Am. 2022, Act 134, Imd. Eff. June 30, 2022.

Administrative rules: R 791.1101 et seq. of the Michigan Administrative Code.

Popular name: Act 306

Popular name: APA

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

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APPELLEES' APPENDIX

TAB 45

Michigan Tax Tribunal

Licensing and Regulatory Affairs

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Tax Docket Lookup

Tax Docket Information:

Docket Number:	21-000039-TT
Status:	Disposed
Petitioner:	Nationwide Agribusiness Insurance Company
Respondent:	Michigan Department of Treasury
Case Type:	ET Non-Property
Division:	ET
County:	

Full Title: Nationwide Agribusiness Insurance Company, Petitioner vs. Michigan Department of Treasury, Respondent

Judge: Kopke, Peter M.

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Action Information						
Line #	Subject	Filer	Line Ref	Enter Date/Post Mark	Fee	Related Item
95	Order - Higher Court - MSC			05/22/2025		Download
94	Order - Higher Court			08/13/2024		Download
93	Decision Rev/Rem - Higher Court			06/20/2024		Download
						Download
92	Record Sent - COA			06/02/2023		
91	Certification Letter COA			06/02/2023		Download
90	Record requested- COA			06/01/2023		Download
89	Claim of Appeal was filed	PET		02/02/2023	\$100.00	Download
88	Final Opinion and Judgment			01/23/2023		Download
87	Proposed Opinion and Judgment			08/22/2022		Download
86	Proposed Order Granting Resp Motion for Summary Disp			08/22/2022		Download
85	Proposed Order Denying Petitioners Motion for Summary Disp			08/22/2022		Download
84	Proof of Service of Misc Documents was received.	PET		09/16/2021		Download
83	A response to a request has been filed.	PET		09/16/2021		Download
82	Documentation	RESP		09/02/2021		Download
81	A response to motion was filed.	RESP		09/02/2021		Download
80	Proof of Service of Misc Documents was received.	PET		09/02/2021		Download
79	Documentation	PET		09/02/2021		Download
78	A response to motion was filed.	PET		09/02/2021		Download

77	Errata request received.	RESP		08/04/2021		Download
76	Proof of Service of Misc Documents was received.	PET		08/03/2021		Download
75	Brief	PET		08/03/2021		Download
74	Proof of Service of Misc Documents was received.	PET		08/03/2021		Download
73	Documentation	RESP		08/02/2021		Download
72	Motion for Summary Disposition was received.	RESP		08/02/2021	\$100.00	Download
71	Proof of Service of Misc Documents was received.	PET		08/02/2021		Download
70	Exhibit List	PET		08/02/2021		Download
69	Motion for Summary Disposition was received.	PET		08/02/2021	\$100.00	Download
68	Proof of Service of Misc Documents was received.	PET		07/15/2021		Download
67	Proof of Service of Misc Documents was received.	RESP		07/12/2021		Download
66	Proof of Service			07/09/2021		Download
65	Granted	PET	60	07/09/2021		Download
64	Granted	PET	59	07/09/2021		Download
63	Order granting Motion.			07/09/2021		Download
62	Proof of Service of Misc Documents was received.	PET		07/02/2021		Download
61	Proof of Service of Misc Documents was received.	RESP		07/01/2021		Download
60	A Motion to Compel Deposition was filed.	PET		06/24/2021	\$0.00	Download
59	Motion to Extend was received.	PET		06/24/2021	\$50.00	Download
58	Proof of Service			06/23/2021		Download
57	Order Adjourning In-Camera Review		51	06/23/2021		Download
56	Denied	PET	43	06/23/2021		Download
55	Order Denying Motion		43	06/23/2021		Download
54	Withdrawal of Motion			06/18/2021		Download

53	Proof of Service of Misc Documents was received.	PET		06/03/2021		Download
						Download
52	A response to motion was filed.	RESP		06/11/2021		Download
51	An in-camera review has been scheduled.			06/11/2021		
50	Proof of Service			06/11/2021		Download
49	Scheduling Order			06/11/2021		Download
48	Placed in abeyance.	PET	43	06/11/2021		Download
47	Order Placing Motion in Abeyance		43	06/11/2021		Download
46	Proof of Service of Misc Documents was received.			06/04/2021		Download
45	Proof of Service of Misc Documents was received.	PET		06/04/2021		Download
44	Proof of Service of Misc Documents was received.	PET		06/02/2021		Download
43	Motion for Protective Order was received.	PET		06/02/2021	\$50.00	Download
42	Proof of Service			05/13/2021		Download
41	Order Extending Time for Pet to Respond to Disc			05/13/2021		Download
40	Order Consolidating with 21-000036			05/13/2021		Download
39	Order Consolidating 21-000611			05/13/2021		Download
38	Documentation	PET		05/03/2021		Download
37	Proof of Service of Misc Documents was received.			04/28/2021		Download
36	Proof of Service			04/28/2021		Download
35	A status conference has been scheduled.			04/28/2021		
34	Scheduling Order			04/28/2021		Download
33	Appearance	PET		04/26/2021		Download
32	Appearance	PET		04/26/2021		Download
31	Proof of Service			04/22/2021		Download
30	Granted	RESP	24	04/22/2021		Download
29	Granted		22	04/22/2021		Download
28	Order granting Motion.			04/22/2021		Download
27	Order for Immediate Consideration			04/22/2021		Download

26	Proof of Service of Misc Documents was received.	PET		04/14/2021		Download
25	Documentation	PET		04/14/2021		Download
24	Motion to Compel was received.	RESP		04/14/2021	\$50.00	Download
23	Proof of Service of Misc Documents was received.			04/09/2021		Download
22	Motion to Extend was received.			04/08/2021	\$50.00	Download
21	Proof of Service of Misc Documents was received.	RESP		03/12/2021		Download
20	Answer was received	RESP		03/12/2021		Download
19	ET Case Info Sheet			03/12/2021		Download
18	Proof of Service			03/05/2021		Download
17	Order Placing all Other Cases in Abeyance			03/05/2021		Download
16	Scheduling Order			03/05/2021		Download
15	Order Designating Lead Case			03/05/2021		Download
14	Order Req Resp to File Responsive Pleading			03/05/2021		Download
13	Denied	RESP	9	03/05/2021		Download
12	Granted		5	03/05/2021		Download
11	Miscellaneous Order			03/05/2021		Download
10	A response to motion was filed.	RESP		02/26/2021		Download
9	Motion to Extend was received.	RESP		02/23/2021	\$50.00	Download
8	Appearance	RESP		02/08/2021		Download
7	Proof of Service of Misc Documents was received.			02/05/2021		Download
6	Amended Petition			02/05/2021		Download
5	Motion for Leave to . . .			02/05/2021	\$50.00	Download
4	Petition has been verified	PET	2	01/19/2021		Download
3	Notice of Docket Number ET			01/19/2021		Download
2	A petition was received.	PET		01/15/2021		Download
1	ET Case Info Sheet			01/15/2021	\$250.00	Download

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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

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Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

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APPELLEES' APPENDIX

TAB 46

STATE OF MICHIGAN
IN THE COURT OF APPEALS

NATIONWIDE AGRIBUSINESS
INSURANCE COMPANY, et al.,

Court of Appeals No. 364790

Petitioners-Appellants,

Tax Tribunal No. 21-000039-TT

v

MICHIGAN DEPARTMENT OF
TREASURY,

Respondent-Appellee.

