RECEIVED by MSC 8/30/2021 2:05:19 PM

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Boonstra, P.J., Riordan, and Redford, JJ

COMERICA, INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,

Defendant-Appellant.
______________________________________/

Supreme Court No. 161661

Court of Appeals No. 344754

Tax Tribunal No. 17-000150-TT

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

APPELLANT DEPARTMENT OF TREASURY'S APPENDIX

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

Scott L. Damich (P74126)
David W. Thompson (P75356)
Assistant Attorneys General
Attorneys for Dep't of Treasury
Defendant-Appellant
P.O. Box 30754
Lansing, MI 48909
(517) 335-7584

Dated: August 30, 2021

RECEIVED by MSC 8/30/2021 2:05:19 PM

TABLE OF CONTENTS

Page

Docket Entries

Court of Appeals Docket Entries 001a–006a

Opinions/Rulings

Michigan Tax Tribunal Final Opinion and Judgment 007a–027a

Court of Appeals Opinion 028a–037a

Court of Appeals Order on Reconsideration 038a

Angela Sinacola Living Trust v PNC Bank, N.A.,

unpublished per curiam opinion of the Court of Appeals, issued

November 13, 2014 (Docket No. 317481) 039a–044a

Relevant Portions of the Record

Petition (*without exhibits*) 045a–063a

Audit Report of Findings 064a–070a

Joint Stipulation of Facts 071a–073a

Merger Agreement 074a–081a

Debra Stover Deposition Transcript (*relevant pages only*) 082a–092a

Gerald Coe Deposition Transcript (*relevant pages only*) 093a–101a

2008 Michigan Business Tax Annual Return for Financial Institutions 102a–105a

Tax Credit Assignments 106a–107a

Letter from Debra Stover, dated November 21, 2008 .... 108a

Informal Conference Recommendation 109a–122a

RECEIVED by MSC 8/30/2021 2:05:19 PM

Letter from Caroline A. June, dated June 24, 2015 .... 123a–124a

Caroline June Deposition Transcript 125a–127a

Intent to Assess No. UB35645 .... 128a–129a

Amended Petition (*without exhibits*) 130a–147a

Response to Amended Petition 148a–163a

Comerica Incorporated's Court of Appeals' Brief, dated
December 4, 2018 (*without appendices*) 164a–191a

Disclosure Statement 192a

Amended Articles of Association 193a–222a

Reference Materials

IRS Publication, *Employer Identification Number—
Understanding Your EIN* 223a–254a

Single Business Tax Act Provision 255a–265a

RECEIVED by MSC 8/30/2021 2:05:19 PM

Home › Cases, Opinions & Orders ›

Case Search

Case Docket Number Search Results - 344754

Appellate Docket Sheet
COA Case Number: 344754
MSC Case Number: 161661
COMERICA INC V DEPARTMENT OF TREASURY

1	COMERICA INC Oral Argument: Y Timely: Y	PT-AE-XT	RET	(57473) **BRUETSCH THOMAS P**
2	TREASURY DEPARTMENT OF Oral Argument: Y Timely: Y	RS-AT-XE	AG	(75356) **THOMPSON DAVID W**

COA Status: Case Concluded; File Open **MSC Status:** Pending on Application
Case Flags: Electronic Record

07/24/2018 1 Claim of Appeal - Civil
Proof of Service Date: 07/24/2018
Jurisdictional Checklist: Y
Register of Actions: Y
Fee Code: STATE
Attorney: 75356 - THOMPSON DAVID W

05/31/2018 2 Order Appealed From
From: TAX TRIBUNAL
Case Number: 17-000150-TT
Trial Court Judge: 33155 MARMON DAVID
Nature of Case:
Tax Tribunal

07/24/2018 3 Transcript Requested By Atty Or Party
Date: 07/23/2018
Timely: Y
Reporter: 3443 - HECKAMAN TAMARA S
Filed By Attorney: 75356 - THOMPSON DAVID W
Hearings:
05/23/2018
Comments: attached to event #1

07/30/2018 4 Notice Of Filing Transcript
Date: 07/26/2018
Timely: Y
Reporter: 3443 - HECKAMAN TAMARA S
Hearings:
05/23/2018

07/30/2018 5 Correspondence Sent
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE
Attorney: 75356 - THOMPSON DAVID W
Comments: NFT sent to attys

08/01/2018 6 Transcript Filed By Party
Date: 08/01/2018

RECEIVED by MSC 8/30/2021 2:05:19 PM

Filed By Attorney: 75356 - THOMPSON DAVID W
Hearings:
05/23/2018 Motion

08/06/2018 7 Appearance - Appellee
Date: 08/06/2018
For Party: 1 COMERICA INC PT-AE-XT
Attorney: 57473 - BRUETSCH THOMAS P
Comments: appearance & change of of email address

08/14/2018 8 Claim of Cross Appeal
Date: 08/14/2018
For Party: 1 COMERICA INC PT-AE-XT
Attorney: 57473 - BRUETSCH THOMAS P
Fee Code: FP

08/21/2018 9 Docketing Statement MCR 7.204H
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE
Proof of Service Date: 08/21/2018
Filed By Attorney: 75356 - THOMPSON DAVID W

09/10/2018 10 Stips: Extend Time - AT Brief
Extend Until: 10/18/2018
Filed By Attorney: 75356 - THOMPSON DAVID W
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE
P/S Date: 09/10/2018

09/11/2018 11 Docketing Statement MCR 7.204H
For Party: 1 COMERICA INC PT-AE-XT
Proof of Service Date: 09/11/2018
Filed By Attorney: 57473 - BRUETSCH THOMAS P
Comments: XT

09/19/2018 12 Stips: Extend Time - XAT Brief
Extend Until: 11/06/2018
Filed By Attorney: 57473 - BRUETSCH THOMAS P
For Party: 1 COMERICA INC PT-AE-XT
P/S Date: 09/19/2018

10/18/2018 13 Motion: Extend Time - Appellant
Proof of Service Date: 10/18/2018
Filed By Attorney: 74126 - DAMICH SCOTT L
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE
Fee Code: STATE
Requested Extension: 11/15/2018
Answer Due: 10/25/2018

10/23/2018 15 Submitted on Administrative Motion Docket
Event: 13 Extend Time - Appellant
District: L
Item #: 2

10/26/2018 16 Motion: Extend Time - Cross-Appellant
Proof of Service Date: 10/26/2018
Filed By Attorney: 57473 - BRUETSCH THOMAS P
For Party: 1 COMERICA INC PT-AE-XT
Fee Code: EPAY
Requested Extension: 12/04/2018
Answer Due: 11/02/2018

10/30/2018 18 Order: Extend Time - Appellant Brief - Grant
View document in PDF format

RECEIVED by MSC 8/30/2021 2:05:19 PM

Event: 13 Extend Time - Appellant
Panel: CMM
Attorney: 74126 - DAMICH SCOTT L
Extension Date: 11/15/2018

11/06/2018 19 Submitted on Administrative Motion Docket
Event: 16 Extend Time - Cross-Appellant
District: L

11/07/2018 20 Order: Extend Time - Cross-Appellant Brief - Grant
View document in PDF format
Event: 16 Extend Time - Cross-Appellant
Panel: CMM
Attorney: 57473 - BRUETSCH THOMAS P
Extension Date: 12/04/2018

11/15/2018 21 Brief: Appellant
Proof of Service Date: 11/15/2018
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 75356 - THOMPSON DAVID W
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE

12/04/2018 22 Brief: Cross-Appellant
Proof of Service Date: 12/04/2018
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 57473 - BRUETSCH THOMAS P
For Party: 1 COMERICA INC PT-AE-XT

12/20/2018 23 Brief: Appellee
Proof of Service Date: 12/20/2018
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 57473 - BRUETSCH THOMAS P
For Party: 1 COMERICA INC PT-AE-XT

12/28/2018 24 Motion: Extend Time - Cross-Appellee
Proof of Service Date: 12/28/2018
Filed By Attorney: 75356 - THOMPSON DAVID W
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE
Fee Code: STATE
Requested Extension: 03/05/2019
Answer Due: 01/04/2019

01/08/2019 27 Submitted on Administrative Motion Docket
Event: 24 Extend Time - Cross-Appellee
District: L

01/09/2019 28 Order: Extend Time - Cross-Appellee Brief - Grant
View document in PDF format
Event: 24 Extend Time - Cross-Appellee
Panel: CMM
Attorney: 75356 - THOMPSON DAVID W
Extension Date: 03/05/2019

01/10/2019 29 Brief: Reply
Proof of Service Date: 01/10/2019
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 75356 - THOMPSON DAVID W

RECEIVED by MSC 8/30/2021 2:05:19 PM

For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE

03/05/2019 30 Brief: Cross-Appellee
Proof of Service Date: 03/05/2019
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 75356 - THOMPSON DAVID W
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE

03/06/2019 31 Noticed
Record: REQST
Mail Date: 03/07/2019

03/07/2019 32 Electronic Material Received by Record Room
File Location:
Comments: Certificate of E-record

03/07/2019 33 Electronic Record Filed
File Location:
Comments: E-record

03/18/2019 35 Motion: Extend Time - Reply Brief
Proof of Service Date: 03/18/2019
Filed By Attorney: 57473 - BRUETSCH THOMAS P
For Party: 1 COMERICA INC PT-AE-XT
Fee Code: EPAY
Requested Extension: 04/02/2019
Answer Due: 03/25/2019
Comments: XT

03/26/2019 37 Submitted on Administrative Motion Docket
Event: 35 Extend Time - Reply Brief
District: L

03/27/2019 39 Order: Extend Time - Reply Brief - Grant
View document in PDF format
Event: 35 Extend Time - Reply Brief
Panel: CMM
Attorney: 57473 - BRUETSCH THOMAS P
Extension Date: 04/02/2019

04/02/2019 40 Brief: Reply - Cross Appeal
Proof of Service Date: 04/02/2019
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 57473 - BRUETSCH THOMAS P
For Party: 1 COMERICA INC PT-AE-XT

01/02/2020 44 Brief: Supplemental Auth`y
Proof of Service Date: 01/02/2020
Filed By Attorney: 57473 - BRUETSCH THOMAS P
For Party: 1 COMERICA INC PT-AE-XT

01/13/2020 45 Correspondence Received
Date: 01/10/2020
For Party: 1 COMERICA INC PT-AE-XT
Attorney: 57473 - BRUETSCH THOMAS P
Comments: Dates Attorney Is Unavailable For Oral Argument

02/11/2020 48 Motion: Motion
Proof of Service Date: 02/11/2020
Filed By Attorney: 75356 - THOMPSON DAVID W
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE

RECEIVED by MSC 8/30/2021 2:05:19 PM

Fee Code: STATE
Answer Due: 02/18/2020
Comments: Motion for Leave to File a Response to Supplemental Authority;reponse filed w/motion

02/11/2020 49 Submitted on Motion Docket Affecting Call
Event: 48 Motion
District: L

02/11/2020 53 Brief: Supplemental Auth`y
Proof of Service Date: 02/11/2020
Filed By Attorney: 75356 - THOMPSON DAVID W
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE
Comments: response to supplemental authority-accepted per 2/14/20 order

02/14/2020 52 Order: Grant - Generic
View document in PDF format
Event: 48 Motion
Panel: MTB,MJR,JRR
Attorney: 75356 - THOMPSON DAVID W
Comments: Motion for Leave to file a Response to Supplemental Authority is GRANTED; response file w/ motion is accepted

03/06/2020 47 Submitted on Case Call
District: L
Item #: 18
Panel: MTB,MJR,JRR

03/06/2020 54 Oral Argument Audio
Listen to audio in MP3 format

04/16/2020 55 Opinion - Per Curiam - Published
View document in PDF format
Pages: 10
Panel: MTB,MJR,JRR
Result: Vacated, Reversed and Remanded
Comments: Petitioner may tax costs

05/07/2020 56 Motion: Reconsideration of Opinion
Proof of Service Date: 05/07/2020
Filed By Attorney: 75356 - THOMPSON DAVID W
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE
Fee Code: STATE
Answer Due: 05/21/2020

05/20/2020 57 Answer - Reconsideration
Proof of Service Date: 05/20/2020
Event No: 56 Reconsideration of Opinion
For Party: 1 COMERICA INC PT-AE-XT
Filed By Attorney: 57473 - BRUETSCH THOMAS P

05/26/2020 58 Submitted on Reconsideration Docket
Event: 56 Reconsideration of Opinion
District: C

05/27/2020 59 Order: Reconsideration - Deny - Appeal Remains Closed
View document in PDF format
Event: 56 Reconsideration of Opinion
Panel: MTB,MJR,JRR
Attorney: 75356 - THOMPSON DAVID W

07/20/2020 60 SCt: Application for Leave to SCt
Supreme Court No: 161661
Answer Due: 08/17/2020

RECEIVED by MSC 8/30/2021 2:05:19 PM

Fee: E-Pay
For Party: 2
Attorney: 75356 - THOMPSON DAVID W

07/20/2020 61 SCt Case Caption
Proof Of Service Date: 07/20/2020

07/20/2020 62 SCt: Miscellaneous Filing
Filing Date: 07/20/2020
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE
Filed By Attorney: 75356 - THOMPSON DAVID W
Comments: Notice of filing

07/20/2020 63 Other
Date: 07/20/2020
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE
Attorney: 75356 - THOMPSON DAVID W
Comments: Notice of filing for leave to appeal in the Supreme Court

08/10/2020 64 SCt: Answer - SCt Application/Complaint
Filing Date: 08/10/2020
For Party: 1 COMERICA INC PT-AE-XT
Filed By Attorney: 57473 - BRUETSCH THOMAS P

08/31/2020 65 SCt: Reply - SCt Application/Complaint
Filing Date: 08/31/2020
For Party: 2 TREASURY DEPARTMENT OF RS-AT-XE
Filed By Attorney: 75356 - THOMPSON DAVID W

03/17/2021 66 SCt Order: Application - Grant
View document in PDF format
Comments: 20-min OAs. Invited AC=Taxation Section of SBM. Just-in-time AT brf due 8-30-2021.

04/07/2021 67 Correspondence Sent
Proof Of Service Date: 04/07/2021
Comments: Sent copies per request to Warner Norcross & Judd, PLLC.

04/30/2021 68 Michigan Appeals Reports Publication
332 Mich App 155

Case Listing Complete

RECEIVED by MSC 8/30/2021 2:05:19 PM

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

Comerica Incorporated,
Petitioner,

v

MTT Docket No. 17-000150

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
David B. Marmon

ORDER PARTIALLY GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER PARTIALLY GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

This matter concerns tax liability for financial institutions under the now-repealed Michigan Business Tax Act. Specifically, at issue is the calculation of the tax base upon which the tax is applied for tax years 2008, 2009, and 2010. Also, at issue is whether or not certain tax credits under the old Single Business Tax Act and subsequently under the Michigan Business Tax Act carry over to a new entity. A third issue regarding the ordering of such credits has also been raised.

Pursuant to the Tribunal's Prehearing Order, the parties filed Joint Stipulation of Facts on March 12, 2018. Also pursuant to that order, the parties filed dispositive motions on April 11, 2018. Respondent filed its motion requesting that the Tribunal enter summary judgment, arguing that its assessments are correct. Petitioner filed its Motion, alleging that Respondent improperly calculated Petitioner's tax base by a peculiar method of averaging, turning a $5 billion tax base into an $8 billion tax base. Petitioner further contends Respondent wrongfully denied the

carryover of certain tax credits by treating them as an illegal second assignment from Comerica-Michigan to Comerica- Texas, rather than a transfer according to law. On May 2, 2018, both parties filed response briefs to the other party's Motion. Finally, the Tribunal heard oral arguments from the parties on May 23, 2018.