BRIEF OF APPELLEE MICHIGAN DEPARTMENT OF TREASURY

ORAL ARGUMENT REQUESTED

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Dated: May 31, 2023

TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	ii
Statement of Jurisdiction	v
Counter-Statement of Questions Presented	vi
Statutes Involved	vii
Introduction	1
Counter-Statement of Facts and Proceedings	3
Standard of Review	11
Argument	12
I. The Tax Tribunal properly determined that the ITA premiums tax and credits must be calculated and reported on an individual entity basis.....	12
A. The ITA premiums tax requires “an” individual insurance company to report its liability and pay tax.	12
B. The ITA and Insurance Code mandate that any credits claimed against the premiums tax, including MAIPF credits, be calculated and reported on an individual entity basis.	17
C. Nationwide relies on inapplicable—i.e., more general—definitions and misunderstands the premiums tax and retaliatory tax.....	18
D. Nationwide mischaracterizes case law concerning unitary business groups, which has no application in this matter.	24
II. The Tax Tribunal properly determined that the retaliatory tax, per the ITA and Insurance Code, must be calculated and reported by individual insurers.....	28
III. Nationwide’s allegation that Treasury improperly assessed penalties in this matter has been abandoned.	33
Conclusion and Relief Requested	36
Word Count Statement.....	37

INDEX OF AUTHORITIES

	<u>Page</u>
 Cases	
<i>Briggs Tax Serv, LLC v Detroit Pub Sch</i> , 485 Mich 69 (2010)	12
<i>Cheesman v Williams</i> , 311 Mich App 147 (2015)	35
<i>Commerce & Indus Ins Co v Dep't of Treasury</i> , 301 Mich App 256 (2013)	4, 23
<i>D'Agostini Land Co, LLC v Dep't of Treasury</i> , 322 Mich App 545 (2018)	26, 27
<i>Donkers v Kovach</i> , 277 Mich App 366 (2007)	19, 21
<i>Houghton Lake Area Tourism & Convention Bureau v Wood</i> , 255 Mich App 127 (2003)	26
<i>Menard Inc v Dep't of Treasury</i> , 302 Mich App 467 (2013)	26
<i>Montgomery Ward & Co v Dep't of Treasury</i> , 191 Mich App 674 (1991)	30
<i>People v Pinkey</i> , 501 Mich 259 (2018)	32
<i>SBC Health Midwest, Inc v City of Kentwood</i> , 500 Mich 65 (2017)	14, 15, 17
<i>TCF Nat'l Bank v Dep't of Treasury</i> , 330 Mich App 596 (2019)	24, 25
<i>TIG Ins Co v Dep't of Treasury</i> , 464 Mich 548 (2001)	3, 30
 Statutes	
MCL 8.3b	22, 23

MCL 205.22(3)	v
MCL 205.24(2)	34
MCL 205.24(4)	34
MCL 206.607(5)	13, 25
MCL 206.611	19, 21
MCL 206.611(5)	15, 16
MCL 206.623	20
MCL 206.623(1)	15
MCL 206.623(2)	15
MCL 206.635	passim
MCL 206.635(1)	13, 19, 22
MCL 206.635(2)	13, 19, 21, 22
MCL 206.637	vi, 12, 22
MCL 206.637(1)	17, 19
MCL 206.637(1)(c)	21
MCL 206.641	22
MCL 206.643	9, 20, 28
MCL 206.643(3)	18, 19, 20
MCL 206.651(f)	16
MCL 206.653(1)	16
MCL 206.691	20, 21
MCL 206.691(1)	18, 20
MCL 208.1261(f)	14, 24
MCL 500.108	5, 25

MCL 500.108(1)	13
MCL 500.134(5)	9, 17
MCL 500.476a	vi, 9, 18, 28
MCL 500.476a(1).....	29
MCL 500.476a(2).....	4, 23
MCL 500.3171	3

Rules

MCR 7.203(A).....	v

Regulations

Mich Admin Code, R 205.1013	34
Mich Admin Code, R 205.1013(7).....	34
Mich Admin Code, R 205.1013(8).....	35

STATEMENT OF JURISDICTION

Defendant-Appellee Michigan Department of Treasury (Treasury) concurs with Petitioners-Appellants' (collectively referred to herein as "Nationwide" unless otherwise stated) statement that this Court has jurisdiction over the Michigan Tax Tribunal's January 23, 2023 Final Opinion and Judgment under MCR 7.203(A) and MCL 205.22(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The Income Tax Act (ITA) provides that the premiums tax is levied against “an insurance company,” which is defined as a duly authorized insurer in the State of Michigan. MCL 206.635. Further, the Act provides that credits against the tax, including the Michigan Automobile Insurance Placement Facility (MAIPF) credits at issue, are available only to “an” individual insurance company. MCL 206.637. Does the ITA allow insurance companies to compute their premiums tax base and tax credits as a group, instead of as individual insurance companies?

Appellants’ answer: Yes.

Appellee’s answer: No.

Trial court’s answer: No.

2. The retaliatory tax imposed by the Insurance Code, MCL 500.476a, places non-Michigan insurers writing policies/risk in Michigan on the same footing as Michigan insurers operating in other states by comparing Michigan’s taxes/burdens with that imposed by the state of the foreign insurer. Does the Insurance Code allow a unitary business group of insurance companies to compute the retaliatory tax as a group, instead of as individual insurance companies?

Appellants’ answer: Yes.

Appellee’s answer: No.

Trial court’s answer: No.

3. Treasury assessed penalties against Nationwide. While Nationwide asserted the penalties were improper in its petition, it did not develop facts or brief the matter before the Tax Tribunal. Nationwide now asserts, without authority, that the tribunal’s affirmance of the assessments was erroneous. Has Nationwide abandoned this issue on appeal?

Appellants’ answer: No.

Appellee’s answer: Yes.

Trial court’s answer: Did not address.

STATUTES INVOLVED

MCL 500.476a(1)

[W]henever, by a law in force outside of this state or country, a domestic insurer or agent of a domestic insurer is required to make a deposit of securities for the protection of policyholders or otherwise, or to make payment for taxes, fines, penalties, certificates of authority, valuation of policies, or otherwise, or a special burden or other burden is imposed, greater in the aggregate than is required by the laws of this state for a similar alien or foreign insurer or agent of an alien or foreign insurer, the alien or foreign insurer of that state or country is required, as a condition precedent to its transacting business in this state, to make a like deposit for like purposes with the state treasurer of this state, and to pay to the revenue commissioner for taxes, fines, penalties, certificates of authority, valuation of policies, and otherwise an amount equal in the aggregate to the charges and payments imposed by the laws of the other state or country upon a similar domestic insurer and the agents of a domestic insurer, regardless of whether a domestic insurer or agent of a domestic insurer is actually transacting business in that state or country. [.]

MCL 206.635

- (1) Except as otherwise provided under subsection (4) or (6), each insurance company shall pay a tax determined under this chapter.
- (2) The tax imposed by this chapter on each insurance company shall be a tax equal to 1.25% of gross direct premiums written on property or risk located or residing in this state.

MCL 206.637

- (1) Except as otherwise provided under subsection (3), an insurance company may claim a credit against the tax imposed under this chapter in the following amounts:

* * *

- (c) Amounts paid to the Michigan automobile insurance placement facility pursuant to chapter 33 of the insurance code of 1956, 1956 PA 218, MCL 500.3301 to 500.3390.

INTRODUCTION

This case concerns a foreign insurance company's tax liability under Michigan's Income Tax Act (ITA) and Insurance Code. Each insurance company is responsible for paying a tax on either its gross premiums, or a "retaliatory" tax—which seeks to impose the same tax on a foreign insurer as its state of origin would impose on a Michigan insurer—whichever is greater. An insurance company may also take credits against its premiums tax base. Those credits include payments of Michigan Automobile Insurance Placement Facility (MAIPF) assessments.

Appellants are foreign insurance companies responsible for paying Michigan's premiums tax, or otherwise a retaliatory tax, whichever is greater. This fact would be lost on a reader relying on Appellants' brief to understand the issues in this appeal. The word "premiums" appears three times in Appellants' brief and nowhere in its legal argument. Yet this is the tax that insurance companies are responsible to pay. Instead, Appellants focus on general unitary business principles without acknowledging the more specific provisions governing the tax base/calculation they are required to make and the credits that are available to insurance company taxpayers. Like the cherry-picked credit-sharing scheme at issue, Appellants' argument is a pick-and-choose-what-you-like argument that ignores the actual tax scheme at issue and allows entities that never paid MAIPF assessments to benefit from them anyway.

Specifically, Appellants claim to be a unitary business group of insurance companies that may share credits. In other words, Appellants assert that an insurance company that did not pay any MAIPF assessments may still claim

MAIPF credits because it is “unitary” with another entity in the group that did generate those credits.

But Appellants misunderstand that the premiums tax and the retaliatory tax are imposed on “an” insurance entity. There is no “unitary business group” of insurance entities for purposes of the premiums tax or the retaliatory tax. The same is true of tax credits, which may only be claimed by “an” insurance company—i.e., the entity that actually generated the credits by paying MAIPF assessments. Further, Appellants misunderstand that the retaliatory tax compares Michigan’s burdens (taxes, fees, and assessments) to the burdens on the same premiums a hypothetical Michigan insurance company would pay in the foreign insurer’s origin state. This analysis is impossible for a purported “unitary business group” of insurers from various foreign states that all impose different taxes and burdens on an insurance company.