The Tribunal has reviewed the Motions, Responses, the Joint Stipulation of Facts and the evidence submitted and finds that partially granting each party's Motion for Summary Disposition is warranted.

PETITIONER'S CONTENTIONS

Petitioner contends that it is entitled to a refund for each year based upon an adjusted tax base, and additional refunds/credits for disallowed credits. Its contentions regarding refunds for adjustment of tax base are as follows:

Year	contended tax base	apportionment rate	tax rate	resulting tax	surcharge rate	resulting surcharge	assessed and collected tax	assessed & collected Surcharg	tax refund	surcharge refund	total refund
2008	$5,219,724,306	0 280684	0 00235	$3,442,969	0 277	953,702	$5,499,715	$1,523,421	$2,056,746	$569,719	$2,626,465
2009	$4,927,489,469	0 384434	0 00235	$4,451,592	0 234	1,041,673	$6,161,396	$1,441,767	$1,709,804	$400,094	$2,109,898
2010	$4,941,253,701	0 319618	0 00235	$3,711,387	0 234	868,465	$4,444,157	$1,039,933	$732,770	$171,468	$904,238
totals				$11,605,948		2,863,839	$16,105,268	$4,005,121	$4,499,320	$1,141,282	$5,640,602

Additionally, Petitioner contends that it is entitled to certain credits as follows:

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

2008	Audit Determination	Petitioner's determination	difference
SBT Investment Tax Credit(Comerica Bank)	$738,954	$738,954	$0
SBT Investment Tax Credit (Comerica Inc)	0	$34,983	$34,983
SBT Historic Preservation Credit	0	$809,485	$809,485
SBT "New" Brownfield Credit	0	$1,589,303	$1,589,303
Compensation and Investment Tax Credit	$1,271,340	$1,271,340	$0
Historic Preservation Credit	$605,606	$0	($605,606)
Brownfield Redevelopment Credit	$856,352	$0	($856,352)
Total Credits	**$3,472,252**	$4,444,065	**$971,813**
2009	Audit Determination	Petitioner's determination	difference
SBT Investment Tax Credit(Comerica Bank)	0	0	0
SBT Investment Tax Credit (Comerica Inc)	0	0	0
SBT Historic Preservation Credit	0	0	0
SBT "New" Brownfield Credit	0	1,699,529	1,699,529
Compensation and Investment Tax Credit	1,886,047	1,886,047	0
Historic Preservation Credit Carryforward	0	605,606	605,606
Brownfield Redevelopment Credit	978,832	978,832	0
Brownfield Redevelopment Credit carryfwd	0	803,616	803,616
Total Credits	**2,864,879**	**5,973,630**	**3,108,751**
2010	Audit Determination	Petitioner's determination	difference
SBT Investment Tax Credit(Comerica Bank)	0	0	0
SBT Investment Tax Credit (Comerica Inc)	0	0	0
SBT Historic Preservation Credit	0	0	0
SBT "New" Brownfield Credit	0	0	0
Compensation and Investment Tax Credit	1,559,753	1,559,753	0
Historic Preservation Credit	0	0	0
Brownfield Redevelopment Credit	891,400	891,400	0
Brownfield Redevelopment Credit carryfwd	0	52,736	52,736
Total Credits	**2,451,153**	**2,503,889**	**52,736**
Total additional credit			**$4,133,300**

RESPONDENT'S CONTENTIONS

Respondent contends that its audit results for each year are correct and that no refund or additional credit is due.

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.[1] In this case, both parties moved for summary disposition under MCL 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 "when

[1] See TTR 215.

RECEIVED by MSC 8/30/2021 2:05:19 PM

the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law."[2]

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.[3] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[4] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[5] 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.[6] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[7]

CONCLUSIONS OF LAW

The Tribunal has carefully considered each parties' Motion under MCR 2.116 (C)(10) and finds that partially granting the Motions are warranted. Two broad maxims both apply to the facts of this case. Tax exactions, property or excise, 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

---

[2] *Lowrey v LMPS & LMPJ, Inc,* 500 Mich. 1, 5; 890 NW2d 344 (2016) (citation omitted).
[3] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[4] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[5] *Id.*
[6] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[7] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

> implication or forced construction. Such laws may be made plain, and the language thereof, if doubious,[sic] is not resolved against the taxpayer.[8]

This principle was more recently restated by the Supreme Court: "the authority to impose a tax must be expressly authorized by law; it will not be inferred. Moreover, ambiguities in the language of a tax statute are to be resolved in favor of the taxpayer."[9]

The other maxim concerns exceptions to the tax, such as deductions, exemptions and credits. The Court of Appeals more recently summed up the law in this regard, as follows:

> Taxation is the rule, and exemptions are the exception. *Ladies Literary Club v. City of Grand Rapids,* 409 Mich. 748, 754, 298 N.W.2d 422 (1980). Consequently, statutory exemptions are strictly construed against the taxpayer. *ANR Pipeline Co. v. Dep't of Treasury,* 266 Mich.App. 190, 201, 699 N.W.2d 707 (2005). Similarly, a deduction presents a matter of legislative grace, and a clear provision must be identified to allow for a particular deduction. *Id.* A deduction must be clearly expressed because the "propriety of a deduction does not turn upon general equitable considerations, such as a demonstration of effective economic and practical equivalence." *Perry Drug Stores, Inc. v. Dep't of Treasury,* 229 Mich.App. 453, 461, 582 N.W.2d 533 (1998) (citation and quotation marks omitted). The burden of proving a deduction is on the party seeking the deduction. See *Southfield Western, Inc. v. City of Southfield,* 146 Mich.App. 585, 590, 382 N.W.2d 187 (1985).[10]

Applying these two maxims to the motions, the Tribunal is in agreement with Petitioner that its tax base was improperly calculated by including capital from a defunct entity and double-counting assets. Further, the Tribunal is in agreement with Respondent that Petitioner has failed to carry its burden to show that the disallowed tax credits were available to it as a matter of law.

The parties stipulated to the following facts which the Tribunal finds relevant:

> 3. Until October 31, 2007, a Comerica subsidiary, Comerica Bank, was a Michigan Banking Corporation organized as a state-chartered bank regulated by the State of Michigan ("Comerica-Michigan").

[8] *In Re Dodge Brothers*, 241 Mich 665,669; 217 NW 777 (1928).
[9] *Mich Bell Tel Co . Dep't of Treasury,* 445 Mich 470, 477 (1994).
[10] *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 473; 838 NW2d 736 (2013).

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

4. As of October 31, 2007, Comerica-Michigan was capitalized with 5,852,732 shares of common stock and 350,000 shares of preferred stock.

5. For strategic business purposes, on October 8, 2007, Comerica created Comerica Bank, a Texas Banking Association, under the laws of the State of Texas, with authority to issue 500 shares of common stock ("Comerica-Texas").

6. On October 16, 2007, Comerica-Michigan and Comerica-Texas entered into an "Agreement and Plan of Merger," under which Comerica-Michigan would be merged into Comerica-Texas.
***
8. Pursuant to the Agreement and Plan of Merger and the certification of the Texas authorities, Comerica-Michigan was merged into Comerica-Texas on October 31, 2007 at 11:59:59 PM.
***
10. Comerica-Texas was the only acquiring corporation in the merger. Comerica-Michigan was the only acquired corporation.

11. Immediately following the merger, on October 31, 2007 at 11:59:59 PM, Comerica-Michigan ceased to exist and was no longer a state chartered bank.

12. Comerica filed 2008, 2009, 2010, and 2011 Michigan Business Tax returns for its unitary business group. It included Comerica-Texas as a member of the unitary business group, but did not separately include Comerica-Michigan as a member of the unitary business group.

I. Net Capital Calculation

Comerica attached as an Exhibit 2, Respondent's First Audit Report, which showed its determination of Comerica Bank's Determined Net Capital for 2004-2011:

Determined Net Capital	Member2-Comerica Bank
2004	$5,261,816,056
2005	$5,248,615,346
2006	$5,194,400,994
2007	$5,381,750,034
2008	$5,012,039,101
2009	$3,800,641,868
2010	$5,317,436,509
2011	$6,035,432,756

The five-year averages resulting from this determination, also found in Exhibit 2, are as follows:

5-Year Averages	Tax Base Member 2 - Comerica Bank
2008 (2004-2008)	$5,219,724,306
2009 (2005-2009)	$4,927,489,469
2010 (2006-2010)	$4,941,253,701
2011 (2007-2011)	$5,109,460,054

Comerica is in agreement with this determination. What Comerica objects to and is the first basis for this appeal is the redetermination of its Net Capital in the second audit.

Net Capital	Comerica TX (member 2)	Comerica-MI (member 42)	Total
2004	0	$5,261,816,056	$5,261,816,056
2005	0	$5,248,615,346	$5,248,615,346
2006	0	$5,194,400,994	$5,194,400,994
2007	$5,381,750,034	0	$5,381,750,034
2008	$5,012,039,101	0	$5,012,039,101
2009	$3,800,641,868	0	$3,800,641,868
2010	$5,317,436,509	0	$5,317,436,509

For 2008, Respondent took a two-year average (2007-2008) for Comerica-TX of $5,196,894,568 and a five-year average for Comerica-MI (2004-2008) of $3,140,966,479 and adding them together determined the tax base for 2008 to be $8,337,861,047, rather than the original determination of $5,219,724,306; a difference in tax base of $3,118,136,741. Similarly, using a three-year average for Comerica-TX and adding the base on a 5-year average for Comerica-MI, Respondent determined a tax base for 2009 of $6,820,080,269 and, using a four-year average, $5,916,847,077 for 2010.

The specific provision used to determine the tax base at issue is MCL 208.1265, which states:

> (1) For a financial institution, tax base means the financial institution's net capital. Net capital means equity capital as computed in accordance with generally accepted accounting principles less goodwill and the average daily book value of United States obligations and Michigan obligations. If the financial institution does not maintain its books and records in accordance with generally accepted accounting principles, net capital shall be computed in accordance with the books

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

> and records used by the financial institution, so long as the method fairly reflects the financial institution's net capital for purposes of the tax levied by this chapter. Net capital does not include up to 125% of the minimum regulatory capitalization requirements of a person subject to the tax imposed under chapter 2A.
>
> (2) **Net capital shall be determined 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. If a financial institution has not been in existence for a period of 5 tax years, net capital shall be determined by adding together the financial institution's net capital for the number of tax years the financial institution has been in existence and dividing the resulting sum by the number of years the financial institution has been in existence. For purposes of this section, a partial year shall be treated as a full year.**
>
> (3) For a unitary business group of financial institutions, net capital calculated under this section does not include the investment of 1 member of the unitary business group in another member of that unitary business group.
>
> (4) For purposes of this section, each of the following applies:
>
> **(a) A change in identity, form, or place of organization of 1 financial institution shall be treated as if a single financial institution had been in existence for the entire tax year in which the change occurred and each tax year after the change.**
>
> (b) The combination of 2 or more financial institutions into 1 shall be treated as if the constituent financial institutions had been a single financial institution in existence for the entire tax year in which the combination occurred and each tax year after the combination, and the book values and deductions for United States obligations and Michigan obligations of the constituent institutions shall be combined. A combination shall include any acquisition required to be accounted for by the surviving financial institution in accordance with generally accepted accounting principles or a statutory merger or consolidation. [Emphasis added]**.**

Petitioner first argues that Respondent's methodology of including Comerica-MI, which ceased to exist on October 31, 2007, and adding its capital together with Comerica-TX amounts to taxation in 2008, 2009 and 2010 of a financial institution that no longer existed. In support, Petitioner relies on MCL 208.261(f), which defines financial institution as:

> (f) "Financial 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

RECEIVED by MSC 8/30/2021 2:05:19 PM

> company other than a diversified savings and loan holding company as defined in 12 USC 1467a(a)(F), or a federally chartered farm credit system institution.
> (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.

Respondent counters that it is not taxing Comerica-MI; rather, it is taxing a unitary business group. Respondent's argument begs the question as to whether a disbanded bank should be part of a unitary business group. The Tribunal holds that a former financial institution is not a financial institution and therefore cannot be part of the unitary business group.

Respondent also argues that Comerica-MI's net capital for purposes of the averaging provision must be accounted for separately in the years prior to the combination with Comerica-TX, per Section 265(4)(b). The Tribunal disagrees and finds such reasoning to be circular, as 265(4)(b) only applies to financial institutions, which Comerica-MI is not as of October 31, 2007. The Tribunal fails to find support in the text of Section 265 for extending a tax to a former financial institution.

Respondent counters that its interpretation of an ambiguous statute should stand, except for compelling reasons.[11] Petitioner's rejoinder to this argument is because Respondent has itself abandoned this interpretation, it is unclear which position is entitled to deference. Respondent issued a Notice dated November 21, 2016,[12] which states:

> NOTICE TO TAXPAYERS REGARDING FIVE-YEAR AVERAGING CALCULATION OF NET EQUITY CAPITAL FOR FINANCIAL INSTITUTIONS COMBINING WITH OTHER FINANCIAL INSTITUTIONS (RESCIND MBT FAQ FS AND CIT INSURANCE COMPANIES/FINANCIAL INSTITUTIONS FAQ 6)

[11] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008).
[12] Exhibit 12 to Petitioner's Brief

RECEIVED by MSC 8/30/2021 2:05:19 PM

> Issued: November 21, 2016
>
> Financial institutions calculate their MBT and their CIT net capital tax base by averaging net capital over a five-year period (or the number of years in existence if fewer than five years).1 When two or more financial institutions combine into one, the law requires the combined institution to be treated as if it had been a single financial institution for the entire tax year in which the combination occurs and for each tax year after the combination.2 The treatment of entities in the years prior to the combination for purposes of calculating net capital during the five-year lookback period was previously interpreted to require that net capital for both the surviving and acquired entities for tax years prior to the year of combination should be included in the calculation of the tax base. This policy was reflected in MBT FAQ F5 and CIT Insurance Companies/Financial Institutions FAQ 6.
>
> Upon further review of this policy, the Department now rescinds MBT FAQ F5 and CIT Insurance Companies/Financial Institutions FAQ 6. *The Department will no longer calculate net capital for years prior to the combination year using both the surviving and acquired entities' net capital. When two or more financial institutions combine, only the surviving financial institution's net capital for the years prior to the combination is used to calculate the surviving entity's tax base. Thus, for the years prior to the combination, the surviving financial institution will use only its own books and records to compute the five-year look-back averaging calculation. In the year of the acquisition and for all years following the combination, the surviving financial institution will merge its books and records with those of the acquired financial institution and the combined books and records will be used to compute the net capital tax base.*
>
> *The Department will give this change in policy full retroactive effect*, and will apply it to all open tax years. Whether a period is open under the statute of limitations may depend on whether and when an audit of a taxpayer's books and records commenced.3 If a taxpayer previously filed a return under MBT FAQ F5 and the tax period remains open, the taxpayer may amend accordingly. [Emphasis added].
>
> 1 MCL 208.1265(2) and MCL 206.655(2).
> 2 MCL 208.1265(4)(b).
> 3 See MCL 205.27a(2) and (3) and LR 2015-2
> http://www.michigan.gov/documents/treasury/LR_2015-2_-_Administration_of_PA_3_491518_7.pdf

Respondent argues that this notice only applies to financial institutions that merge with outside institutions. When asked at oral argument why this Notice was issued to that group, Respondent

RECEIVED by MSC 8/30/2021 2:05:19 PM

answered to the effect that its prior regimen was unfair to those institutions. The Tribunal finds this rationale unconvincing. Clearly, its treatment of Petitioner in calculating its tax base amounts to double-counting assets and is no fairer to Petitioner than it would be to a bank with an outside acquisition. The Tribunal also agrees with Petitioner that § 265(4)(b) refers to both mergers and consolidation. Thus, the Tribunal fails to find any distinction with a difference between merger and acquisition, as both are combinations referred to in the statute. The interpretation set forth by Respondent in its 11/21/16 Notice avoids the pitfalls found in its previous interpretation, which taxes entities beyond the scope of this section – former financial institutions. It also avoids the accounting anomie of double counting assets, which doubtlessly does not comport with Generally Accepted Accounting Principles, referred to throughout §265.