In short, the governing provisions (i.e., the more specific definitions) are clear and unambiguous that both the taxed entity and the proper credit claimant are “an insurance company.” Appellants’ tortured reading of the statute, case law mischaracterizations, and selective testimony references do not otherwise undermine this simple and unremarkable conclusion.

For these reasons, the Tax Tribunal’s well-reasoned and thorough determination should be affirmed.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Statutory background of the Corporate Income and Retaliatory Tax.

Under the ITA, special taxes are imposed on insurance companies. Part 2 of the ITA imposes a tax on insurance companies for direct premiums written in Michigan. The statute also allows certain credits to be claimed against the premiums tax, including MAIPF credits. To claim MAIPF credits, an insurance company must pay an assessment amount to the MAIPF (i.e., the Facility). The Facility issues MAIPF assessments to individual insurance companies, which are responsible for paying these assessed amounts. The assessment is based on the individual insurance company's participation ratio (percent of total automobile written premiums in Michigan) for anticipated expenses of operation and administration of the Plan, per MCL 500.3171. In other words, each insurance company must calculate and claim its own MAIPF credits on an individual basis.

The ITA also includes a retaliatory tax component on foreign insurers doing business in Michigan. Unlike domestic insurers, foreign insurers doing business in Michigan are required to pay the greater of either the tax levied on gross direct premiums, or a retaliatory tax as set for under § 476a of the Insurance Code.

Retaliatory tax regimes have been common insurance taxation for over a century and Michigan has had a form of retaliatory tax since 1871. *TIG Ins Co v Dep't of Treasury*, 464 Mich 548, 552 (2001). Foreign insurers determine their retaliatory tax by computing the total burdens imposed on the foreign insurer by Michigan. That amount is compared with the total burdens that would be imposed

by the foreign insurer's domicile state on a hypothetical Michigan insurer conducting the same amount of business in the foreign insurer's domicile state. If the total charges on the Michigan insurer exceeds the charges imposed by Michigan on the foreign insurer, then the foreign insurer owes retaliatory tax. The retaliatory tax on foreign insurers is designed to encourage states to impose equal tax burdens on foreign and domestic insurers with the goal of promoting interstate commerce. *Commerce & Indus Ins Co v Dep't of Treasury*, 301 Mich App 256, 265 (2013); See also MCL 500.476a(2) ("The purpose of this section is to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes."). Michigan's retaliatory tax achieves that purpose by ensuring the total burden levied on a foreign insurer in Michigan are at least equal to the burdens that would be imposed on a Michigan insurer operating in that foreign insurer's home state.

The ITA and Insurance Code, as well as Treasury's policy and forms, do not allow for group-wide tax computation and the sharing of credits amongst separate insurance companies.

The premiums tax and retaliatory tax both require that each insurance company report its own tax liability, including credits against tax. Neither the ITA nor the Insurance Code supports a group-wide tax computation and the sharing of credits for insurance companies as members of a unitary group. Consequently, Treasury has not promulgated a schedule or form for group returns. Similarly, there is no schedule or form available to transfer credits to another insurance company in the unitary business group. Instead, consistent with the ITA and the

Insurance Code, Treasury's promulgated forms for insurance companies require each insurance company to report its own direct premiums and credits as separate entities when computing Michigan's tax on premiums. Treasury's forms also require each foreign insurer operating in Michigan to compute the retaliatory tax as separate entities.

Nationwide's business operations.

Insurance companies must be duly authorized insurers in the State of Michigan. (MCL 500.108; Docket Line No. 73, pp 3–4.) The petitioners in this litigation (collectively referred to herein as “Nationwide” unless otherwise stated) are foreign insurance companies from various states of origin that all purportedly comprise a unitary business group. For example, Nationwide Agribusiness Insurance Company (Nationwide Agribusiness) is a corporation domiciled in Iowa. (Docket Line No. 73, p 6 ln 4.) Nationwide Mutual Insurance Company (Nationwide Mutual) is a corporation domiciled in Ohio. (*Id.* at 41 ln 4.) Other entities to this litigation have various states of origin, including Pennsylvania and Wisconsin. (*Id.* at 77 ln 4; *id.* at 111 ln 4.) Both Nationwide Mutual and Nationwide Agribusiness (as well as all other entities) are licensed to engage in the business of insurance in Michigan.

The following facts are undisputed:

- Unitary business groups (UBGs) are not “authorized insurers” in the State of Michigan—only individual insurance companies are;
- UBGs do not write risk (insurance policies) in Michigan—only individual insurance companies do;

- UBGs do not charge and collect premiums in Michigan—only individual insurance companies do;
- UBGs are not assessed by the Michigan Assigned Claims Plan (MACP)—only individual insurance companies are;
- UBGs do not pay MAIPF assessments—only individual insurance companies do.

Accordingly, there is no dispute that as a matter of fact and law (per Chapter 12 of the ITA), a UBG does not write risk or have gross premiums, and, therefore, has no tax base against which to levy the premiums (or retaliatory) tax. Further, a UBG does not pay MAIPF assessments and has no credits to apply against the premiums (or retaliatory) tax.

The Nationwide petitioners' original returns calculated their Michigan Corporate Income and Retaliatory tax on a separate entity basis.

The dispute in this case involves premiums and retaliatory tax liability for the 2014 through 2016 tax years. For those years, the Nationwide petitioners and related entities each filed Insurance Company Returns for Corporate Income and Retaliatory Taxes on an individual basis, reporting their own direct premiums written in Michigan when calculating their own premiums tax liability. For example, for 2015, Nationwide Agribusiness reported the amount of direct premiums it wrote in Michigan, \$10,363,260. (Docket Line No. 73, p 6 ln 11; *id.* at 206.)

These original returns calculated and claimed credits against its reported premiums tax calculation, also on an individual basis. For example, Nationwide Agribusiness claimed a \$33,799 credit for payments Nationwide Agribusiness made

to the Facility. (*Id.* at 6 ln 20c; *id.* at 254.) That credit and others were derived from Nationwide Agribusiness' activities. Ultimately, Nationwide Agribusiness reported \$91,371 in premiums tax liability. (*Id.* at 7 ln 41.)

Because these entities were foreign insurers operating in Michigan, they completed the portion of the Corporate Income and Retaliatory Tax Return dedicated to Michigan's retaliatory tax. For example, Nationwide Agribusiness reported \$102,408 as the total burdens that would be imposed by Iowa on a hypothetical Michigan company doing the same business in Iowa. (*Id.* at ln 39A.) The Michigan burdens reported by Nationwide Agribusiness totaled \$103,754. (*Id.* at ln 39B.) That amount includes credits that are derived from Nationwide Agribusiness' own activities, including but not limited to, a \$2,277 regulatory assessment paid to the State of Michigan, Department of Insurance and Financial Services and a \$4,473 payment by Nationwide Agribusiness to the Safety Education and Training Fund. (*Id.* at ln 33b and ln 37b; *id.* at 256–257; *id.* at 259.) Because the Michigan actual burdens Nationwide Agribusiness claimed on its return exceeded the Iowa burdens, Nationwide Agribusiness reported \$0 as its retaliatory amount. (*Id.* at 7 ln 40.) Ultimately, Nationwide Agribusiness reported \$91,371 in premiums tax liability for the 2015 tax year. (*Id.* at ln 41.)

The Nationwide petitioners filed amended returns calculating their corporate income and retaliatory taxes and credits on a purported “unitary” basis.

The Nationwide petitioners amended their returns calculating their corporate income and retaliatory taxes contrary to the ITA, the Insurance Code, and the

method provided in Treasury's forms for insurance companies. Specifically, these entities computed their premiums and retaliatory taxes and credits on a "unitary," or group-wide basis with several other insurance companies with whom they claim to have a unitary relationship. (Docket Line No. 73, pp 261–267.) By doing so, these entities reduced their retaliatory tax calculations for foreign insurers included within the purported unitary business group.

The group also redistributed otherwise unused nonrefundable credits to reduce the premiums tax liability of other member entities. For example, Nationwide Agribusiness' 2015 Amended Return increased the MAIPF from \$33,799 to \$125,170. (*Id.* at 269 ln 20c.) The ~\$90,000 credit increase does not tie back to payments Nationwide Agribusiness made to the Facility that it forgot to report in its original 2015 return. Instead, that figure represents a portion of a credit that went unused by another member of the group that was transferred to Nationwide Agribusiness so that it could reduce its premiums tax calculation from \$91,371 to \$0. (*Id.* at 272–275.)

In short, the amended returns claimed amounts paid to the Facility as MAIPF credits on a "unitary," or group-wide computation basis, i.e., distributed excess credits among the insurance company entities of Nationwide's purported unitary business group to offset premiums tax liability imposed by MCL 206.635. But the entities claiming the credits did not necessarily generate those credits—instead, they claimed those credits as their own when the credits would reduce their

tax liability, and when the credits would otherwise be unused by the original credit-generating entities whose tax liabilities were already low or zero.

The Nationwide petitioners also amended their retaliatory tax calculation, this time claiming amounts as “other assessments” on a “unitary,” or group-wide computation basis and distributing those amounts among the insurance company entities of its purported unitary business group to offset any retaliatory tax imposed by MCL 500.476a and MCL 206.643. For example, Nationwide Agribusiness increased the line 38b total of all other assessments paid in state of incorporation and/or to State of Michigan on its 2015 amended return from \$0 to \$90,026. (Docket Line No. 73, p 7 ln 38b; *id.* at 270 ln 38b.) According to Nationwide, “certain companies have amounts on line 38 which also may be transferred to other companies as needed to reduce or eliminate the retaliatory tax on a unitary basis.” (*Id.* at 261.) Nationwide has confirmed that the \$90,026 amount Nationwide Agribusiness claimed on line 38b of its 2015 Amended Return “constitutes a portion of the Unitary Business Group’s MACP assessments that were paid to the MAIPF.” (*Id.* at 278.) This is contrary to MCL 500.134(5), which prohibits MAIPF assessments being claimed as “burdens” for purposes of the retaliatory tax.

The effect of Nationwide’s scheme was to negate the retaliatory tax by distributing burdens/credits such that the premiums tax and the retaliatory tax were the same amount. For example, Nationwide Agribusiness reported \$102,408 as the total taxes, fees, and assessments that would be imposed by Iowa on a hypothetical Michigan company doing the same business in Iowa. (*Id.* at 270 ln

39A.) But this time, Nationwide Agribusiness' *Michigan* burdens also totaled \$102,408. (*Id.* at ln 39B.) This effectively negated any retaliatory tax. To achieve that result, Nationwide Agribusiness reduced its previously reported Michigan premiums tax from \$91,371 to \$0. (*Id.* at 7 ln 27B; *id.* at 270 ln 27B.) Nationwide Agribusiness then reported \$90,026 in Michigan burdens transferred to it from other insurance companies. (*Id.* at 270 ln 38B; *id.* at 277–278.) Like its original return, the Michigan actual burdens Nationwide Agribusiness claimed on its Amended Return did not exceed the Iowa burdens. As a result, this entity reported \$0 as its retaliatory amount. Ultimately, the entity reported \$0 in Michigan corporate income and retaliatory taxes and requested a \$91,371 refund for alleged corporate income tax overpayments. (*Id.* at 270 ln 41 and ln 58.)

Treasury initially honored the overpayment amounts claimed on the Nationwide petitioners' amended returns and issued refunds where requested. Treasury then discovered that the refunds were based on Nationwide's computation of the retaliatory and premiums tax and the claiming of credits on a "unitary," or group-wide basis—i.e., credit transfers/sharing to entities that did not incur those burdens. Treasury then issued notices of refund adjustments and assessments where necessary for the refunded amounts. The Nationwide petitioners requested an informal conference. (*Id.* at 280; *id.* at 282.) Treasury held informal conferences December 9, 2019, and issued an Informal Conference Recommendation, which were affirmed by Decisions and Orders of Determination, dated November 17, 2020. (*Id.* at 284–288; *id.* at 290–294.)

Michigan Tax Tribunal proceedings.

The Nationwide petitioners filed a series of petitions alleging that Treasury's corporate income and retaliatory tax computations are contrary to law because they do not calculate their Michigan corporate income and retaliatory tax liability on a group-wide basis. (Docket Line No. 6, ¶ 7; Docket Line No. 39.) They further alleged that Treasury has failed to administer Part 2 of the ITA because it has not promulgated forms allowing group-wide tax computation and the sharing of credits amongst members of a unitary business group. (Docket Line No. 6, ¶¶ 7(f)–(g); Docket Line No. 39.) Finally, while they alleged that Treasury's assessments of penalty were erroneous, (Docket Line No. 6, ¶¶ 7(a)–(b)), Nationwide did not develop any facts or brief this issue below.

These matters were consolidated and ultimately decided in Treasury's favor. Specifically, the Tax Tribunal agreed with Treasury that each insurer must individually calculate its own credits and tax base, and cannot distribute credits among insurance affiliates who did not generate the credits. (Docket Line Nos. 87 and 88.)

Nationwide now appeals from the Tax Tribunal's Final Opinion and Judgment.

STANDARD OF REVIEW

The standard of review for cases originating from the Michigan Tax Tribunal is multifaceted. "If fraud is not claimed, this Court reviews the Tax Tribunal's decision for misapplication of the law or adoption of a wrong principle." *Briggs Tax*

Serv, LLC v Detroit Pub Sch, 485 Mich 69, 75 (2010). Moreover, “when statutory interpretation is involved, this Court reviews the Tax Tribunal’s decision de novo.” *Id.* Also, the Court reviews the tribunal’s rulings on summary disposition de novo. *Id.*

ARGUMENT

I. The Tax Tribunal properly determined that the ITA premiums tax and credits must be calculated and reported on an individual entity basis.

The ITA is clear that the premiums tax is levied against “an insurance company,” which is defined as a duly authorized insurer in the State of Michigan. MCL 206.635. Further, the Act provides that credits against the tax, including the MAIPF credits at issue, are available only to “an” individual insurance company. MCL 206.637. For these reasons, the Tax Tribunal properly determined that a unitary business group—a network of different entities—cannot calculate its premiums tax base or credits on a combined basis.

A. The ITA premiums tax requires “an” individual insurance company to report its liability and pay tax.

The ITA imposes one of three separate types of taxes upon an entity depending on whether the entity is a standard corporation, an insurance company, or a financial institution. For insurance companies, Chapter 12 of the ITA imposes a premiums tax. MCL 206.635. The premiums tax is calculated as 1.25% of gross direct premiums written on property or risk located in Michigan. MCL 206.635.

Importantly, under Chapter 12 of the ITA, an insurance company's premiums tax liability is *calculated* on an individual entity basis.

Specifically, the Code states, "*each* insurance company shall pay a tax determined under this chapter" and "[t]he tax imposed by this chapter on *each* insurance company shall be a tax equal to 1.25% of gross direct premiums written on property or risk located or residing in this state" MCL 206.635(1), (2) (emphasis added). In short, under the plain language of the ITA, it is clear that the insurance premiums tax is calculated in the singular rather than the aggregate.

Nationwide asserts that the term "insurance company" as used in the ITA consists of multiple insurance companies as a purported "unitary business group." (Docket Line No. 6, ¶¶ 8(c)–(d).) This argument defies the plain language of the statute. The ITA defines an "insurance company" in the singular rather than the "plural." It states that an insurance company "means *an* authorized insurer as defined in section 108 of the insurance code of 1956, 1956 PA 218, MCL 500.108." MCL 206.607(5) (emphasis added). The Insurance Code of 1956 defines an "authorized" insurance company as "*an* insurer duly authorized, by a subsisting certificate of authority issued by the [insurance] commissioner, to transact insurance in this state." MCL 500.108(1) (emphasis added).

The indefinite article "an" as used both in the ITA and the Insurance Code of 1956 is used to modify the singular noun "insurance company." This also comports with the Insurance Code, which defines an "insurance company" as an "authorized insurer," which is another textual indication that the tax base and credits are

computed at the individual entity level. Further, authorized insurers are issued certificates of authority by the Michigan Insurance Commissioner. (Docket Line No. 73, pp 3–4.) The Tax Tribunal properly recognized this unremarkable fact and its implications: “UBGs are totally different from insurance companies. UBGs do not write premiums nor do any other functions that an insurance company does. UBGs are simply a creation of Tax law.” (Docket Line No. 87, p 12.) Thus, from a plain reading of the ITA, an insurance company’s tax liability is determined and calculated in the singular rather than the aggregate. Accordingly, the Tax Tribunal properly determined that Nationwide erred in calculating its members’ tax liability on a group-wide basis.