In summary, as to the issue of determining the tax base, the long-held rule in this state is 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.[13] Double-counting assets and taxing entities that are no longer financial institutions is a forced and dubious construction. Respondent's expansion of Petitioner's tax base to include a legally defunct bank is an extension of a tax by implication, which is prohibited under Michigan law. Accordingly, as there is no factual dispute, only a dispute as to the law, summary disposition is appropriate. As Petitioner's argument prevails concerning the tax base, summary disposition in its favor is appropriate on this issue.

II. Tax Credits

The second issue before the Tribunal is whether Petitioner is entitled to tax credits assigned to Comerica-MI. Petitioner argues that under Texas corporation law, as well as IRC

[13] *In Re Dodge Brothers*, *supra* at 669.

RECEIVED by MSC 8/30/2021 2:05:19 PM

368(a)(1)(F), and under Michigan banking law, those credits transfer by law, rather than by an assignment. Respondent counters that Texas corporate law and Michigan banking law are irrelevant as to tax credits. As to federal law, Respondent argues that Petitioner has failed to prove its merger qualified under IRC 368(a)(1)(F), and even if it did, that law is not determinative as to tax credits.

The tax credits at issue are MCL 208.38g and MCL 208.39c. Both credits contain severe restrictions on assignment of the credits. Section 38g states in relevant part:

> (18) Except as otherwise provided in this subsection, for projects for which a certificate of completion is issued before January 1, 2006, if a qualified taxpayer is a partnership, limited liability company, or subchapter S corporation, *the qualified taxpayer may assign all or a portion of a credit* allowed under subsection (2) or (3) *to its partners, members, or shareholders, based on their proportionate share of ownership of the partnership, limited liability company, or subchapter S corporation or based on an alternative method approved by the Michigan economic growth authority. A credit assignment under this subsection is irrevocable* and, except for a credit assignment based on a multiphase project, shall be made in the tax year in which a certificate of completion is issued. A qualified taxpayer may claim a portion of a credit and assign the remaining credit amount. If the qualified taxpayer both claims and assigns portions of the credit, the qualified taxpayer shall claim the portion it claims in the tax year in which a certificate of completion is issued. *A partner, member, or shareholder that is an assignee shall not subsequently assign a credit or any portion of a credit assigned under this subsection.* The credit assignment under this subsection shall be made on a form prescribed by the Michigan economic growth authority. The qualified taxpayer shall send a copy of the completed assignment form to the Michigan economic growth authority in the tax year in which the assignment is made. A partner, member, or shareholder who is an assignee shall attach a copy of the completed assignment form to its annual return required under this act, for the tax year in which the assignment is made and the assignee first claims a credit, which shall be the same tax year. [Emphasis added].

Similarly, MCL 208.39c provides as follows:

> (7) If a qualified taxpayer is a partnership, limited liability company, or subchapter S corporation, the qualified taxpayer *may assign all or any portion of a credit allowed under this section to its partners, members, or shareholders, based on the partner's, member's, or shareholder's proportionate share of ownership* or based on an alternative method approved by the department. *A credit assignment under this subsection is irrevocable* and shall be made in the

RECEIVED by MSC 8/30/2021 2:05:19 PM

> tax year in which a certificate of completed rehabilitation is issued. A qualified taxpayer may claim a portion of a credit and assign the remaining credit amount. *A partner, member, or shareholder that is an assignee shall not subsequently assign a credit or any portion of a credit assigned to the partner, member, or shareholder under this subsection.* A credit amount assigned under this subsection may be claimed against the partner's, member's, or shareholder's tax liability under this act or under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.532. A credit assignment under this subsection shall be made on a form prescribed by the department. The qualified taxpayer and assignees shall send a copy of the completed assignment form to the department in the tax year in which the assignment is made and attach a copy of the completed assignment form to the annual return required to be filed under this act for that tax year.

Both parties acknowledge that the credit has already been assigned once from one of Comerica-MI's partners.[14] Respondent argues paradoxically that there can be no assignment because the procedure for assigning was not followed, and if there was an assignment, it would be void, as it violates the probation against a second assignment found in each credit.

Petitioner argues that Michigan recognizes a difference between transfers as a matter of law and of assignments. In *KIM v JP Morgan Chase Bank, NA*,[15] the Supreme Court differentiated between the transfer of a mortgage by operation of law and the subsequent transfer via assignment. The Court noted that in fact there were two transfers of a mortgage; the first from the former mortgage holder to the FDIC by 12 USC 1821(d)(2)(G)(i)(II), and a second transfer from the FDIC to the Defendant. As to what constitutes a *transfer by operation of law,* the Supreme Court stated:

> Similarly, this Court has long understood the expression to indicate "the manner in which a party acquires rights *without any act of his own.*" Accordingly, there is ample authority for the proposition that a transfer that takes place by operation of law occurs unintentionally, involuntarily, or through no affirmative act of the transferee.[16] [Emphasis supplied in original; footnote omitted].

[14] See Petitioner's Exhibit 13, at 000337-000340
[15] *KIM v JP Morgan Chase Bank, NA,* 493 Mich 98; 825 NW2d 329 (2012)
[16] *Id*., at 110.

RECEIVED by MSC 8/30/2021 2:05:19 PM

The second case cited by Petitioner is *Angela Sinacola Living Trust v PNC Bank NA*.[17] In *Sinacola*, which also involved the validity of a mortgage foreclosure without an assignment, the Court of Appeals held that a transfer of a mortgage through a series of mergers is an acquisition by operation of law in accordance with the National Banking Act, 12 USC 1 *et seq*.

While there was a merger between Comerica-MI and Comerica TX, it is far from clear that the transfer of credits from one entity to another was unintentional or involuntary, as the entities were both formed by the Petitioner.

In the present case, Petitioner argues that Section 10.008 of the Texas Business Organizations Code also transfers the tax credits by virtue of the merger, and not by assignment. Section 10.008 states in relevant part as follows:

> (a) When a merger takes effect:
>
> (1) the separate existence of each domestic entity that is a party to the merger, other than a surviving or new domestic entity, ceases;
>
> (2) *all rights, title, and interests to all real estate and other property owned by each organization that is a party to the merger is allocated to and vested, subject to any existing liens or other encumbrances on the property*, in one or more of the surviving or new organizations as provided in the plan of merger without:
> (A) reversion or impairment;
> (B) any further act or deed; or
> (C) any transfer or assignment having occurred; [Emphasis added]

One issue raised by this statute is whether a tax credit is "other property." At oral argument, Petitioner contended that it must be property, since it can be assigned. The Tribunal, however, concludes that a non-revocable tax credit is more akin to a privilege than to property.

[17] *Angela Sinacola Living Trust v PNC Bank NA,* unpublished per curiam decision of the Michigan Court of Appeals decided November 13, 2014 (Docket No 317481).

RECEIVED by MSC 8/30/2021 2:05:19 PM

The Tribunal is persuaded by the logic of *Chrysler Corp v CIR*,[18] where the Sixth Circuit Court of Appeals described the Foreign Tax Credit as "a privilege granted by the government, and hence the statute is to be strictly construed in favor of the government." While *Chrysler* is a federal case about a different tax and different credit, the Tribunal notes the Sixth Circuit's rationale for strict construction. Michigan has long articulated a strict construction standard for tax credits. The Supreme Court quoted Justice Cooley as follows:

> The rule is also well stated in 2 Cooley on Taxation (4th Ed.), p. 1403, § 672: 'An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it 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.'[19]

As a privilege, rather than property, the Tribunal holds that the Texas merger statute is not determinative as to whether the privilege of a tax credit transfers from Comerica-MI to Comerica-TX. Rather, the Tribunal agrees with Respondent that such a determination must be determined through Michigan tax law, and specifically, the terms of the disputed credits.

---

[18] *Chrysler Corp v CIR*, 436 F.3d 644,654 (6th Cir 2006).

[19] *City of Detroit v Detroit Commercial College*, 322 Mich 142,148-149; 33 NW2d 737 (1948). This case was also cited by *Ladies Literary Club v Grand Rapids*, 409 Mich 748,754; 298 NW2d 422 (2002), which is more recently cited in *Menard Inc*, 302 Mich App at 473.

RECEIVED by MSC 8/30/2021 2:05:19 PM

The terms of the tax credits are very specific as to who may use them, how they may be used, and places a very specific limit on their assignment. The statutes spell out that they can only be assigned to certain related parties, and then, only assigned once. While these statutes are silent as to whether they can be transferred by operation of law, Petitioner cannot point to any provision that allows these privileges to be transferred to a second successor entity by other means. Based on strict construction, the Tribunal holds that these credits, being privileges, cannot be transferred to a successor entity, except as specifically stated, through one assignment. When Comerica-MI was extinguished,[20] so were the tax credits.

Petitioner next argues that Comerica-TX and Comerica-MI are merely a change in form of the same entity. In support, Petitioner contends that it qualifies for such treatment under IRC 368(a)(1)(F). Respondent contests that Petitioner qualifies under §368(a)(1)(F), arguing that Petitioner failed to submit any documentation that the IRS has made such a determination. Respondent further argues that, based on the merger plan, Petitioner fails to meet the 6-part test found under the IRS regulations. Alternatively, Respondent contends that it is irrelevant as to whether Petitioner qualifies for a tax-free reorganization under federal law. The Tribunal agrees and holds that it is irrelevant as to whether Petitioner so qualifies, as such questions under federal tax law do not necessarily translate into Michigan law, concerning tax credits and a business taxing regimen peculiar to Michigan. Accordingly, whether it qualifies under IRC §368(a)(1)(F) is irrelevant to a determination as to whether the tax credits transfer.

Respondent also contends that Petitioner's new FEIN for Comerica-TX number proves that it is a different entity than Comerica-MI. Petitioner counters that while federal FAQs do not

[20] Petitioner's Exhibit 16, Letter from Deputy Commissioner of Office of Financial and Insurance Services dated December 18, 2007 confirming that Comerica-MI ceased its corporate existence.

RECEIVED by MSC 8/30/2021 2:05:19 PM

require a new FEIN, there is nothing therein that disqualifies Petitioner from tax-free treatment by adopting a new number. Further, Petitioner filed a return using the new number but added that it was formerly known under the old number.

The Tribunal finds that, while emblematic, a new FEIN is not determinative of whether Comerica-TX is, for all intents and purposes, the same entity as Comerica-MI. Rather, the Tribunal accepts the parties' stipulation that Comerica-MI ceased to exist on October 31, 2007, and therefore, Petitioner's net capital should not contain the capital of this defunct entity in Petitioner's 2008 tax base. For the same reason, the Tribunal holds that Comerica-TX is not the same entity as Comerica-MI and does not inherit the privileges of the tax credits.

Accordingly, as there is no issue of fact, but only of law, and because Respondent's arguments prevail, summary disposition on the tax credit issue in Respondent's favor is appropriate.

III. Relief calculation

Respondent contends that Petitioner is not entitled to relief from the assessments as it failed to set forth specific relief in its Petition or Prehearing Statement. Respondent further argues that Petitioner's Amended Prehearing Statement also fails to set forth specific calculations of taxes. Petitioner counters that it has set forth the amounts for which it has been aggrieved using Respondent's numbers, and the Tribunal is capable of determining the proper relief from the information set forth in its Amended Prehearing Statement using simple math. The Tribunal agrees with Petitioner. Original assessments were cancelled by Respondent after the audits, and what remains is an appeal of the audits and a request for refunds or credits. Further, Petitioner has set forth, for each count and each year, a dollar amount.

RECEIVED by MSC 8/30/2021 2:05:19 PM

For 2008, prior to its second audit, Respondent had originally calculated the Average Net Capital at $5,219,724,306, which Petitioner contends is the correct tax base. While that base does not double-count the same assets which were in Comerica-TX and Comerica-MI, it does include in the base for 2008 assets of a bank that was not in existence in 2008. As the Tribunal has determined that §265 does not include the capital of a former financial institution, the appropriate method is to look only at the net capital of Comerica-TX for the current year, and previous years it was in existence (if less than 5 years), and average the net capital for those years. In 2008, Comerica-TX was in existence for 2 years.[21] Its net capital for each year is as follows:

2007	$5,381,750,034
2008	$5,012,039,101
2009	$3,800,641,868
2010	$5,317,436,509

For 2008, its average net capital equals ($5,381,750,034 + $5,012,039,101) ÷ 2 = $5,196,894,567. For tax year 2009, the average net capital equals ($5,381,750,034 + $5,012,039,101 + $3,800,641,868) ÷ 3 = $4,731,477,001. For tax year 2010, the average net capital equals ($5,381,750,034 + $5,012,039,101 + $3,800,641,868 + $5,317,436,509) ÷ 4 = $4,877,966,878. The average net capital for each year is the tax base. That base is subject to an apportionment factor for each year, to which the parties are in apparent agreement. The resulting product is then multiplied by the tax rate for each year of 0.235%.[22] Additionally, there is a surcharge levied on this tax.[23] After the proper tax and surcharge are determined, these figures

[21] Per §265(4)(b), Comerica-TX is treated as if in existence for all of 2007, even though it was formed in October of that year.
[22] MCL 208.1263.
[23] MCL 208.1281(b)(i) for 2008, and (b)(ii) for 2009 and 2010.

are subtracted from the audit results, and the amount due as a refund is calculated. These calculations are as follows:

Year	tax base	apportionment rate	tax rate	resulting tax	surcharge rate	resulting surcharge	assessed and collected tax	assessed & collected Surcharg	tax refund	surcharge refund	total refund
2008	$5,196,894,567	0 280684	0 00235	$3,427,910	0 277	949,531	$5,499,715	$1,523,421	$2,071,805	$573,890	$2,645,695
2009	$4,731,477,001	0 384434	0 00235	$4,274,510	0 234	1,000,235	$6,161,396	$1,441,767	$1,886,886	$441,532	$2,328,417
2010	$4,877,966,878	0 319618	0 00235	$3,663,852	0 234	857,341	$4,444,157	$1,039,933	$780,305	$182,592	$962,896
totals				$11,366,273		2,807,108	$16,105,268	$4,005,121	$4,738,995	$1,198,013	$5,937,008

No additional adjustment concerning the disallowed tax credits is necessary, as Respondent prevails on this issue.

JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition is PARTIALLY GRANTED on the issue of tax base only.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is PARTIALLY GRANTED on the issue of tax credits only.

IT IS FURTHER ORDERED that for 2008, Petitioner is entitled to a refund of $2,071,805 for the excess tax calculated under §265, and a refund of $573,890 for excess surcharge under §281.

IT IS FURTHER ORDERED that for 2009, Petitioner is entitled to a refund of $1,887,997 for the excess tax calculated under §265, and a refund of $441,792 for excess surcharge under §281.

IT IS FURTHER ORDERED that for 2010, Petitioner is entitled to a refund of $780,305 for the excess tax calculated under §265, and a refund of $182,592 for excess surcharge under §281.

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties 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 Opinion within 28 days of entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves the last pending claim and closes the case.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[24] 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.[25] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[26] Responses to motions for

[24] See TTR 261 and 257.
[25] See TTR 217 and 267.
[26] See TTR 261 and 225.

RECEIVED by MSC 8/30/2021 2:05:19 PM

reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[27]

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[28] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[29] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[30]

Entered: May 31, 2018

[27] See TTR 261 and 257.
[28] See MCL 205.753 and MCR 7.204.
[29] See TTR 213.
[30] See TTR 217 and 267.