The tribunal’s decision is further supported by comparing the taxing scheme for insurance companies under Chapter 12 of the ITA, which calculates tax liability on an individual entity basis for “each” insurance company. This is to be contrasted with standard taxpayers under Chapter 11 and financial institutions under Chapter 13, MCL 208.1261(f), which calculate taxes on either an individual or group-wide basis depending on whether the entities form a unitary business group. Had the Legislature wanted the premiums tax for insurance companies to be calculated on a group-wide basis, it certainly knows how. Accordingly, it must be presumed that the Legislature’s failure to do so must be intentional. As explained by the Michigan Supreme Court in *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65 (2017):

We do not read requirements into a statute where none appear in the plain language and the statute is unambiguous. It is not within the province of this Court to read therein a mandate that the [L]egislature *has* not seen fit to incorporate. Further, the Legislature knows how to

require that an institution be a nonprofit for an exemption to apply, as evidenced by the express imposition of that requirement in MCL 211.7n and in other portions of MCL 211.9(1)(a). We must presume that the Legislature's failure to limit the tax exemption found in MCL 211.9(1)(a) to nonprofit educational institutions was intentional. Therefore, we will not write a nonprofit requirement into the applicable portion of MCL 211.9(1)(a). [*Id.* at 72–73 (emphasis added) (citations omitted).]

Similarly, had the Legislature meant to provide for “unitary” filings for premiums and retaliatory tax purposes, it knew how to do so. Its omission from the more specific/applicable provisions in Chapter 12, means that each individual insurance company must report its own credits and tax liability.

To illustrate, for standard corporations under Chapter 11, the tax liability can be determined either on an individual entity basis or group-wide basis depending on whether the standard corporation forms a unitary business group. The ITA imposes a corporate income tax on every *taxpayer* with business activity within Michigan. MCL 206.623(1). The corporate income tax is imposed on the corporate income tax base, which means a taxpayer's business income subject to certain adjustments under the code. MCL 206.623(1), (2). In summary, the corporate income tax is determined by the *taxpayer's* income and adjustments.

The definition of “taxpayer” under the ITA includes either individual entities or a unitary business group of entities: “[t]axpayer’ means a corporation, insurance company, financial institution, or unitary business group, *whichever is applicable under each chapter*, that is liable for a tax, interest, or penalty under this part.” MCL 206.611(5) (emphasis added). “Whichever is applicable” in this instance is paramount because there is no unitary business group as it concerns insurance

companies under Chapter 12 of the ITA. The statutory language further states that “[f]or purposes of chapters 11 and 14, taxpayer does not include an insurance company or financial institution.” MCL 206.611(5). In short, the corporate income tax is imposed on either an individual corporation or a unitary business group of corporations.

Similar to standard corporations, tax liability for financial institutions under Chapter 13 of the ITA can be determined either on an individual entity basis or group-wide basis depending on whether the financial institutions form a unitary business group. The definition of “financial institution” includes a unitary business group of financial institutions such as certain banks, associations, and institutions. MCL 206.651(f). Under the ITA, a financial institution is subject to a franchise tax imposed on the tax base of the financial institution “as determined under [MCL 206.655] after allocation or apportionment” MCL 206.653(1). The tax liability is calculated on either an individual entity basis or a group-wide basis depending on whether the financial institution is a unitary business group. The Legislature has not defined an “insurance company” to include a unitary business group because, gross premiums (which comprise the tax base) are written by “an insurance company” per the ITA and the Insurance Code. As patent from Chapters 11 and 13, had the Legislature wanted the premiums tax to be determined on a group-wide basis, it knows how to do so. It is not for a court to write a group-wide calculation into a statute where it does not exist.

B. The ITA and Insurance Code mandate that any credits claimed against the premiums tax, including MAIPF credits, be calculated and reported on an individual entity basis.

The ITA is clear that only single insurance companies may claim credits, including MAIPF credits, against the premiums tax. MCL 206.637(1) provides that “an insurance company may claim a credit against the tax imposed under this chapter in the following amounts: . . . Amounts paid to the Michigan automobile insurance placement facility pursuant to chapter 33 of the insurance code of 1956, 1956 PA 218, MCL 500.3301 to 500.3390.”

Neither the ITA nor the Insurance Code make any mention of a “unitary business group” of insurance companies—either as an assessed entity or as a credit claimant. And this makes sense: only individual insurers are assessed by the MAIPF (i.e., the Facility). (Docket Line No. 73, p 254.) Neither does either scheme contemplate that an entity that did *not* pay any MAIPF assessment can still benefit from a tax credit as if it had. The omission of a “unitary” group of insurance company taxpayers as an eligible credit claimant is intentional and must be given effect. *SBC Health Midwest*, 500 Mich at 72–73.

Finally, Nationwide ignores that MAIPF assessed amounts cannot be claimed as credits against the retaliatory tax. MCL 500.134(5). For these reasons alone, Nationwide’s claims must fail as a matter of law, and the Tax Tribunal decision must be upheld.

C. Nationwide relies on inapplicable—i.e., more general—definitions and misunderstands the premiums tax and retaliatory tax.

Nationwide attempts to rely on MCL 206.691 as requiring that the premiums tax must be calculated on a group-wide basis for unitary business groups. This statutory provision is not the “silver bullet” they hope. Pursuant to MCL 206.691(1) “a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group.” MCL 206.691(1). But § 691 is the more general provision applicable to corporate taxpayers and unitary business groups subject to a corporate income tax base, whereas the premiums and retaliatory taxes, MCL 206.635 and MCL 500.476a, are the more specific and applicable provisions. The Tax Tribunal recognized as much: “MCL 206.691 makes no reference to premiums and retaliatory taxes. The Legislature intended this provision to concern general corporate income taxes, and not every subcategory of taxes. If the Legislature intended for this provision to apply to all taxes, it would have said so in this provision.” (Docket Line No. 87, p 11.)

Further, the ITA is clear that the premiums tax is imposed on “an” insurance company. Specifically, Chapter 12 of the ITA provides for the filing of a return for “an insurance company.” It states, in part: “*an* insurance company shall file the annual return required under this part before March 2 after the end of the tax year, and an automatic extension under section 685(3) is not available.” MCL 206.643(3) (emphasis added). The indefinite article “an” modifies the singular noun “insurance company.” In short, the Legislature’s decision to narrowly frame the calculation of premiums tax on a single-entity basis does not support a group-wide calculation.

Nationwide concedes that the definition it relies on for a “unitary business group” is “included in chapter 10 of the CIT. That chapter provides the general rules and definitions” (Appellants’ Br, p 16.) This forms the core of Nationwide’s statutory argument: “MCL 206.611(5) and 206.691 . . . plainly and unambiguously authorize the filing of unitary returns by a unitary group of insurance companies.” (*Id.* at 31.) But Nationwide does not consider that more specific provisions trump general provisions. “When two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute must control over the more general statute.” *Donkers v Kovach*, 277 Mich App 366, 371 (2007). Nationwide is correct that certain general definitions are found in Chapter 10, and that general rules of tax administration are found in Chapter 16. But the premiums and retaliatory tax are imposed on insurance companies under Chapter 12 of the ITA, as well as the Insurance Code. This is to be distinguished from franchise taxes on financial institutions (Chapter 13) and corporate income taxes on standard taxpayers (Chapter 11).

Nationwide also asserts that the general definition of “unitary business group” in MCL 206.611 applies to Chapter 12. (Appellants’ Br, p 16.) Nationwide is wrong. Chapter 12 of the ITA has “explicit statutory text” to the effect that “each” insurance company is responsible for its own premiums/retaliatory tax liability, which is calculated on an entity-by-entity basis. MCL 206.635(1), (2); MCL 206.643(3); MCL 206.637(1). Chapter 12 contains the more specific provision, and, therefore, governs this matter. *Donkers*, 277 Mich App at 371.

The statutory language in MCL 206.691, on the other hand, does not address the calculation of the premiums/retaliatory tax for insurance companies, or the gross premiums tax base.¹ Rather, for purposes of determining tax liability, this statutory provision specifically addresses the elimination of intercompany transactions for purposes of determining *the corporate tax base, apportionment formulas, exemption, credits, and filing thresholds* for regular corporations.² Under Chapter 11 of the ITA, regular corporations are taxed on their corporate income tax base, after allocation or apportionment. See MCL 206.623. Insurance companies, on the other hand, are taxed on their gross premiums and are not subject to apportionment (all premiums are collected on policies/risk in the State of Michigan, for which reason *there is no apportionment*) or a filing threshold. MCL 206.635. Further, foreign insurers are subject to the comparative analysis of the retaliatory tax. MCL 206.643. This is further evidenced by the remaining statutory text, which, in pertinent part, eliminates financial institutions and insurance companies' corporate income tax from the corporate income tax base. MCL 206.691. This

¹ A plain reading of MCL 206.691 and MCL 206.643(3) as a whole, indicates that the “combined return” requirement under MCL 206.691 specifically applies to entities filing a corporate income tax return, and not to insurance companies filing a premium tax return. This statutory provision requires all transactions between those persons included in a unitary business group be eliminated from the corporate income tax base, the apportionment formulas, and for purposes of determining exemptions, credits, and the filing threshold. MCL 206.691(1). Neither the corporate income tax base nor the apportionment formula apply to insurance companies.

² Treasury refers to C-corporations taxed under Chapter 11 as “standard” taxpayers. Insurance companies taxed under Chapter 12 and financial institutions taxed under Chapter 13 are referred to as “regulated” taxpayers.

Court must recognize this distinction and give meaning to the more specific provisions governing the premiums tax base and premiums/retaliatory tax.

Donkers, 277 Mich App at 371.

Further, Nationwide ignores that MCL 206.691 explicitly eliminates income attributable to an insurance company or financial institution:

If a United States person included in a unitary business group or included in a combined return is subject to the tax under chapter 12 [insurance company] or 13 [financial institution], any corporate income attributable to that person shall be eliminated from the corporate income tax base and any sales attributable to that person shall be eliminated from the apportionment formula under this part.

Thus, by its very terms, Section 691 separates the tax base as it concerns insurance companies and banks from that of standard taxpayers.

Similarly, Nationwide’s argument that interpreting the ITA in accordance with the singular language of “an insurance company” would render MCL 206.611 and 206.691 superfluous (Appellants’ Br, p 21) is wrong—these provisions have general application. Merely because they have no application to the calculation of premiums/retaliatory tax in Chapter 12 (owing to more specific provisions) does not mean they are superfluous or nugatory.

Chapter 12 specifically mandates “each insurance company” pay a tax determined under this chapter. MCL 206.635. This chapter requires “each insurance company” to pay a tax equal to 1.25% of gross direct premiums written on property or risk located or residing in Michigan. MCL 206.635(2). Chapter 12 permits “an insurance company” to claim “a credit against the tax imposed under this chapter” including amounts it paid to the MAIPF. MCL 206.637(1)(c). In

addition, “an insurance company” is subject to the premiums tax or the retaliatory tax, whichever is greater. MCL 206.641. In short, unlike the tax treatment of standard taxpayers, which are explicitly allowed to file as UBGs, “each” insurance company is responsible for its own premiums/retaliatory tax liability. That they are treated separately means—by definition—that there is no superfluous language.

This makes sense within the context of the statutory scheme. Individual insurance companies are authorized insurers who can write policies and charge premiums in the State of Michigan, in accordance with the Insurance Code. Thus, certificates of authorization are issued to individual insurance companies, e.g., Crestbrook Insurance Company—not the unitary business group. (Docket Line No. 73, pp 3–4.) The Legislature understood that, and so harmonized the ITA with the Insurance Code by levying premiums/retaliatory taxes on “each insurance company.” MCL 206.635(1), (2).

Finally, Nationwide argues that the Tax Tribunal improperly relied on MCL 206.635 and 206.637 for the propositions that tax is “being imposed on ‘each insurance company’ ” and that only “an insurance company” can take credits against the tax. (Appellants’ Br, p 23.) Nationwide cites MCL 8.3b, which provides that “[e]very word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number.” But:

[T]he statute only states that a word importing the singular number “may extend” to the plural. The statute does not say that such an automatic understanding is required. Moreover, MCL 8.3 (citation omitted) provides that the rule stated in § 3b shall be observed “unless

such construction would be inconsistent with the manifest intent of the Legislature.” Second, the Legislature has directed that “all words and phrases shall be construed and understood according to the common and approved usage of the language” [MCL 8.3a (citation omitted).]” [*Robinson v Detroit*, 462 Mich 439, 461 n 18 (2000).]

Here, there is no necessary connection (“automatic understanding”) between the singular phrase “an insurance company” and a unitary business group (which itself is still a singular phrase). If anything, the logic of Nationwide’s argument would have to mean that in place of “an insurance company,” the language reads as a plural phrase, i.e., “insurance companies.” But Nationwide does not make this argument (which would also be erroneous), and the one that it does make is contradicted by the statutory language, the statute that they rely on for interpretation (MCL 8.3b), and by common sense.

Nationwide seeks to convert the phrase “insurance company” to “unitary business group.” *This is not a plural construction of a singular phrase*—and there is no statutory or case law support for this proposition in the ITA or under the Insurance Code. Nationwide’s position is nonsensical on its own terms and otherwise conflicts with the purpose of the retaliatory tax. The Legislature’s purpose for the retaliatory tax “is to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes.” MCL 500.476a(2). See also *Commerce & Indus Ins Co*, 301 Mich App at 265 (“[t]he purpose of a retaliatory tax is to encourage states to impose equal tax burdens on all insurance companies, whether foreign or domestic, thereby promoting interstate business.”). Nationwide’s reading of the statute does not promote the interstate business of insurers, but rather hinders it.

D. Nationwide mischaracterizes case law concerning unitary business groups, which has no application in this matter.

Nationwide cites *TCF National Bank v Department of Treasury*, 330 Mich App 596 (2019), as support for their position that a UBG of insurance companies can file tax returns and claim credits collectively. But it does Nationwide no good because the statutes—including definitions—and issues are completely different. Specifically, unlike the definitions for “financial institution” under Chapter 13, which explicitly defines financial institutions to include UBGs, the definition for “insurance company” under Chapter 12 does not contemplate a unitary business group of insurance companies. As the Tax Tribunal recognized, “the definition of ‘insurance company’ does not include UBGs, while the definition of ‘financial institutions’ in *TCF* did include UBGs.” (Docket Line No. 87, p 13.) Further, *TCF* dealt with the question of how to compute net capital for financial institutions (banks), not how to compute premiums or retaliatory tax liability for insurance companies.

The Tax Tribunal’s analysis is supported by the statute at issue in *TCF*. Michigan Business Tax Act (MBTA) provides that various entities, including the financial institution UBGs and their members, are “financial institutions.” Specifically, MCL 208.1261(f) provides that “[f]inancial institution” means “any of the following:”

(i) A bank holding company, a national bank, a state chartered bank, an office of thrift supervision chartered bank or thrift institution, a savings and loan holding company other than a diversified savings and loan holding company as defined in 12 USC 1467a(a)(F)

(ii) Any person, other than a person subject to the tax imposed under chapter 2A, who is directly or indirectly owned by an entity described in subparagraph (i) and is a member of the unitary business group.

(iii) A *unitary business group* of entities described in subparagraph (i) or (ii), or both. [Emphasis added.]

The *TCF* Court recognized as much: “[t]he plain language of this definitional provision establishes that a ‘financial institution’ may be a type of bank, or an entity owned by such a bank that is a member of the UBG, or a UBG made up of either or both of these two types of entities.” 330 Mich App at 607. Further, “the Legislature intended the term ‘financial institution’ to mean a UBG when a UBG taxpayer’s franchise-tax liability is at issue.” *Id.* at 609. The Court concluded: “the [Court of Claims] based its decision on an erroneous interpretation of the meaning of the statutory term ‘financial institution,’ because the statute plainly defines a UBG as a financial institution” *Id.* at 612.

Here, unlike Chapter 13’s franchise tax discussed in *TCF*, there is no parallel definition for “insurance company” that embraces or otherwise references a UBG under Chapter 12. The statutory definition for “insurance company” instead refers *only* to “an authorized insurer” in Michigan, and contains no reference to a UBG. MCL 206.607(5). The same is true of the Insurance Code, MCL 500.108 (defining an “authorized” insurance company as “*an* insurer duly authorized, by a subsisting certificate of authority issued by the [insurance] commissioner, to transact insurance in this state.” (Emphasis added).) The statutes contemplate only a singular entity, not a conglomerate. And this makes sense—the comparative

retaliatory tax cannot be computed for a conglomerate of different entities from different states with different burdens and taxes.