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

RECEIVED by MSC 8/30/2021 2:05:19 PM

STATE OF MICHIGAN

COURT OF APPEALS

COMERICA, INC.,

Petitioner-Appellee/Cross-Appellant,

v

DEPARTMENT OF TREASURY,

Respondent-Appellant/Cross-Appellee.

FOR PUBLICATION
April 16, 2020
9:05 a.m.

No. 344754
Tax Tribunal
LC No. 17-000150-TT

Before: BOONSTRA, P.J., and RIORDAN and REDFORD, JJ.

PER CURIAM.

Respondent appeals, and petitioner cross-appeals, the Michigan Tax Tribunal's (the "tribunal") order granting partial summary disposition in favor of petitioner and partial summary disposition in favor of respondent under MCR 2.116(C)(10) (no genuine issue of material fact).

This matter involves the calculation of the franchise tax of a unitary business group (UBG)[1] under the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq.*, and the carryforward of

---

[1] A unitary business group means

> a group of United States persons, 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 United States persons, and that has business activities or operations which result in a flow of value between or among persons included in the unitary business group or has business activities or operations that are integrated with, are dependent upon, or contribute to each other. For purposes of this subsection, flow of value is determined by reviewing the totality of facts and circumstances of business activities and operations. [MCL 208.1117(6).]

RECEIVED by MSC 8/30/2021 2:05:19 PM

tax credits under the Single Business Tax Act (SBTA), MCL 208.1 *et seq.*,[2] when two UBG entities merge and become a single entity. For the reasons stated herein, we vacate in part, reverse in part, and remand to the tribunal for further proceedings consistent with this opinion.

I. FACTS & PROCEDURAL HISTORY

Petitioner is a bank holding corporation which owns about 40 subsidiary financial corporations. One such subsidiary was a state-chartered bank regulated by Michigan law ("Comerica-Michigan"). For strategic business reasons, petitioner decided to convert Comerica-Michigan into a Texas banking association. In order to accomplish this, petitioner created another subsidiary on October 8, 2007, a Texas banking association ("Comerica-Texas"), and on October 31, 2017, Comerica-Michigan merged into Comerica-Texas. At that point, Comerica-Michigan ceased to exist. All of Comerica-Michigan's rights, privileges, powers, franchises, and all property (real, personal, and mixed), as well as all debts, liabilities, and duties, vested in Comerica-Texas.

Petitioner filed Michigan Business Tax (MBT) returns for tax years 2008-2011, and included Comerica-Texas as a UBG member, but not Comerica-Michigan. For the 2008 tax year, the year in which the merger occurred, petitioner included Comerica-Texas's net capital, which is the taxpayer's tax base for purposes of the franchise tax, and reported Comerica-Michigan's historical net capital as effectively belonging to Comerica-Texas. Additionally, in its returns, petitioner claimed certain tax credits which Comerica-Michigan had earned under the SBTA. Overall, petitioner claimed a refund for each tax year.

In September 2013, respondent audited petitioner's 2008-2011 MBT returns and subsequently reduced petitioner's refund. The adjustment was due to respondent's calculation of petitioner's net capital and its disallowance of the claimed tax credits. Respondent treated Comerica-Texas and Comerica-Michigan as separate entities with their own net capital because the MBTA's averaging provision, MCL 208.1265, required an accounting for the years prior to the merger when Comerica-Michigan still had its own net capital. Respondent disallowed Comerica-Texas the Comerica-Michigan tax credits on the basis that the SBTA permitted the assignment of those credits only once. Because the credits previously had been assigned by a limited liability company to Comerica-Michigan in 2005, respondent concluded that they could not be reassigned to Comerica-Texas.

Petitioner disputed the refund reduction and requested an informal conference with respondent which took place before a departmental hearing referee. Following the informal conference, the hearing referee issued a recommendation upholding respondent's decision, which

---

[2] The SBTA, MCL 208.1 *et seq.*, was repealed by 2006 PA 325, effective December 31, 2007. The SBTA was replaced by the now-former MBTA, MCL 208.1101 *et seq.*, effective January 1, 2008. See 2007 PA 36. The MBTA was repealed by 2011 PA 39, and replaced with the Corporate Income Tax Act, MCL 206.601 *et seq.*, effective January 1, 2012. See 2011 PA 38. Although it was repealed in 2011 subject to certain conditions being satisfied, the MBTA still applies under certain circumstances. *Hudsonville Creamery & Ice Cream Co, LLC v Dep't of Treasury*, 314 Mich App 726, 729 n 1; 887 NW2d 641 (2016).

RECEIVED by MSC 8/30/2021 2:05:19 PM

respondent adopted. Petitioner applied to the tribunal for a review of respondent's assessment and alleged that respondent had double counted petitioner's net capital when calculating the tax base. Petitioner further alleged that respondent wrongly disallowed the tax credits which, petitioner argued, transferred by operation of law via the merger, not by assignment. The parties filed cross-motions for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), and each party argued that their calculation of net capital was correct under the MBTA, and that their position on the tax credit issue was correct under the SBTA.

After oral argument, the tribunal granted partial summary disposition for petitioner and partial summary disposition for respondent. The tribunal found that respondent improperly calculated petitioner's net capital, and ordered that respondent recalculate the amount considering "only at the net capital of Comerica-TX for the current year, and previous years it was in existence, and averag[ing] the net capital for those years." The tribunal affirmed respondent's disallowance of the tax credits because the merger was not unintentional or involuntary and, therefore, it was not clear that a transfer by operation of law had occurred. The tribunal reasoned that the credits could only be transferred to a successor entity by assignment because they were privileges, not property rights, and thus, because the credits had been assigned once, "when Comerica-MI was extinguished, so were the tax credits."

Respondent moved for reconsideration and the tribunal denied the motion. This appeal and cross-appeal followed.

II. STANDARDS OF REVIEW

Our review of the tribunal's decision is limited. If fraud is not claimed, we review the 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; 780 NW2d 753 (2010). We deem the tribunal's factual findings conclusive if they are supported by competent, material, and substantial evidence on the whole record. *Id*. We review de novo questions of statutory interpretation, and the grant or denial of a motion for summary disposition. *Id*. Summary disposition under MCR 2.116(C)(10) is proper if, after viewing all admissible evidence in a light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*. (citation omitted).

III. ANALYSIS

A. MICHIGAN BUSINESS TAX ACT

Respondent erred in its calculation of petitioner's tax base. The MBTA imposes a franchise tax on the tax base of financial institutions with a nexus in Michigan, including UBGs. MCL 208.1263(1); MCL 208.1261(f)(iii); MCL 208.1265; *TCF Nat'l Bank v Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___ (2019); slip op at 5. "For a financial institution, tax base means the financial institution's net capital." MCL 208.1265(1). The MBTA's averaging provision, MCL 208.1265, specifies how net capital is calculated, *TCF Nat'l*, ___ Mich App at ___; slip op at 6, and states:

RECEIVED by MSC 8/30/2021 2:05:19 PM

> (1) For a financial institution, tax base means the financial institution's net capital. Net capital means equity capital as computed in accordance with generally accepted accounting principles less goodwill and the average daily book value of United States obligations and Michigan obligations. If the financial institution does not maintain its books and records in accordance with generally accepted accounting principles, net capital shall be computed in accordance with the books and records used by the financial institution, so long as the method fairly reflects the financial institution's net capital for purposes of the tax levied by this chapter. Net capital does not include up to 125% of the minimum regulatory capitalization requirements of a person subject to the tax imposed under chapter 2A.
>
> (2) Net capital shall be determined 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. If a financial institution has not been in existence for a period of 5 tax years, net capital shall be determined by adding together the financial institution's net capital for the number of tax years the financial institution has been in existence and dividing the resulting sum by the number of years the financial institution has been in existence. For purposes of this section, a partial year shall be treated as a full year.
>
> (3) For a unitary business group of financial institutions, net capital calculated under this section does not include the investment of 1 member of the unitary business group in another member of that unitary business group.
>
> (4) For purposes of this section, each of the following applies:
>
> (a) A change in identity, form, or place of organization of 1 financial institution shall be treated as if a single financial institution had been in existence for the entire tax year in which the change occurred and each tax year after the change.
>
> (b) The combination of 2 or more financial institutions into 1 shall be treated as if the constituent financial institutions had been a single financial institution in existence for the entire tax year in which the combination occurred and each tax year after the combination, and the book values and deductions for United States obligations and Michigan obligations of the constituent institutions shall be combined. A combination shall include any acquisition required to be accounted for by the surviving financial institution in accordance with generally accepted accounting principles or a statutory merger or consolidation.

Recently, we interpreted these statutory provisions in *TCF National Bank*, ___ Mich App at ___, and held that the MCL 205.1265 averaging formula must be applied to a UBG as a single taxpayer, rather than at the individual member level.

Respondent argues that *TCF National Bank* is inapplicable here because that case did not involve the merger of two subsidiary banks. We disagree. *TCF National Bank* considered the proper method for calculating net capital of UBGs generally, and we are required to interpret the same statutory provision at issue in this case, MCL 208.1265. *Id.*; slip op at 5. Our holding in

RECEIVED by MSC 8/30/2021 2:05:19 PM

TCF National Bank, that the proper way to apply the averaging provision to a UBG pursuant to §§ 1265(1)-(3) is at the member level, is binding here and moots the parties' arguments regarding the interpretation of § 1265(4).[3]

Respondent further argues that our holding in *TCF National Bank* does not permit the negation of billions of dollars' worth of net capital, as would presumably occur here. However, the possibility that respondent may receive an unfavorable outcome is not a persuasive reason to set aside binding precedent.

Finally, respondent argues that application of *TCF National Bank* would render § 1265(4) surplusage. Our rules of statutory interpretation require us to give every word in a statute meaning, and avoid a construction that would render any part of the statute surplusage or nugatory. *Duffy v Michigan Dep't of Nat Res*, 490 Mich 198, 215; 805 NW2d 399 (2011). However, *TCF National Bank* does not apply to non-UBG financial institutions,[4] the combination of which, we agree, may implicate subsection (4). But, that is not the case in the matter before us. Thus, respondent's argument fails.

The tribunal's order directs respondent to recalculate petitioner's net capital by looking "only at the net capital of Comerica-TX for the current year, and previous years it was in existence . . . , and averag[ing] the net capital for those years." This methodology does not comply our holding in *TCF National Bank*, and therefore, we must vacate the portions of the order regarding petitioner's tax base, and remand this case to the tribunal. On remand, the tribunal shall enter an order directing respondent to recalculate petitioner's net capital in a manner consistent with our holding in *TCF National Bank*.

B. SINGLE BUSINESS TAX ACT

Petitioner argues that we should reverse respondent's decision to disallow the tax credits and the tribunal's opinion and judgment affirming that determination. We agree.

The primary goal of statutory interpretation is to give effect to the intent of the Legislature, focusing first on the statute's plain language. *Hudsonville Creamery*, 314 Mich App at 733.

---

[3] See MCR 7.215(C)(2) (our published opinions have precedential effect under the rule of stare decisis); *WA Foote Mem Hosp v City of Jackson*, 262 Mich App 333, 341; 686 NW2d 9 (2004) (a case is stare decisis on a particular point of law if the issue was raised in the action decided by the court, and its decision made part of the opinion of the case); *Terra Energy, Ltd v Michigan*, 241 Mich App 393, 399; 616 NW2d 691 (2000) (a case is stare decisis on a particular point of law if the issue was raised in the action and decided by the Court, and the decision was included in the opinion).

[4] In addition to a UBG and its members, the definition of "financial institution" includes "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), or a federally chartered farm credit system institution." MCL 208.1261(f)(*i*).

RECEIVED by MSC 8/30/2021 2:05:19 PM

Agency interpretations are entitled to respectful consideration, but they are not binding on courts and cannot conflict with the plain meaning of the statute. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008).

If a statute is unambiguous, judicial construction is neither required nor permitted, and the statute must be enforced as written. *Diallo v LaRochelle*, 310 Mich App 411, 417-418; 871 NW2d 724 (2015). A statute is not made ambiguous merely because a term it contains is undefined. *Id.* at 418. If a statute does not define a word, it is appropriate to consult dictionary definitions to determine the plain and ordinary meaning of the word. *Id.* "A legal term of art, however, must be construed in accordance with its peculiar and appropriate legal meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). However, "nothing may be read into a statute that is not within the intent of the Legislature apparent from the language of the statute itself." *Detroit Pub Sch v Conn*, 308 Mich App 234, 248; 863 NW2d 373 (2014). In other words, we must not judicially legislate by adding into a statute provisions that the Legislature did not include. *Pike v N Michigan Univ*, 327 Mich App 683, 697; 935 NW2d 86.

The parties agree that the SBTA permits a single assignment of tax credits, and that the credits were assigned once, before the merger of Comerica-Michigan and Comerica-Texas. However, the parties dispute whether the SBTA permits the credits to transfer by means other than an assignment, i.e., whether there was a transfer by operation of law through the merger. We conclude that the SBTA's single-assignment limitation applies only to assignments, and not to transfers made by operation of law. Because the tax credits here transferred by operation of law pursuant to the merger statute, MCL 487.13703(1), they were not subject to the single-assignment limitation.

MCL 208.38g(18) provides:

> Except as otherwise provided in this subsection . . . the qualified taxpayer may assign all or a portion of a credit allowed under subsection (2) or (3) to its partners, members, or shareholders . . . . A credit assignment under this subsection is irrevocable . . . . A partner, member, or shareholder that is an *assignee shall not subsequently assign a credit* or any portion of a credit assigned under this subsection. [Emphasis added.]

Additionally, MCL 208.39c(7) contains the same single-assignment limitation:

> Except as otherwise provided in this subsection . . . the qualified taxpayer may assign all or a portion of a credit allowed under subsection (2) or (3) to its partners, members, or shareholders . . . . A credit assignment under this subsection is irrevocable . . . . A partner, member, or shareholder that is an *assignee shall not subsequently assign a credit* or any portion of a credit assigned under this subsection. [Emphasis added.]

Plainly, the statutory language permits an initial assignment of the credits. By making that assignment irrevocable and mandating that "an assignee shall not subsequently assign a credit or any portion of a credit assigned under this subsection," the statutes also prohibit any assignment beyond the first initial assignment. However, the statutes address only transfers made by

RECEIVED by MSC 8/30/2021 2:05:19 PM

assignment, and are silent regarding transfers made by any other mechanism, such as transfers made by operation of law pursuant to a merger of entities. As such, the statutory single-assignment limitation does not apply to these types of conveyances. Under the doctrine of "of *expressio unius est exclusio alterius*, which means the express mention of one thing implies the exclusion of another," the Legislature's use of the term "assignment," to the exclusion of other types of transfers, indicates an intent to prohibit only more than one assignment, but not other types of transfers. *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014). To find otherwise would require that we read into the SBTA additional limitations which the Legislature has omitted. *City of Fraser v Almeda Univ*, 314 Mich App 79, 99; 886 NW2d 730 (2016). "When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose." *Id*. Thus, we reject respondent's argument that the SBTA prohibits all transfers beyond that permitted by a single assignment.

Additionally, under Michigan jurisprudence, transfers by assignment are distinct from transfers by operation of law. In *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 111; 825 NW2d 329 (2012), our Supreme Court recognized the difference between transfers by assignment and those made by operation of law, such as in the context of a merger. That case addressed the applicability of MCL 600.3204, which requires that all mortgage assignments (except assignments effected by operation of law) must be recorded before initiation of a foreclosure by advertisement, when the mortgage at issue was acquired through a voluntary purchase agreement. *Id*. at 102. The Court considered the nature of transfers made by operation of law, which it defined as "the manner in which a party acquires rights *without any act of his own*." *Id*. at 110 (emphasis in original). The Court explained that "a transfer that takes place by operation of law occurs unintentionally, involuntarily, or through no affirmative act of the transferee." *Id*. The Court concluded that a voluntary purchase agreement did not constitute a transfer by operation of law, as would have happened if a mortgage had transferred as a result of a merger under traditional banking and corporate law. *Id*. at 111, citing 12 USC 215a(e) and MCL 450.1724(1)(b). Here, the tax credits were not purchased by Comerica-Texas, but were acquired by operation of law when Comerica-Michigan merged into Comerica-Texas.