Nationwide also cites *D'Agostini Land Company, LLC v Department of Treasury*, 322 Mich App 545, 561 (2018) for the proposition that a “there is no specific statutory bar against concluding” that it can calculate its corporate income tax liability “on a unitary basis.” (Appellants’ Br, p 26.) First, this assertion contradicts the burden in tax cases. Because a tax deduction “presents a matter of legislative grace, and a clear provision must be identified to allow for a particular deduction,” Appellants bear the burden of showing that they are entitled to the deduction. *Menard Inc v Dep’t of Treasury*, 302 Mich App 467, 473 (2013).

This assertion also violates well established rules of statutory construction. Specifically, courts apply the doctrine of *expressio unius est exclusio alterius*, which provides that “an express mention of one thing generally implies the exclusion of similar things that were not mentioned.” *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 151 (2003). As applied in this matter, the express mention of “an” insurance company as the entity upon which tax is levied, and the credit claimant means the exclusion of the UBG as either the taxed entity or the credit claimant. This is especially so given that the Legislature knew how to include UBGs as the taxed entity and credit claimant in other areas of the statute.

This analysis follows from *D'Agostini*, in which the Court of Appeals noted that, unlike the MBTA, the ITA added “unitary business group” to the “credit

disqualifying provision.” 322 Mich App at 560. Just like the Legislature knew how to add “unitary business group” to that credit disqualifying provision, it also knew how to add a “unitary business group” to the list of levied entities (as it did in Chapters 11 and 13) and to tax credits for purposes of the premiums and retaliatory taxes. It did not. Similarly, the Legislature could have allowed for group-wide computation of tax similar to standard corporations and financial institutions but did not. Its decision to narrowly frame the calculation of premiums tax on a single-entity basis is consistent with the Insurance Code’s requirement that “an insurance company” be “authorized” before writing insurance and collecting premiums in Michigan and does not support a group-wide calculation. Nationwide does not address this clear language directly; instead, it engages in misdirection, patching cherry-picked testimony from Mr. Wilkinson’s deposition (which does not support Nationwide’s claims)³ together to support its filing methodology and interpretation of the statute.

³ Even if this testimony had any bearing on the legal issues presented, Mr. Wilkinson testified extensively that neither his letter nor the statute support Nationwide’s position in this case:

- “[W]e did not think that insurance companies could share tax attributes that way.” [Docket Line No. 82, p 27];
- “I understand that this letter is being held to, maybe, stand for things that was not my intent at the time I wrote it.” [*Id.* at 33];
- “I did not know that there were any benefits to filing combined and certainly was not aware of the return posture that Mr. Prateshler was contemplating, until after this.” [*Id.* at 41];
- “At the time I [wrote] the letter, I didn’t think there were any benefits to filing on a unitary basis for an insurance company. *Hence the ‘if any,’*

II. The Tax Tribunal properly determined that the retaliatory tax, per the ITA and Insurance Code, must be calculated and reported by individual insurers.

A foreign insurer is required to pay the greater of either the tax levied on gross direct premiums written on property or risk in Michigan, or a retaliatory tax as set forth under MCL 500.476a of the Insurance Code. MCL 206.643. Calculation of the premiums or retaliatory tax must be made on an entity-by-entity basis comparing an insurance company's tax burden in Michigan to that entity's tax burden in another state.⁴ MCL 206.643; MCL 500.476a.

Accordingly, the Tax Tribunal properly determined that the retaliatory tax is computed and paid by individual insurers: "MCL 206.691 makes no reference to retaliatory taxes, therefore [Treasury] is correct that MCL 500.476a controls how these taxes are filed, and shall be filed by an individual insurance company." (Docket Line No. 87, p 16.) This determination comports with the governing statutes. An "alien or foreign insurer" is responsible for paying Michigan's retaliatory tax, which is imposed by the Insurance Code, MCL 500.476a. The

which, you know, I wasn't aware that there were any benefits at the time, put a big caveat there to make that clear.

You know, this particular question of utilizing attributes of any particular company on a group basis was not part of what I was reviewing at the time I wrote the letter." [*Id.* at 49 (emphasis added).]

⁴ Nationwide Agribusiness is a corporation domiciled in Iowa. (Docket Line No. 73, p 6 ln 4.) Nationwide Mutual is a corporation domiciled in Ohio. (*Id.* at 41 ln 4.) Other entities to this litigation have various states of origin, including Pennsylvania and Wisconsin. (*Id.* at 77 ln 4; *id.* at 111 ln 4.) (See also Docket Line No. 70, pp 133–136.)

retaliatory tax puts non-Michigan insurers writing policies/risk in Michigan on the same footing as Michigan insurers operating in other states by comparing Michigan's burdens with that imposed by the state of the foreign insurer:

[W]henever, by a law in force outside of this state or country, a domestic insurer or agent of a domestic insurer is required to make a deposit of securities for the protection of policyholders or otherwise, or to make payment for taxes, fines, penalties, certificates of authority, valuation of policies, or otherwise, or a special burden or other burden is imposed, greater in the aggregate than is required by the laws of this state for a similar alien or foreign insurer or agent of an alien or foreign insurer, the alien or foreign insurer of that state or country is required, as a condition precedent to its transacting business in this state, to make a like deposit for like purposes with the state treasurer of this state, and to pay to the revenue commissioner for taxes, fines, penalties, certificates of authority, valuation of policies, and otherwise an amount equal in the aggregate to the charges and payments imposed by the laws of the other state or country upon a similar domestic insurer and the agents of a domestic insurer, regardless of whether a domestic insurer or agent of a domestic insurer is actually transacting business in that state or country. [MCL 500.476a(1).]

Nationwide's assertions fundamentally misunderstand the retaliatory tax and its computation. Because the retaliatory tax analyzes and compares the burdens and taxes imposed by Michigan against those imposed by the origin state of the insurer, it is impossible to make this comparison for a series of foreign entities *all from different origin states*. There is no single point of comparison: because the entities comprising the Nationwide UBG have various states of origin, those various tax/burden amounts would somehow have to be compared with Michigan's burdens/taxes. But the statute does not contemplate that Michigan's single amount

of taxes/burdens could be compared with that of a multitude (or even two) foreign states. It is a simple one-to-one calculation.⁵

This makes sense within the context of the statute's purpose and the business realities concerning the insurance industry. "[T]he selective imposition of the tax on only those insurers incorporated in states that tax Michigan insurers more heavily than Michigan taxes them indicates that the purpose of the legislation is to pressure those states to relieve the tax burden on Michigan insurers doing business in those states." *TIG Ins Co*, 464 Mich at 559. Here, the Nationwide entities come from a number of various foreign states. It may very well be that some of those states already have taxes and burdens lower than those imposed by Michigan, while others have taxes and burdens that are higher than Michigan. The

⁵ Nationwide devotes extensive briefing to an assertion that Treasury runs afoul of *Montgomery Ward & Company v Department of Treasury*, 191 Mich App 674, 684 (1991) in making this common-sense argument. (Appellants' Br, pp 26–31.) Nationwide's assertion is misplaced because Treasury is not counterclaiming against Nationwide substituting one legal theory for another, or assessing a larger tax liability without notice, which was the due process problem at issue in *Montgomery Ward*:

This reasoning is especially persuasive because otherwise defendant could "counterclaim" any amount on any theory for the tax years in question. Defendant argues that there is no problem with lack of notice because the counterclaim deals with the same set of "operative facts." This is not much assurance to a taxpayer if any liability alleged to have accrued within a given tax year is considered to have arisen from the same set of "operative facts." Under such circumstances, a taxpayer could be ambushed at the appellate level with an entirely new theory of tax liability and be forced to defend against a much larger tax liability than that from which it originally appealed. [191 Mich App at 683–684.]

Here, Treasury did not counterclaim, substitute one theory for another, or seek a larger tax liability. Therefore, Nationwide has not been ambushed and *Montgomery Ward* has no application.

purpose of the retaliatory taxes would be frustrated if there were one single computation of Michigan against a multitude of insurers who may or may not have tax burdens higher than Michigan's.

Treasury's forms comport with the statute and its purpose. The form requires the foreign insurer to compute its premiums tax liability (page 1 of the return), and then compares Michigan's burdens to the foreign state's burdens (page 2 of the return). There is no place on the form (or in the statute) for multiple foreign states' taxes and burdens to be computed, indexed, or compared to Michigan's.

Here, it is impossible to analyze the purported "unitary business group" of insurance companies, which come from Ohio, Pennsylvania, Iowa, and Wisconsin—all of which may differ in the amount of taxes and burdens they impose on insurers. Nationwide makes a passing attempt to address this issue, which amounts to "there is a way to do this—just see how we did it in our amended returns." (See Appellants' Br, pp 32–33.) But Nationwide does not explain what burdens each entity is reporting from what state of domicile or how those burdens compare with Michigan's. It is a one-to-one computation, e.g., \$500 imposed by Wisconsin on a Michigan insurer compared to \$300 imposed by Michigan on a Wisconsin insurer. In this instance, the retaliatory tax would be \$200. Nationwide does not explain how this type of computation is possible in the context of a UBG with entities from various states. How do we run this computation if Wisconsin imposes \$500, Pennsylvania \$200, Ohio \$800, Iowa \$250, etc.? What numbers are to be compared

with Michigan burdens so that Michigan insurers are on the same footing in foreign states as those foreign insurers operating in Michigan? Nationwide has no explanation because it defies the language and purpose of the statute as well as common sense. Further, because UBGs do not pay premiums or MAIPF assessments, there is no public policy reason for a “deposit of securities for the protection of policyholders” of policies written by UBGs. Simply: there are no policyholders of UBG-written policies, for which reason Nationwide’s position renders this language—and its public policy underpinnings—nugatory. *People v Pinkey*, 501 Mich 259, 282–283 (2018).

Nationwide’s tax returns reflect the compromised position that the undisputed facts pin them into—admittedly manufacturing new and unapproved tax forms to accommodate claims that have no basis in law or business reality. (Appellants’ Br, p 7.) In so doing, Nationwide undermines the intention of the retaliatory tax scheme, i.e., to put different states and their domiciled insurers on equal footing.

If Nationwide’s reading of the statute is correct—that Section 691 of the Act requires consolidation of tax bases and sharing of credits—then insurance companies will cherry-pick their purported UBG members (which Nationwide appears to do in this case), tax bases, and tax credits based on what is most advantageous to them in any given state, which will make uniformity across states impossible. Concomitantly, the comparison between Michigan and the foreign insurer’s state of origin becomes impossible to calculate insurer-by-insurer, and the

retaliatory tax itself would become un-administrable. This result does not put Michigan insurers on an equal footing with other states' insurers, but instead fundamentally undermines that intent by eliminating the possibility of measuring burdens state-by-state. This problem is only exacerbated if some states incorporate unitary principals (even if not expressly provided by statute) while others do not. Nationwide's approach would also award credits to insurers who did not earn those credits by contributing to Michigan's insurance market.

In sum, only "an" insurance company is responsible to pay the retaliatory tax. Nationwide's assertions otherwise are contrary to statute, common sense, and mathematical possibilities.

III. Nationwide's allegation that Treasury improperly assessed penalties in this matter has been abandoned.

For the first time in briefing, Nationwide argues that the penalties assessed in this matter should be waived. The only other mention of this issue in the lower court record is in Nationwide's petition. Specifically, the petition asserts as follows:

7. The Department erred in its numerous determinations of tax due and/or refund adjustments, and the imposition of any penalties and interest based on the following errors:

- (a) That Petitioner filed its tax return for the period at issue with insufficient, payment of tax, penalty and/or interest. This determination is both false and erroneous.
- (b) That Petitioner owes interest and penalty for the tax period at issue due to underpayment and/or late payment of estimated tax. This determination is both false and erroneous.

[Docket Line No. 6, ¶¶ 7(a)–(b).]

Aside from these conclusory allegations in the amended petition, there is no mention in the record below of penalty waiver, the standards for penalty waiver, or any facts as to why penalty should be waived in this case.

Waiver of penalty may be granted if the failure to remit was due to reasonable cause and not willful neglect. MCL 205.24(4). By statute, Treasury was required to promulgate a rule defining what constitutes reasonable cause for waiver of penalty. MCL 205.24(2). In response, Treasury identified several examples of what would be considered reasonable cause for failure to file or pay. Mich Admin Code, R 205.1013. While the rule makes clear that there may be other circumstances that qualify as reasonable cause, Treasury identified the following situations as examples of reasonable cause for late payment, if other contributing circumstances do not exist:

- a) Prolonged unavoidable absence of the taxpayer responsible for filing and, due to circumstances beyond the taxpayer's control, is precluded from making alternate arrangements for filing and paying.
- b) Destruction of taxpayer's records.
- c) Inability to obtain the necessary records due to reasons beyond the taxpayer's control.
- d) Taxpayer receives erroneous written information from Treasury.
- e) Filing is delayed by the post office.
- f) A bank error. [Mich Admin Code, R 205.1013(7).]

Treasury also identified several factors that alone do not constitute reasonable cause for failure to file or pay but may be considered with other facts

and circumstances and may constitute reasonable cause: compliance history of taxpayer, nature of the tax, taxpayer's financial circumstances, the taxpayer was incorrectly advised by a tax advisor who is competent in Michigan state tax matters, accounting system breaks down, death or serious incapacitating illness of the taxpayer, lack of funds to make timely payment, or taxpayer's reliance on an employee to file the return. Mich Admin Code, R 205.1013(8).

Despite opportunities in discovery and summary disposition briefs, Nationwide developed no facts and made no arguments concerning the penalties below. To its credit, Nationwide is candid that even it did not address the matter in its briefing: "the statutory basis for the penalties and the method by which they were calculated was never discussed. Instead, the parties focused on the underlying merits of the parties' legal positions on the taxes themselves." (Appellants' Br, p 34.) And, even now on appeal, Nationwide does not make any reference to the Administrative Code or any other supporting authorities, or assert facts that have anything to do with the standards for penalty waiver, but instead mischaracterizes Mr. Wilkinson's letter with cursory reference to case law concerning good faith belief in a legal position and reliance on tax advisors. (*Id.* at 36.) Because it developed no facts and made no briefing attempts below, and now on appeal ignores the governing law concerning penalty waiver (i.e., the Administrative Code), Nationwide has abandoned this issue. *Cheesman v Williams*, 311 Mich App 147, 161 (2015) ("An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims; nor may an

appellant give an issue only cursory treatment with little or no citation of authority.”).

If Nationwide wanted to contest the penalties in this matter, it had every opportunity to do so. Its thirteenth-hour entreaties based on a self-serving mischaracterization of Mr. Wilkinson’s letter are procedurally improper and substantively unsupported. For these reasons, the Tax Tribunal’s affirmance of the assessments in their entirety was proper and should be upheld by this Court.

CONCLUSION AND RELIEF REQUESTED

Nationwide misunderstands the premiums tax, the retaliatory tax, and the tax credits at issue. These burdens are imposed against and available only to “an” insurance company, not a “unitary business group.” Nationwide’s attempts to prioritize general language over specific language is contrary to law and rules of statutory construction. It also defies common sense insofar as it is impossible to compare Michigan’s burdens to that of a foreign insurer’s state of domicile in the context of a UBG whose members are domiciled in various states. Further, Nationwide’s position finds no support in the case law cited, or in the testimony given in this matter.

Respectfully submitted,

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STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONWIDE AGRIBUSINESS INSURANCE
COMPANY, ET AL.,

Petitioner-Appellee,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

Supreme Court No. 167608

Court of Appeals No. 364790

Tax Tribunal No. 21-000039-TT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid

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APPELLEES' APPENDIX

TAB 47



Treasury Taxes

Insurance Companies/Financial Institutions 8. How must a foreign insurer file for purposes of the retaliatory tax when the insurer's state of incorporation requires unitary filing?

A foreign insurer must calculate its burden for purposes of the Michigan retaliatory tax according to the laws of its state of incorporation. If the insurer's state of incorporation requires filing on a unitary basis, the insurer should compute its retaliatory tax burden using this method.

The retaliatory tax is calculated by first computing the burden to the foreign insurer doing business in Michigan and then computing the burden that would be imposed upon a hypothetical Michigan insurer as if it was performing the identical business activity in the foreign state. When making this calculation it should be assumed that the hypothetical Michigan insurer would calculate its liability in the same manner required of the foreign insurer.



Insurance Companies/Financial Institutions 8. How must a foreign insurer file for purposes of the retaliatory tax when the insurer's state of incorporation requires unitary filing?

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