In sum, the statutes' failure to reference transfers that occur by operation of law, through merger or otherwise, is not synonymous with a prohibition against such transfers. The tribunal effectively read a prohibition into the statutes that does not exist on the basis that tax exemption statutes are to be strictly construed against the taxpayer. Although tax credit statutes are to be strictly construed in favor of the taxing unit, *Auto-Owners Ins Co v Dep't of Treasury*, 226 Mich App 618, 621; 575 NW2d 770 (1997), tax credits are distinct creatures of tax law, subject to ordinary rules of statutory construction, and judicial construction is not necessary or permitted where the statute is unambiguous. *Stege v Dep't of Treasury*, 252 Mich App 183, 194; 651 NW2d 164 (2002); *Ashley Capital LLC v Dep't of Treasury*, 314 Mich App 1, 7; 884 NW2d 848 (2015). Had the Legislature intended to prohibit transfer of the tax credits by operation of law, it could have done so, but it did not. We must presume the Legislature intended the language it plainly expressed. *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002).

Additionally, the tribunal found that the credits did not transfer by operation of law because "it [was] far from clear that the transfer of credits from one entity to another was unintentional or involuntary, as the entities were both formed by [petitioner]." We disagree.

RECEIVED by MSC 8/30/2021 2:05:19 PM

"A corporation is a creature of statute, unable to exist except by the force of express law." *Handley v Wyandotte Chemicals Corp*, 118 Mich App 423, 425; 325 NW2d 447 (1982). "Consequently, the effect of a merger or consolidation on the existing constituent corporations depends upon the terms of the statute under which the merger or consolidation is accomplished." *Id*. See also Cox and Hazen, 4 Treatise on the Law of Corporations § 22:2 (3d) (in a merger, assets and business are transferred "by operation of law—that is, by force of the statute operating on the [merger] agreement"). Under Michigan law, when a merger occurs,

> the consolidated bank possesses all the rights, interests, privileges, powers, and franchises and is subject to all the restrictions, disabilities, liabilities, and duties of each of the consolidating organizations. The title to all property, real, personal, and mixed, is transferred to the consolidated bank, and shall not revert or be in any way impaired by reason of this act. [MCL 487.13703(1).]

The tribunal concluded that tax credits are privileges—not property interests. We disagree. "Property, as ordinarily understood, extends to every kind of valuable right and interest." *United States v Hoffman*, 901 F3d 523, 536 (CA 5, 2018) (holding that state issued tax credits are "property" within the meaning of federal wire and mail fraud statutes), citing *Pasquantino v United States*, 544 US 349, 356; 125 S Ct 1766; 161 L Ed2d 619 (2005) (holding that tax revenue due to a foreign government is "property" under federal fraud statutes). See also *Segal v Rochelle*, 382 US 375; 86 S Ct 511; 26 L Ed 428 (1966) (holding that under the federal Bankruptcy Act the right to receive a tax refund is a future right, generally recognized as a property interest, and a contingency might affect the value of the interest, but cannot negate the existence of the property interest at the time of filing). While the mere expectation of a government entitlement may not constitute a cognizable property interest, a legitimate claim of entitlement would. See, e.g., *Board of Regents v Roth,* 408 US 564, 577; 92 S Ct 2701; 33 L Ed2d 548 (1972) (considering whether a property interest exists in continued state employment in a due process claim); *Barrington Cove, LP v RI Hous & Mortg Fin Corp*, 246 F3d 1, 5-6 (CA 1, 2001) (finding in a due process claim that there was no property interest in a claimed federal tax credit where the federal statute did not prescribe conditions for obtaining the credits); *Reed v Village of Shorewood,* 704 F2d 943, 948 (CA 7, 1983) (observing that a cognizable property interest "is what is securely and durable yours under state [or federal] law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain"), overruled in part on other grounds by *Brunson v Murray*, 843 F3d 698, 713 (CA 7, 2016). We have held that a claim for a tax refund is a mere expectation, not a vested right subject to due process, *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 371; 803 NW2d 698 (2010). But, the case before us concerns the transfer of certified tax credits in a merger—not a mere expectation that tax credits could be obtainable in the future. *Id*. Thus, we conclude that the tax credits in controversy constitute property interests within the meaning of the merger statute, MCL 487.13703(1). *Hoffman*, 901 F3d at 538. See also *Virginia Historic Tax Credit Fund 2001 LP v CIR*, 639 F3d 129, 141 (CA 4, 2011) (finding that a transfer of tax credits constituted a transfer of property, but declining to decide whether tax credits always constitute property); *Brandon Bay, Ltd Pship v Payette Co*, 142 Idaho 681, 684; 132 P3d

RECEIVED by MSC 8/30/2021 2:05:19 PM

438 (2006) (tax credits are not contractual rights, but "rights and privileges" that flow from property and are equivalent to income).[5]

Because the tax credits are property and fall within the ambit of the merger statute, we conclude that they transferred by operation of law when the merger of Comerica-Michigan and Comerica-Texas, two separate entities, occurred. In concluding that petitioner acted voluntarily and affirmatively in conducting the merger, the tribunal conflated the voluntary act of merger with the automatic transfer of assets resulting from that merger. Here, the voluntary act of merging, subject to MCL 487.1307(1), automatically transferred the tax credits by operation of law, and precluded application of the SBTA's single-assignment provisions.[6] Therefore, we reverse the tribunal's decision to disallow the tax credits.[7]

IV. CONCLUSION

---

[5] We are not bound by the decisions of lower federal courts, or decisions of other states, but may look to such sources as persuasive authority. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004); *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005).

MCL 450.1724(1)(b) provides that when a merger occurs, "[t]he title to all real estate and other property and rights owned by each corporation party to the merger are vested in the surviving corporation without reversion or impairment." However, under the Banking Code, MCL 487.11101 *et seq*., both state and out-of-state banks are considered "banking corporations." MCL 487.11201(g); MCL 487.11202(q). The Michigan Business Corporation Act, MCL 450.1101 *et seq*., "does not apply to . . . banking corporations." MCL 450.1123(2). Additionally, between the two merger statutes, MCL 487.13703(1) controls because it is more specific than MCL 450.1724(1)(b). *Tyra v Organ Procurement Agency of Michigan*, 498 Mich 68, 94; 869 NW2d 213 (2015) (more specific statutory provisions control over more general statutory provisions). See also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 183.

Because we conclude that tax credits are property rights, they would transfer by operation of law under either merger statute. Even if we agreed with the tribunal's conclusion that the tax credits are "privileges," they would still fall within the ambit of "all the rights, interests, privileges, powers, and franchises" of Comerica-Michigan as described in MCL 487.13703(1). However, we cannot conclude that the tax credits as "privileges" would transfer by operation of law under the more restrictive language in MCL 450.1724(1)(b), and because that issue is not before us, we decline to make any such finding here.

[6] MCL 208.38g(18) and MCL 208.39c(7).

[7] By concluding that that the SBTA does not prohibit the transfer of tax credits by operation of law, and that petitioner obtained the credits by operation of law through the merger, we need not address petitioner's argument regarding the relevancy of federal tax law. Nor do we need to consider respondent's argument that there is an existing question of fact regarding the amount of the tax credits. The parties are free to raise that issue before the tribunal on remand.

RECEIVED by MSC 8/30/2021 2:05:19 PM

For these reasons, we vacate the tribunal's grant of partial summary disposition in favor of petitioner on the issue of petitioner's tax base calculation, and we reverse the tribunal's grant of summary disposition in favor of respondent on the issue of petitioner's claimed tax credits. The matter is remanded to the tribunal for further proceedings consistent with this opinion. We do not retain jurisdiction. Petitioner, having prevailed on appeal, may tax costs pursuant to MCR 7.219.

/s/ Mark T. Boonstra
/s/ Michael J. Riordan
/s/ James Robert Redford

RECEIVED by MSC 8/30/2021 2:05:19 PM

Court of Appeals, State of Michigan

ORDER

Comerica Inc v Department of Treasury

Docket No. 344754

LC No. 17-000150-TT

Mark T. Boonstra
Presiding Judge

Michael J. Riordan

James Robert Redford
Judges

The motion for reconsideration is DENIED.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

May 27, 2020
Date

Chief Clerk

RECEIVED by MSC 8/30/2021 2:05:19 PM

2014 WL 6088076
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

The ANGELA SINACOLA LIVING TRUST and The Guy Sinacola Living Trust, Plaintiffs–Appellants,
v.
PNC BANK, N.A., and PNC Mortgage, alleged successor to National City Mortgage Company, Defendants–Appellees.

Docket No. 317481.
|
Nov. 13, 2014.

Oakland Circuit Court; LC No.2012–127118–CH.

Before: WHITBECK, P.J., and FITZGERALD and MURRAY, JJ.

Opinion

PER CURIAM.

***1** In this action challenging the foreclosure on their property, plaintiffs, The Angela Sinacola Living Trust and The Guy Sinacola Living Trust, appeal as of right the July 11, 2013 order[1] of the Oakland Circuit Court granting defendants' motion for summary disposition and dissolving the temporary injunction tolling plaintiffs' redemption period. Resolution of this case centers on whether defendants violated certain statutory recording requirements in conducting a foreclosure by advertisement and, if so, whether plaintiffs suffered prejudice as a result. Because we hold that there was no statutory violation in the first instance, we affirm.

BACKGROUND

This case is about whether defendants dotted their "I's" and crossed their "T's" in pursuing a foreclosure by advertisement on plaintiffs' property in Clarkston (the "property"). Plaintiffs first acquired their interest in the property on April 15, 2003, by quitclaim deed from Angela Sinacola. Earlier that same day, Ms. Sinacola had taken out a mortgage on the property in favor of National City Mortgage Services Co. for approximately $793,000. Over the next few years, the identity of the mortgagee changed several times through an assignment as well as through several ensuing mergers involving the assignee.

First, the Oakland County Records reflect that on August 27, 2004, the mortgage was assigned to National City Mortgage Co., an entity defendants refer to as "Oldco." This is the only assignment on record. On January 4, 2005, this assignee changed its name to National City Mortgage, Inc., which in turn merged into National City Real Estate Services, LLC. National City Bank—the sole member of National City Real Estate Services—subsequently merged into defendant PNC Bank, NA, and National City Real Estate Services was dissolved.[2]

Some time after these mergers, plaintiffs defaulted on the mortgage. The notice of default dated June 2, 2010, identifies defendant PNC Mortgage (a division of defendant PNC Bank) as the "servicer and owner, or authorized representative of the mortgage owner." Despite receiving this notice, plaintiffs still failed to make payments. Accordingly, a notice of a pending foreclosure sale was provided on April 1, 2011. Over two months later, on June 12, 2011, Ms. Sinacola requested PNC Bank to disclose the name of the current "private investor" for the mortgage. PNC Mortgage (apparently the division responsible for responding) declined to release that information, and on July 12, 2011, PNC Bank foreclosed on the property by advertisement with a full credit bid for approximately $708,000. The Sheriff's Deed from the sale clearly reflects PNC Bank as the party of interest and further identifies PNC Bank in the following way:

> PNC Bank, National Association, successor by merger to National City Bank, successor by merger to National City Mortgage Co., formerly known as NCMC NewCo., Inc., successor in interest to National City Mortgage Co., subsequently known as National City Mortgage, Inc.

***2** Despite this detailed summary of PNC Bank's involvement, the property's chain of title identified neither

RECEIVED by MSC 8/30/2021 2:05:19 PM

PNC Mortgage nor PNC Bank as having any interest at the time of foreclosure, and it is this fact upon which plaintiffs' entire case hinges.

PROCEEDINGS

Less than two months before the expiration of the one-year redemption period, plaintiffs filed a two-count complaint against defendants. Count I alleged that the foreclosure was void because the property's chain of title disclosed neither PNC Bank nor PNC Mortgage's interest as purportedly required by MCL 600.3204(3) (requiring the party foreclosing by advertisement to record its assignment of the mortgage if that party was not the original mortgagee). Count II requested the court quiet title in plaintiffs' favor since PNC Bank and PNC Mortgage lacked a recorded interest as of July 11, 2011. Plaintiffs also sought and obtained temporary injunctive relief—extended periodically throughout the proceedings—tolling the redemption period, otherwise set to expire on July 12, 2012.

Defendants subsequently moved for summary disposition and for dissolution of the preliminary injunction. Defendants argued that because PNC Bank acquired its interest in the property "by operation of law," MCL 600.3204(3) was inapplicable and no recording of PNC Bank's interest before the foreclosure was necessary. Alternatively, defendants claimed that plaintiffs could not show prejudice where they were aware PNC Mortgage was servicing the mortgage as early as June 2, 2010, by virtue of the notice of default, and plaintiffs had otherwise filed their complaint before the expiration of the redemption period despite having made no payments for three years.

Plaintiffs responded that by merging with National City Bank, PNC Bank acquired its interest affirmatively and voluntarily rather than "by operation of law," and PNC Bank was therefore required to record its interest in accordance with MCL 600.3204(3). The failure to record this interest resulted in prejudice, plaintiffs continued, because plaintiffs were unable to determine the actual note holder which in turn potentially subjected them to "double liability."

Defendants replied that plaintiffs had conflated a voluntary bank merger with a voluntary purchase and sale agreement, and had otherwise failed to demonstrate how any prejudice flowed from the failure to record PNC Bank's interest. Defendants further identified the current investor as Bank of New York Mellon in the event the court considered that to be a material fact.

At the conclusion of the ensuing motion hearing, the trial court ruled in defendants' favor, summarily concluding that plaintiffs faced no potential for double liability and therefore could not establish the prejudice necessary to void the foreclosure. An order was subsequently entered granting defendants' motion, dissolving the preliminary injunction and dismissing plaintiffs' case. This appeal followed.

ANALYSIS

***3** Plaintiffs initially argue that because PNC Bank voluntarily acquired its interest in the property, the failure to record that interest rendered the foreclosure by advertisement voidable under MCL 600.3204(3). Although defendants moved for summary disposition below under both MCR 2.116(C)(8) and (10), resolution of this issue (including the identification of the parties involved in the mergers) required review of evidence beyond the pleadings. Accordingly, our review falls under the standard for subrule (C)(10) .[3] *Espinoza v. Thomas,* 189 Mich.App 110, 114–115; 472 NW2d 16 (1991).

This Court reviews a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) de novo. *McCoig Materials, LLC v. Galui Const, Inc.,* 295 Mich.App 684, 693; 818 NW2d 410 (2012). "A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Curry v. Meijer, Inc.,* 286 Mich.App 586, 590; 780 NW2d 603 (2009) (citation omitted). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v. Gen Motors Corp.,* 469 Mich. 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court considers all of the pleadings, affidavits, depositions, admissions and other documentary evidence. *Corely v. Detroit Bd of Ed,* 470 Mich. 274, 278; 681 NW2d 342 (2004). "Where the burden of proof rests with the nonmoving party, that party must respond with documentary evidence to demonstrate the existence of a genuine issue of material fact for trial. The failure of the nonmoving party to so respond results in the entry of judgment for the moving party." *Curry,* 286 Mich.App at 591 (citation omitted).

 © 2021 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 8/30/2021 2:05:19 PM

The prerequisites that must be satisfied to foreclose by advertisement are set forth in Michigan's foreclosure by advertisement statute, MCL 600.3201 *et seq.* Among that statute's many requirements, only its recording provisions are germane to plaintiffs' preserved arguments on appeal. Specifically, § 3204(1)(c) requires "[t]he mortgage containing the power of sale [to be] properly recorded." Likewise, § 3204(3) requires that where the foreclosing party is not the original mortgagee, the record chain of title must reflect the assignment of the mortgage to the foreclosing party. As § 3204(3) provides:

> If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under [MCL 600.3216] evidencing the assignment of the mortgage to the party foreclosing the mortgage.

Thus, "a mortgagee cannot validly foreclose a mortgage by advertisement before the mortgage and all assignments of that mortgage are duly recorded." *Kim v. JPMorgan Chase Bank, NA,* 493 Mich. 98, 106; 825 NW2d 329 (2012). Not every interest held by a foreclosing party who was not the original mortgagee falls within the ambit of § 3204(3), however. To the contrary, § 3204(3)'s recording requirement is inapplicable if the transfer of title to the foreclosing party occurs by operation of law. *Id.* at 108–116. A transfer takes place by operation of law if it "occurs unintentionally, involuntarily, or through no affirmative act of the transferee." *Id.* at 110.

***4** Our Supreme Court's decision in *Kim* is instructive in distinguishing whether a transfer implicates the recording requirement of § 3204(3). There, the Federal Deposit Insurance Corporation (FDIC) was appointed receiver for Washington Mutual's holdings, including the mortgage at issue in that case. *Id.* at 103. Although the FDIC had the statutory authority under 12 USC 1821 to transfer Washington Mutual's assets "without any approval, assignment, or consent," the FDIC instead transferred virtually all of those assets, including the mortgage, to Chase through a Purchase and Assignment Agreement. *Id.* Chase then foreclosed on the mortgage by advertisement without ever recording the assignment. *Id.* at 104. Our Supreme Court held that Chase acquired the mortgage voluntarily rather than by operation of law because the assets "did not pass to [Chase] without any act of [Chase's] own or regardless of [Chase's] actual intent." *Id.* at 111 (citations and internal quotation marks omitted). The Court observed that had Chase not "willingly purchased [the assets], it would not have come into possession of plaintiffs' mortgage." *Id.* at 110–111. Accordingly, Chase's failure to record its interest rendered the foreclosure voidable. *Id.* at 115.

In this case, there is no question that the foreclosing party —PNC Bank—was not the original mortgagee. Likewise, it is undisputed that the chain of title did not identify PNC Bank as having any interest in the property before the foreclosure. However, plaintiffs have failed to rebut that PNC Bank derived its interest in the property through a series of mergers involving the original assignee, whose interest was duly recorded.[4] This fact is dispositive. Indeed, in finding that Chase acquired its interest voluntarily, the *Kim* Court expressly distinguished the acquisition of a mortgage by a Purchase and Assignment Agreement from an acquisition by merger because during a merger, the asset transfer "occur[s] without any voluntary or affirmative action by defendant...." *Kim,* 493 Mich. at 111.

This is exactly what happened here. PNC Bank acquired its interest through a series of mergers, and as a result, acquired the mortgage by operation of law in accordance with federal statute—specifically, the National Banking Act, 12 USC 1 *et seq.*[5] Indeed, on this very point, 12 USC 215a(e) provides that (subject to certain conditions not pertinent here), in the event of a merger, the assets of the old bank transfer to the new entity solely by virtue of the merger itself. As § 215a(e) sets forth in relevant part:

> The corporate existence of each of the merging banks or banking associations participating in such merger shall be merged into and continued in the receiving association and such receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger. All rights, franchises, and interest of the individual merging banks or banking associations in and to every type or property ... *shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer.* The receiving association, upon the merger and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests ... in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed

RECEIVED by MSC 8/30/2021 2:05:19 PM

by any one of the merging banks or banking associations at the time of the merger.... [Emphasis added.]

***5** The plain language of this statute could not more clearly provide that a merger results in the automatic transfer of assets under the circumstances involved here. And, indeed, the *Kim* Court cited this very federal provision in observing that had the FDIC merged Washington Mutual with Chase (rather than execute a Purchase and Transfer Agreement), "[t]he transaction could have constituted a transfer by operation of law under traditional banking and corporate law." *Kim,* 493 Mich. at 111, citing 12 USC 215a(e). Accord *White v. Bank of America, NA,* ––– F Supp 2d ––––, –––– (ND Ga, 2013) 2013 WL 6796460 ("As a result of the merger, by operation of law [under 12 USC 215a(e)], BANA acquired the assets, rights and liabilities of BACHLS, including the Security Deed"); *Dragone v. PNC Bank, National Ass'n.,* unpublished opinion of the United States District Court for the District of Massachusetts, issued June 7, 2013 (Docket No. Civ. A. 11–12194–RWZ), 2013 WL 2460565 ("National City Mortgage Co. subsequently merged with and into National City Bank ... which became the holder of the mortgage by operation of law. See 12 USC 215a(e)"); see also 15 Fletcher Cyclopedia on the Law of Corporations § 7088, p 118 ("The effect of the merger statutes is such that once the conditions for merger have been met, title to the property of the merged corporation passes to the surviving corporation by operation of law.").

In arguing that PNC Bank acted voluntarily and affirmatively in conducting the merger, then, Plaintiffs have conflated the voluntary act of merger with the automatic transfer of assets resulting from that merger. It is the latter which occurs by operation of law and which in this case precludes the application of MCL 600.3204(3) under *Kim.* We may affirm the trial court on this ground alone. See *Messenger v. Ingham Co. Prosecutor,* 232 Mich.App 633, 643; 591 NW2d 393 (1998) ("When this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning.").

But even if there were a recording deficiency, plaintiffs did not suffer prejudice as a result. See *Kim,* 493 Mich. at 115 (holding that plaintiffs must demonstrate prejudice from plaintiffs' failure to comply with MCL 600.3204(3) to set aside the foreclosure). "To demonstrate such prejudice, [plaintiffs] must show that they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute." *Id.* at 115–116.

Plaintiffs claim that their *potential* exposure to "double liability" is the prejudice they suffer. They claim this prejudice may exist because—based on defendants' reply brief below—the holder of the note and the holder of the mortgage appear to be separate entities. See *Talton v. BAC Home Loans Servicing, LP,* 839 F Supp 2d 896, 906–907 (ED Mich, 2012) (explaining that where the foreclosing party is not the holder of the note, the debtor-plaintiff may have a genuine claim of potential exposure to double liability), citing *Livonia Prop Holdings, LLC v. 12840–12976 Farmington Rd. Holdings, LLC,* 399 Fed Appx 97, 102 (CA 6, 2010); see also *Conlin v. Mtg. Electronic Registration Sys., Inc.,* 714 F3d 355, 361–362 (CA 6, 2013) (same). [6] Several problems plague this argument.

***6** First, plaintiffs' reliance on *Talton* and *Livonia Prop Holdings* is misplaced. Those cases pertained to whether an obligor may assert a defect in the assignment of the mortgage to avoid exposure for double liability. See *Talon,* 839 F Supp 2d at 906 (citing *Livonia Prop Holdings,* 399 Fed Appx at 102, in support of the proposition that an obligor "may assert as a defense any matter which renders the assignment absolutely invalid or ineffective, or void" in order to protect the obligor "from having to pay the same debt twice") (internal quotations marks omitted). Here, plaintiffs do not contest the validity of the underlying assignment or subsequent mergers. Rather, the issue is *how* PNC Bank obtained its interest, i.e., through a voluntary transaction or by operation law, and whether there was a recording defect. Those cases are simply inapplicable.

Second, plaintiffs only speculate that they *may* face double liability. Indeed, they cite no specific demand for, let alone the existence of outstanding debt. This argument is therefore insufficient on its face to defeat defendants' motion for summary disposition. *Detroit v. Gen. Motors Corp.,* 233 Mich.App 132, 139; 592 NW2d 732 (1998) ("[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact") (citation and quotations marks omitted, brackets in original).

Third, plaintiffs' own complaint acknowledges that Ms. Sinacola received notice of plaintiffs' default from PNC Mortgage and notice of the foreclosure proceedings from PNC Mortgage/PNC Bank. Yet, aside from seeking a loan modification, plaintiffs still failed to make any mortgage payments after receiving these notices, and took no action

RECEIVED by MSC 8/30/2021 2:05:19 PM

until filing this law suit, which was almost one year after learning of the impending foreclosure sale and six weeks before the redemption period expired. Accordingly, it was not the absence of the foreclosing party's name from the chain of title that could prejudice plaintiffs but rather plaintiffs' own failure to redeem the property even after learning the identity of the foreclosing party. The recording of PNC Bank's interest simply would not have put plaintiffs in a better position to preserve their interest in light of these facts. See *Mitan v. Fed Home Loan Mtg., Corp.,* ––– F Supp 2d ––––, –––– (ED Mich, 2013), 2013 WL 5913660 (finding no prejudice where despite the plaintiff's learning of the sheriff's sale two weeks beforehand, the plaintiff "took no action to redeem the property or to challenge the foreclosure until he filed the instant state court action ... at least six months after learning of the impending foreclosure and just two weeks before the redemption period expired. Voiding a foreclosure is an equitable remedy and it is unavailable to a party who delays unduly in seeking relief"), citing, among others, *Kim,* 493 Mich. at 121 (MARKMAN, J., concurring).

***7** Fourth, and most importantly, it is undisputed that PNC Bank acquired the property in a full credit bid. A full credit bid is one that is "equal to the unpaid principal and interest on the mortgage plus the costs of foreclosure...." *New Freedom Mtg. Corp. v. Globe Mtg. Corp.,* 281 Mich.App 63, 68; 761 NW2d 832 (2008). "When property is purchased at a foreclosure sale for an amount equal to the amount due on the mortgage, the debt is satisfied." *Emmons v. Lake States Ins. Co.,* 193 Mich.App 460, 463; 484 NW2d 712 (1992) (citation omitted). This means that "the mortgage is extinguished at the time of the foreclosure sale." *Bank of Three Oaks v. Lakefront Properties,* 178 Mich.App 551, 555; 444 NW2d 217 (1989). In other words, a debt is no longer owed on plaintiffs' mortgage because the mortgage is gone. *Id.* Thus, irrespective of the identity of the note holder, plaintiffs no longer face any exposure on the mortgage.

Finally, we reject plaintiffs' unpreserved argument that the notice of foreclosure was deficient under MCL 600.3212(a) (requiring a notice of foreclosure by advertisement to identify the mortgagor, original mortgagee, and foreclosing assignee, if any). Contrary to plaintiffs' argument, § 3212(a) requires that the relevant notice identify the foreclosing *assignee,* rather than the foreclosing *entity* as plaintiffs incorrectly claim. Here, the notice of foreclosure satisfied this requirement, properly identifying the foreclosing assignee as National City Mortgage Co. Neither the recording nor notice requirements of the foreclosure by advertisement statute were violated in this case.

Affirmed.

Defendants may tax costs, having prevailed in full. MCR 7.219.

All Citations

Not Reported in N.W.2d, 2014 WL 6088076

Footnotes

1 Although signed on July 10, 2013, the order did not appear in the register of actions until July 11, 2013.

2 Defendants note that an entity formerly known as NCMC, NewCo, Inc., took over the name National City Mortgage Co. after "Oldco" abandoned that name. The new National City Mortgage Co. later merged into National City Bank, which as noted above, merged into PNC Bank on November 6, 2009.

3 Although the trial court ruled only on the secondary issue of prejudice, the parties properly raised—both below and on appeal—the preliminary issue of whether a recording deficiency rendered the foreclosure voidable. See *Kim v. JPMorgan Chase Bank, NA,* 493 Mich. 98, 113–116; 825 NW2d 329 (2012). Thus, this issue is properly before us. See *Peterman v. Dep't. of Natural Resources,* 446 Mich. 177, 183; 521 NW2d 499 (1994) (holding that a trial court's failure to rule on an issue does not preclude appellate review where that issue was properly raised).

4 While plaintiffs argue that PNC Bank voluntarily purchased the assets of National City before any merger occurred, they rely wholly on a newspaper article in support of that assertion. That is insufficient, however. See *SSC Assoc. Ltd. Partnership v. Detroit Gen. Retirement Sys.,* 192 Mich.App 360, 363–364; 480 NW2d 275 (1991) (explaining that documentary evidence, admissible in content, is necessary to defeat a motion for

RECEIVED by MSC 8/30/2021 2:05:19 PM

summary disposition under MCR 2.116(C)(10); opinions and inadmissible hearsay will not suffice); *People v. Burt,* 89 Mich.App 293, 295–296; 279 NW2d 299 (1979) ("[N]ewspapers are [generally] hearsay evidence of the facts stated within them and are not admissible in evidence to prove such facts"); see also *Detroit v. Larned Assoc.,* 199 Mich.App 36, 39–41; 501 NW2d 189 (1993) (same). Even worse, the article at least once references PNC Bank's acquisition of the assets as an "[a]n M and A deal," i.e., a merger and acquisition. Thus, plaintiffs failed to rebut that PNC Bank acquired the mortgage by virtue of the mergers rather than through a prior, separate sale.

5 The National Banking Act governs the corporate existence of the entity resulting from the merger of two or more national banks. See *White v. Bank of America, NA,* ––– F Supp 2d ––––, (ND Ga, 2013), 2013 WL 6796460.

6 Plaintiffs also cite *Residential Funding Co, LLC v. Saurman,* 490 Mich. 909, 910; 805 NW2d 183 (2011), which distinguishes between a party's interest in indebtedness and a party's interest in a note. However, as defendants observe, the applicable principle from *Saurman* is that "only the record holder of the mortgage has the power to foreclose...." *Id.* at 910. As the successor in interest to the mortgagee by merger, PNC Bank was the proper foreclosing party.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 8/30/2021 2:05:19 PM

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

Entire Tribunal Case Information Sheet Non-Property Matter

Petitioner's Contact Information:

First Name	M.I.	Last Name
Comerica Incorporated		

Home Address (No., Street, P.O. Box or Rural Route)
411 West Lafayette MC 3415

City or Town	State	ZIP Code
Detroit	MI	48226

Telephone Number	Fax Number

E-mail Address

Attorney/Authorized Representative's Contact Information:

First Name	M.I.	Last Name
Jerrold	M	Bigelman

Firm Name (if any)
Bodman PLC

Address (No., Street, P.O. Box or Rural Route)
1901 St. Antoine Street, 6th Floor at Ford Field

City or Town	State	ZIP Code
Detroit	MI	48226

Telephone Number	Fax Number
(313) 259-7777	(313) 393-7579

E-mail Address
jbigelman@bodmanlaw.com

Respondent's Contact Information:

Respondent		
Michigan Department of Treasury		

Home Address (No., Street, P.O. Box or Rural Route)
430 W. Allegan Street

City or Town	State	ZIP Code
Lansing	MI	48933

Telephone Number	Fax Number
(517) 373-3223	

E-mail Address

RECEIVED by MSC 8/30/2021 2:05:19 PM

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATION HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

COMERICA, INCORPORATED,

Petitioner, MTT Docket No. ____________

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.
______________________________/

PETITION

(Entire Tribunal / Non-Property Tax Petition)

Petitioner, COMERICA, INCORPORATED, ("Taxpayer"),[1] petitions the Michigan Tax Tribunal for a re-determination of the enclosed Informal Conference Recommendations and Decisions and Orders of the Michigan Department of Treasury ("MDOT" or the "Department"), Hearings Division, as to (i) the calculation of net capital for purposes of the financial institutions franchise tax for the audit period of January, 2008 through December, 2011 (the "Audit Period"); and (ii) the denial of carryover Brownfield Credits and Historic Preservation Credits first earned

---

1 Taxpayer is a Delaware corporation. Prior to October 31, 2007, Taxpayer and its primary operating subsidiary, Comerica Bank, a Michigan banking corporation, had their principal places of business in Detroit, Michigan. For strategic reasons, in 2007, Taxpayer decided to move its principal place of business to Dallas, Texas, and to convert Comerica Bank to a Texas banking association. As set out below, it accomplished this by incorporating a no-asset shell corporation, Comerica Bank, a Texas banking association ("New Bank"), and merging Comerica Bank, a Michigan banking corporation ("Old Bank"), into it.

Taxpayer will use the phrase "Comerica Bank" when discussing the merged entity, and will use "Old Bank" and "New Bank" when necessary to distinguish among the entities that existed before and after October 31, 2007.

RECEIVED by MSC 8/30/2021 2:05:19 PM

under the Michigan Single Business Tax ("SBT"), and continued under the Michigan Business Tax ("MBT"), but denied by the Michigan Department of Treasury (the "Department"), as continuing credits after the effective date of the Michigan Corporate Income Tax ("CIT").

INTRODUCTION

1. The docket numbers, assessment numbers, and years during the audit period are as follows:

Docket No.	Assessment No.	Audit Periods Ending/Tax Year
20122043	TP34119	December, 2008
20122043	TP73498	December, 2009
20140478	UB35645	December, 2010
20140723	UB54592	December, 2011

[The foregoing table is subject to Footnote 1 at the end of each of the three (3) Referee Informal Conference Recommendations; page 14 of each.]

2. The type of State of Michigan taxes that are at issue are (i) the financial institutions tax on net capital; and (ii) the carryover of unused Brownfield Credits and Historic Preservation Credits after the effective date of the CIT, which credits were first issued and approved under the SBT, and continued under the MBT.

3. This appeal involves issues relating to the following:

A. The proper calculation of net capital, for purposes of the Michigan financial institutions franchise tax, with regard to combining entities that have undergone a state law corporate merger, which qualifies under Sections 368(a)(1)(A) and (F) of the U.S. Internal Revenue Code ("IRS Code").

B. The disallowance of credit carryovers originating under the SBT, as claimed under the MBT, but not allowed by the Department as continuing under the MBT after the effective date of the CIT, under the theory that such credits were improperly "assigned" when the Old Bank was merged into the New Bank, without the recognition that the combining entities of the Old Bank and the New Bank are, in fact one continuous legal entity under generally accepted merger law, and that tax credits were not

assigned from the Old Bank to the New Bank but, rather, passed by operation of law.

C. Recognition of the ordering of credits in accordance with Michigan Court of Appeals decision in *Ashley Capital, LLC v MDOT,* 314 Mich. App. 1; 884 NW2d 848 (2016).

4. The actions that prompted this appeal are the following: Informal Conference Recommendations of the Referee dated December 14, 2016 (the "Referee"), under the docket and assessment numbers referred to in Paragraph 1 hereof, which followed from an Informal Conference held on May 17, 2016.

5. Petitioner's current principal office address is 1717 Main Street, Dallas, Texas 75201.

6. The Department and the Referee have erred in their interpretation as to both:

(i) the determination of net capital of Comerica Bank, in a manner which effectively "double counts" capital, contrary to recent Department guidance and applicable merger law, including the Internal Revenue Code, Texas Business Code, the Michigan Banking Code, and Michigan Compiled Laws ("MCL") Section 208.1265(4)(a).

(ii) the determination by the Department and Referee that the carryover credits were "assigned" to New Bank and their treatment of Old Bank and New Bank as two separately existing entities, when in fact the type of State-law merger, and its Federal tax characteristics result in a merged / combined entity, without any substantive change, whether as to its business, employees, properties, or tax items, and the transfer of the credits by operation of law.

7. Summary of Amounts in Controversy - - Net Capital Issue:

a. Petitioner's actual net capital for the Audit Period is approximately $5.0 billion.

b. If the Department's calculation of net capital were to stand; to wit., the double counting described in Paragraphs 33 and 34, below, the total approximate net capital of Petitioner would be $8.0 billion in 2008; $7 billion in 2009; and $6.0 billion in 2010.

RECEIVED by MSC 8/30/2021 2:05:19 PM

c. This erroneous calculation would overstate Petitioner's net capital by approximately $3.0 billion in 2008; $2.0 billion in 2009; and $1 billion in 2010.

d. For the Audit Period, the Department's approximate total overstatement of Michigan financial institution tax is $5.7 million; to wit; $4.5 million of regular tax and $1.2 million of surcharge. This is further set forth on the attached calculation, Exhibit "A".

8. Summary of Amounts in Controversy - - Credit Carryover Issue:

a. The unused Brownfield Credits of Petitioner, which would be denied by the Department for use by Petitioner, are approximately $3.3 million.

b. The unused Historic Preservation Credits of Petitioner, which would be denied by the Department for use by Petitioner, are approximately $800,000.

RECEIVED by MSC 8/30/2021 2:05:19 PM

BACKGROUND – TAXPAYER'S RELOCATION TO TEXAS AND THE MERGER OF ITS PRIMARY OPERATING SUBSIDIARY

9. Taxpayer is a publically traded financial service company headquartered in Dallas, Texas, and has been in business, when considering its predecessors, since 1849. Taxpayer decided, for strategic business purposes, to move its headquarters from Detroit, Michigan to Dallas, Texas, in 2007, and to charter its primary operating subsidiary as a Texas banking association. To effectuate the change in form, it created New Bank and engaged in a State law merger under an "Agreement and Plan of Merger" (Exhibit "B").

10. The Agreement and Plan of Merger states that, Old Bank "will be merged with and into the [New] Bank, the separate existence of the [Old] Bank will cease, and the [New] Bank will be the surviving entity governed by the State of Texas ... and such Merger will in all respects have the effect provided for in Section 32.301 of the Texas Finance Code and Section 10.008 of the Texas Business Organizations Code."

11. Article II, Section (a) of the Agreement and Plan of Merger states that New Bank, "shall succeed to , without further transfer, and shall possess all of the rights, privileges, powers

and franchises ... of the Constituent Entities, ... and all property, real, personal and mixed, and all debts due to each of the Constituent Entities ... ".

12. The corporate merger laws of both Michigan and Texas recognize that the properties, rights and privileges of the merged corporation (Old Bank) become those of the surviving corporation (New Bank), by operation of law.

13. Under section 10.008(a)(2) of the Texas Business Code, when a merger takes effect, "all rights, title, and interests to all real estate and other property owned by each organization that is a party to the merger is allocated to and vested ... in one or more of the surviving or new organizations as provided in the plan of merger **without**: (A) reversion or impairment; (B) any further act or deed; or (C) **any transfer or assignment having occurred**." (Emphasis added)

14. Likewise, the Michigan Banking Code expressly permits a bank to consolidate with any number of "consolidating organizations" to form a consolidated bank. (MCL 487.13701(1)). This includes an out-of-state bank within the meaning of the term "consolidating organizations". (MCL 13701(6)). Interstate consolidations are permitted. (MCL 487.13702)). The statute expressly provides that "the corporate existence of each consolidating organization is merged into and continued in the consolidated bank", which then "possesses all the rights, interests, privileges, powers, and franchises and is subject to all the restrictions, disabilities, liabilities, and duties of each of the consolidating organizations". (MCL 487.13703(1)).

15. Further, the reorganization was undertaken pursuant to a State-law merger under Section 368(a)(1)(A) of the IRS Code, which also qualified as a mere change in identity, form, or place of organization, however effected, per IRS Code Section 368(a)(1)(F). In such transactions, assets and liabilities, and tax attributes, are deemed to be transferred by the merged

RECEIVED by MSC 8/30/2021 2:05:19 PM

corporation into the surviving corporation, by operation of law, without any further action on the part of merging parties.

16. Pursuant to the Agreement and Plan of Merger, and as a matter of pure fact and law, there was no change in the business of Comerica Bank as a result of the merger; no change in its employees, no change in its shareholders, and no change in its assets, liabilities, or other rights, after the effective date of the Agreement and Plan of Merger, except that the bank was chartered in Texas.

MERE CHANGES IN IDENTITY, FORM, OR PLACE OF ORGANIZATION

17. A central error by both the Department and the Referee on all issues involved in this matter was their treatment of Comerica Bank as two independent entities, rather than a single, merged corporation. As set out above, under both Texas and Michigan law, the surviving entity in a merger inherits all of the rights, titles, and interests of the merged corporation by operation of law.

18. This treatment by the Department and the Referee did not comport with MCL 208.1265(4), which states that "a change in identity, form, or place of organization of 1 financial institution shall be treated as if a single financial institution had been in existence for the entire tax year in which the change occurred and each tax year after the change."

19. MCL 208.1265(4) mirrors Section 368(a)(1)(F) of the IRS Code, the latter of which discusses what is commonly called an "F" reorganization. These are transactions that are conducted to effect "a mere change in identity, form, or place of organization of one corporation, however effected." An "F" reorganization generally involves, in form, two corporations, one of which transfers or is deemed to transfer assets to the other. However, for tax purposes, the IRS

RECEIVED by MSC 8/30/2021 2:05:19 PM

Code treats the reorganized company as if it were the same entity as the corporation in existence before the reorganization.

20. "F" reorganizations are well recognized in tax law. These concepts have been in the IRS Code since 1925 (under current and predecessor IRS Code sections).

21. An "F" reorganization can include multiple steps, such as a state law statutory merger. Federal Income Tax Regulations, Section 1.368-2(m), illustrate how a series of transactions can encompass an "F" reorganization, including a state statutory merger into a new shell corporation in the State where the survivor of the merger will reside.

22. An "F" reorganization may include an actual or deemed transfer of property from one corporation to another. Section 1.368-2(m)(1) of the Federal Income Tax Regulations. In this case a deemed transfer occurred, with no requirement to physically transfer assets, liabilities, and other rights.

23. Example (5) in Section 1.368-2(m)(4) of the Federal Income Tax Regulations follows steps similar to those undertaken by Comerica Bank. It reads, in pertinent part, as follows:

> Example (5). *Series of related transaction - - mere change.* P owns all of the stock of S1, a State A corporation. The management of P determines that it would be in the best interest of S1 to change its place of incorporation to State B. Accordingly, under an integrated plan, P form S2, a new State B corporation; P contributes the S1 stock to S2; and S1 merges into S2 under the laws of State A and State B. Under paragraph (m)(3)(i) of this section, a series of transactions that together result in a mere change of one corporation may qualify as a reorganization under section 368(a)(1)(F). The contribution of S1 stock to S2 and the merger of S1 into S2 together constitute a mere change of S1. Therefore, the potential F reorganization qualifies as a reorganization under section 368(a)(1)(F). Without regard to its qualification under section 368(a)(1)(F), the potential F reorganization would also qualify as a reorganization under both section 368(a)(1)A) and section 368(a)(1)(D). Under paragraph (m)(3)(iv)(B) of this section, if a potential F reorganization qualifies as a reorganization under section 368(a)(1)(F) and would also qualify under one or more of section 368(a)(1)(A) or 368(a)(1)(D), it qualifies only as a reorganization under

RECEIVED by MSC 8/30/2021 2:05:19 PM

368(a)(1)(F), and neither of section 368(a)(1)(A) nor section 368(a)(1)(D) will apply.

24. In *Davant v. Commissioner,* 366 F. 2d 874 (CA 5th 1966), the court explained:

> "The term "mere change in identity or form obviously refers to a situation which represents a mere change in form as opposed to a change in substance. Whatever the outer limits of Section 368(a)(1)(F), it can clearly be applied where the corporate enterprise continues uninterrupted, except for a distribution of some liquid assets or cash. Under such circumstances, there is a change of corporate vehicles **but not a change in substance**." (emphasis added).

25. The legislative history for "F" reorganizations makes clear that the use of more than one corporation to effectuate an F reorganization of a single operating entity does not prevent a transaction from satisfying the one corporation requirement. See House Report No. 760-248, 97th Congress, 2d Session 541 (1982).

26. An "F" reorganization does not terminate the transferor corporation's tax year. There is no basis to split the fiscal year into 2 separate years.

27. Section 381 of the IRS Code, entitled *Carryovers in certain corporate reorganizations,* provides, in paragraph 381(b)(1), in part, as follows:

> "Except in the case of an acquisition in connection with a reorganization described in in subparagraph (F) of section 368(a)(1) - - (1) the taxable year of the distributor or transferor corporation shall end on the date of the distribution or transfer ... ".

28. The acquiring corporation in a type "F reorganization is treated just as the transferor corporation would have been treated if there had been no reorganization. Section 1.381(b)-1(a)(2) of the Federal Income Tax Regulations provides as follows:

> "*(2) Reorganizations under section 368(a)(1)(F).* In the case of a reorganization qualifying under section 368(a)(1)(F) (whether or not such reorganization also qualifies under any other provision of section 368(a)(1)), the acquiring corporation shall be treated (for purposes of section 381) just as the transferor corporation would have been treated if there had been no reorganization. Thus, the taxable year of the transferor corporation shall not end on the date of transfer merely because of the transfer; a net operating loss of the acquiring corporation

RECEIVED by MSC 8/30/2021 2:05:19 PM

> for any taxable year ending after the date of transfer shall be carried back in accordance with Section 172(b) in computing the taxable income of the transferor corporation for a taxable year ending before the date of transfer; and the tax attributes of the transferor corporation enumerated in section 381(c) shall be taken into account by the acquiring corporation **<u>as if there had been no reorganization</u>**" (emphasis added)

29. The Department and the Referee should have treated the merger of Old Bank into New Bank as if there had been no reorganization, which would have caused it to properly average Comerica Bank's net capital, and would have caused it to properly accept Comerica Bank's Brownfield Credits and Historic Preservation Credits.

<u>FIRST ISSUE – DETERMINATION OF NET CAPITAL</u>

30. Under the MBT, a financial institution's "tax base" was its "net capital." MCL 208.1265(1). Net capital was determined by averaging a financial institution's net capital for the five preceding years. MCL 208.1265(2). Where a financial institution had been in existence less than five years, its net capital was determined by taking the average of net capital for the years the entity had been in existence.

31. When calculating net capital for Comerica Bank, the Department and the Referee treated the merged entity as if it were two unrelated entities for net capital purposes, independently calculating average net capital for Old Bank and New Bank for tax years 2008-2011 and taxing both. This had the effect of double counting net capital.

32. That net capital was double taxed is evident by simply reviewing Comerica Bank's net capital before and after the merger. As of the end of 2006, Comerica Bank's net capital was $5.194 billion dollars. All of this capital was held by Old Bank. New Bank did not yet exist. As of the end of 2007, Comerica Bank's net capital was $5.381 billion. All of this capital was held by New Bank. Old Bank was merged into New Bank. Yet, the Department and the Referee determined that, to determine net capital, the average net capital of both Old Bank

RECEIVED by MSC 8/30/2021 2:05:19 PM

(determined on a five-year average) and New Bank (determined by averaging only the years New Bank was in existence) were to be added together to determine tax base. Thus, for 2008, the Department concluded that Comerica Bank's net capital was $8.338 billion, literally creating $3.118 billion in capital out of thin air.

33. The Department reached this result as follows. For the year 2008, New Bank had been in existence for two years, 2007 and 2008. The Department averaged net capital for those two years, which yielded a result of $5.197 billion dollars. But the Department also independently considered Old Bank. It determined that the five-year average net capital of Old Bank (which merged into New Bank and ceased existing in 2007) was $3.141 billion (averaging $5.262 billion in 2004, $5.249 billion in 2005, $5.194 billion in 2006, and $0 in 2007 and 2008). It then added the average net capital for Old and New Banks together to reach a total net capital of $8.338 billion, even though the combined capital of Old and New Bank for 2008 was only $5.012 billion.

34. Below is a chart for each tax year that shows the capital "created" by the Department.

	Total Capital (per audit)	As Filed (adjusted to use capital per audit)		Per MDOT 5 year average	2, 3, 4, 5 yr. average		Capital
		5-year average	Years incl.	"Old Bank"	"New Bank"	Audit Total	"Created"
2004	5,261,816,056						
2005	5,248,615,346						
2006	5,194,400,994						
2007	5,381,750,034						
2008	5,012,039,101	5,219,724,306	2004-2008	3,140,966,479	5,196,894,568	8,337,861,047	3,118,136,741
2009	3,800,641,868	4,927,489,469	2005-2009	2,088,603,268	4,731,477,001	6,820,080,269	1,892,590,800
2010	5,317,436,509	4,941,253,701	2006-2010	1,038,880,199	4,877,966,878	5,916,847,077	975,593,376
2011	6,035,432,756	5,109,460,054	2007-2011	0	5,109,460,054	5,109,460,054	-

35. This manner of net capital calculation ignores the Department's own guidance. Recently, the Department issued the attached notice (Exhibit "C"), dated November

RECEIVED by MSC 8/30/2021 2:05:19 PM

21, 2016, entitled *Notice to Taxpayers Regarding Five-Year Averaging Calculation of Net Capital Capital for Financial Institutions Combining with Other Financial Institutions* (the "11/21 Notice").

36. The 11/21 Notice recognizes that the Department has, in the past, doubled up on the calculation of net capital for combining companies, and provides, as a correct solution, the following:

> "**The Department will no longer calculate net capital for years prior to the combination year using both the surviving and acquired entities' net capital.** When two or more financial institutions combine, only the surviving financial institution's net capital for the year prior to the combination is used to calculate the surviving entity's tax base. Thus, for the years prior to the combination, the surviving financial institution will use only its own books and records to compute the five-year look-back averaging calculation. **In the year of the acquisition and for all years following the combination, the surviving financial institution will merge its books and records with those of the acquired financial institution and the combined books and records will be used to compute the net capital tax base.**
>
> The Department will give this change in policy full retroactive effect, and will apply it to all open tax years. Whether a period is open under the statute of limitations may dependent on whether and when an audit of a taxpayer's books and records commenced. If a taxpayer previously filed a return under MBT FAQ F5 and the tax period remains open, the taxpayer may amend accordingly." (Emphasis added).

37. Application of the 11/21 Notice in this case would result in (i) years prior to 2007's determination of net capital being those of Old Bank; (ii) for 2007, the year of the merger, being one (1) calculation of one (1) continuing legal corporate entity - - and not two (2) entities; and (iii) the calculation of net capital after 2007 of one (1) continuing entity, New Bank.

38. The Notice should be dispositive, and the Department should apply it in this case.

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

39. But even notwithstanding the Notice, the Department incorrectly applied Michigan law. MCL Section 208.1265(2), when correctly applied, does not cause the double counting and fictional creation of net capital. MCL Section 208.1265(4)(b) provides as follows:

> "(4) For purposes of this section, each of the following applies:
>
> "(a) A change in identity, form, or place or organization of 1 financial institution **shall be treated as if a single financial institution has been in existence for the entire tax year in which the change occurred and each tax year after the change.**
>
> "(b) The combination of 2 or more financial institutions into 1 shall be treated as if the constituent financial institutions had been a single financial institution in existence for the entire tax year in which the combination occurred and each tax year after the combination, and the book values and deductions for United States obligations and Michigan obligations of the constituent institutions shall be combined. A combination shall include any acquisition required to be accounted for by the surviving financial institution in accordance with generally accepted accounting principles or a statutory merger or consolidation." (Emphasis added)

40. The Department should have applied this section and treated Comerica Bank as a combined entity for 2007 and later years. The Department and the Referee, in not understanding the nature of a merger, as the mere continuance of one (1) entity, attempt to create net capital in two (2) entities, where it does not exist. They ignore the above words "statutory merger", in MCL Section 208.1265(4)(b), which refer to a statutory merger under Section 368(a)(1)(A) of the U.S. Internal Revenue Code [an "A" merger].

41. This error "created capital", which resulted in additional tax of approximately $2 million, $1.7 million, and $0.7 million in 2008, 2009, and 2010, respectively.

42. The Tribunal should vacate the calculations of the Department and the decision of the Referee, which result in a double counting of net capital for purposes of the Michigan

franchise tax on financial entities, and direct the Department to re-calculate Comerica Bank's tax liability based on the Notice and in accordance with MCL 208.1265(4)(b).

SECOND ISSUE – DISALLOWANCE OF TAX CREDITS

43. In addition, the Department denied the availability of unused SBT New Brownfield and Historic Preservation Credits. The Department treated Comerica Bank, as merged in 2007 as two (2) separate entities, and decided that a merger of these entities acted as an "assignment" which voided the credits. The Referee followed this treatment.

44. This treatment was erroneous because there was no "assignment" here. Michigan cases hold that a merger does not result in an assignment, and extensive tax law on mergers and "F" reorganizations is in accord.

45. The tax credits at issue were originally obtained by KWA I, LLC (Exhibit "D"). KWA I, LLC was a "qualified taxpayer" eligible to receive the credits.

46. MCL 208.38g(18) provides that a qualified taxpayer "may assign all or a portion of a credit ... to its partners, members or shareholders ... or based on an alternative method approved by the Michigan economic growth authority."

47. Comerica Bank was a partner in KWA I, LLC. In this case, investments were made in a Detroit mixed use development, which resulted in employment opportunities for low-to-moderate income people due to commercial activities on the ground floor. Such activities are encouraged by the Federal Reserve, pursuant to the Community Reinvestment Act, *42 United States Code, Section 5301, et seq.*, in order to provide benefits to local communities. Some of the activities result in state tax credits for the involved bank to further encourage such investments.

48. KWA I, LLC, assigned the credits to Comerica Bank in 2005.

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

49. As set out above, Old Bank was merged into New Bank in October, 2007.

50. Under Michigan and Texas law, a merger does not result in an assignment. Rather, all rights and interests of the merging entity become rights and interests of the merged entity by operation of law. MCL 487.13703(1); Texas Banking Code 10.008(a)(2).

51. The Michigan Supreme Court, in the case of *KIM v. JP Morgan Chase Bank, N.A.*, 493 Mich. 98; 825 N.W. 2d 329 (2012), discussed the concepts of assignment and conveyance "by operation of law." In that case, the Court expressly distinguished an "assignment" from an acquisition by merger, because during a merger an asset transfer "occur[s] without any voluntary or affirmative action." 493 Mich. 98, at 110-111; citing *Miller v. Clark*, 56 Mich. 337 (1855).

52. Following *KIM,* the Michigan Court of Appeals held in *The Angela Sinacola Living Trust v. PNC Bank, N.A.*, No. 317481 (Unpublished, Nov. 13, 2014) "a merger results in the automatic transfer of assets." In such cases, the rights and interests of a party transfer by operation of law and no assignment occurs.

53. For purposes of the continuance of Brownfield and Historic Preservation credits, the corporate reorganization in this case results in no substantive change in the Comerica business entity, as a matter of both federal tax law, and Michigan tax law as to the franchise tax and the carryover of credits.

A. Old Bank participated in community investment partnerships that allowed it to obtain the Michigan Historical Preservation Credits and Michigan Brownfield Credits, and claimed the same in 2005.

B. The credits were claimed under the SBT and then the MBT. Taxpayer has elected to continue the use of the credits after the adoption of the CIT by continuing to file returns under the MBT, until the credits are exhausted, as it is authorized to do.

C. Based on a thin argument centering on Federal employer identification numbers, the Department and the Referee seek to deny earned credits.

RECEIVED by MSC 8/30/2021 2:05:19 PM

D. They take this position despite the fact that for State of Michigan tax purposes, and IRS Code purposes, there is solely one continuing entity.

E. The 2007 merger / "F" reorganization had no substantive effect on the business of Comerica Bank, or its assets, shareholders, tax items, accounting, or physical locations

F. A great deal of merger law is unabashedly ignored by the Department and Referee in their treatment of Comerica Bank, by denying continued use of the credits.

G. As further indicated below, there is no substantive change in a merging entity due to the type of reorganization undertaken by Comerica Bank.

54. It was, therefore, inappropriate for the Department and the Referee to:

A. Adhere to the non-processing of the Taxpayer's 2007 MBT return due to merger of Old Bank) into New Bank ( ).

B. Disallow credits on the 2007 return due to a change of EIN (as to New Bank). [It should be noted that the Department's auditor recommended that the 2007 year was closed; however, the Referee disagreed.]

C. Deny 2008 carryforwards of SBT credits to MBT returns; causing a difference of $4,098,317 from Taxpayer's originally filed return.

D. Misinterpret normal business entity changes, such as the succession of entity changes in this case, New Bank and Old Bank being substantively the same entity.

E. State that, per the SBT, MCL Section 208.38(g), the Brownfield Credits and Historic Preservation Credits cannot benefit New Bank due to new EIN; and saying, based upon its lack of understanding of mergers and "F" reorganizations, that the Old Bank's tax credits ceased to exist on November 1, 2007.

55. It is critical that the Michigan Tax Tribunal reject the notion expressed in the Referee's Recommendations that Federal tax law does not apply, need not be considered, and

can be ignored, when viewing a common, every-day, type of merger and "F" reorganization, as was the case here, where the surviving corporation is substantively the same as the merged corporation, a position that is well-recognized in MCL 208.1265(4), and elsewhere in Michigan law.

THIRD ISSUE - ORDERING

56. Should Petitioner prevail on the availability of SBT credit carryforwards, the ordering of the use of such credits should be changed. Taxpayer lost $1.5 million in MBT Compensation Credits. These compensation credits could not be carried forward. However, this was not an issue since the other credit carryforwards were not allowed.

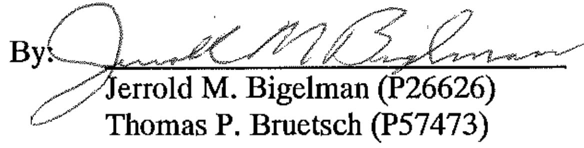
CONCLUSION AND RELIEF

57. Petitioner therefore requests: That the Tribunal (a) vacate the proposed assessments listed at the beginning of this Petition, in paragraph 1, or any substituted assessments in lieu thereof, and allow the full use of any remaining credits of the Petitioner, without limitation, through the filing of MBT returns until such credits are fully utilized, (b) vacate the calculations of the Department which result in a double counting of net capital for purposes of the Michigan franchise tax on financial entities, and recognize the well-established, and continuing net capital of Comerica-Detroit, and then Comerica-Texas, in the historic amount of $5 billion; and (c) direct that any continuing credits be ordered in the manner determined by the Michigan Court of Appeals, in *Ashley Capital, LLC v. MDOT,* supra.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Respectfully Submitted,

BODMAN PLC

By: 

Jerrold M. Bigelman (P26626)
Thomas P. Bruetsch (P57473)
Attorneys for Petitioner
1901 St. Antoine Street
6th Floor at Ford Field
Detroit, Michigan 48226
(313) 259-7777
jbigelman@bodmanlaw.com
tbruetsch@bodmanlaw.com

Dated: February 9, 2017

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

INDEX OF EXHIBITS

Tab A	Calculation – referred to in #7d
Tab B	Agreement and Plan of Merger – referred to in #9
Tab C	Department of Treasury 11/21/16 Notice – referenced in #35
Tab D	KWA I, LLC issued credits are qualified taxpayer – referred to in #45
Tab E	Referee's Decision and Order of Determination Tax Period 12/2008 – 12/2009
Tab F	Referee's Decision and Order of Determination Tax Period 12/2010
Tab G	Referee's Decision and Order of Determination Tax Period 12/2011

RECEIVED by MSC 8/30/2021 2:05:19 PM

Michigan Department of Treasury
COMERICA INC / [redacted]3421
Michigan Business Tax Audit Report of Findings

Introduction

A MBT audit was conducted and completed on the above listed taxpayer for the period 1/1/2008 to 12/31/2011. The audit resulted in a determined amount of $(12,454,941.07).

Audit Objectives

- Determine any differences between the correct tax and the reported tax liability.
- Affect the collection or refund of those taxes determined reported in error.

Cause of Adjustment

Primary: MBT-Financial Institution - Apportionment Within & Outside State, MCL 208.1267(1)
Secondary: MBT-Financial Institution - Net Capital Computation, MCL 208.1265(2)
Third: MBT-Credits

Audit Procedures and Steps Performed

Michigan Business Tax

Audit Confirmation

The Audit Pre-confirmation letter and TAQ were sent to the taxpayer 9/27/2013. The taxpayer returned the completed TAQ via fax on 10/23/2013. The Audit Confirmation letter and Records Request were sent via fax along with instructions to register for the TCB Secure Portal. The taxpayer has neither registered for nor used the TCB Portal. The Audit Contact is Gerald Coe, VP.

Taxpayer Responsibility

The taxpayer is aware of the responsibility to identify credits outside the scope of the audit.

Business Description

The taxpayer is a C-corp that files returns on a calendar-year basis. Comerica, Inc. is the DM of a 41-member UBG. The taxpayer has locations in 21 of the 50 United States, with a corporate headquarters in Dallas, Texas (as of 2007). There are no known foreign operations. The taxpayer conducts a variety of

RECEIVED by MSC 8/30/2021 2:05:19 PM

financial and banking services as part of its normal activity. The UBG members are:

DM	Comerica Incorporated	8421
2	Comerica Bank	1646
3	Comerica Ventures Inc.	0609
4	Pacific Bancard Association	0606
5	Comerica Mgmt Company	7682
6	Comerica Equities Inc	1747
7	Comerica Leasing Corp	6253
8	Comerica Properties Corp	0416
9	ROC Technologies Inc.	3340
10	Comerica Securities Inc.	1207
11	Comerica Capital Advisors Inc.	8575
12	Interstate Select Insurance Services	4918
13	Comerica Holdings, Inc.	7896
14	Comerica Coastal Inc.	4544
15	Comerica Financial Inc.	2136
16	Comerica West Financial Corp	4105
17	Comerica International Corp	0411
18	Comerica Bank & Trust, NA	8794
19	Wilson Kemp & Associates	8151
20	Comerica Insurance Group	9647
21	Comerica West Inc	8565
22	Comerica Assurance Ltd	5194
23	Comerica Investment Services	6891
24	WAM Holdings, Inc.	0616
25	Comerica Insurance Services, Inc.	3147
26	Comerica Capital Markets Corp	4363
27	VRB Corp	7992
28	Comerica West Enterprises Inc	2565
29	CMT Holdings Inc.	6152
30	Comerica Merchant Services	1274
31	Imperial International Inc.	4350
32	Imperial Management Inc.	7448
33	CDV I Incorporated	1888
34	Comerica Insurance Services of Texas	6678
35	MBM Advisors, Inc.	9441
36	Silver Funding Corp	5144
37	World Asset Management Inc.	1226
38	SB Investment Services	6619
39	Sterling Community Investor Corp	3543
40	Comerica Investment LLC	5887
41	WAM Holdings II, Inc.	6903

The Audit Contact is Gerald Coe, VP. Gross Receipts range from $3.9B - $5.8B throughout the audit period. The SIC Code 671 - Bank Holding Companies appears to be appropriate and correct.

General Scanned Documents

RECEIVED by MSC 8/30/2021 2:05:19 PM

Audit Pre-confirmation letter
Audit Confirmation letter
TAQ

Audit Instructions

The Audit Instructions were reviewed prior to the audit's commencement.

Account Maintenance

All of the returns in the audit period were 'Processed/Billed' per SAP, so no account maintenance was deemed necessary. It is noted, though, that the taxpayer has received Notices of Adjustment/Additional Tax Due for each year under audit. These notices were generated due to negative equity capital issues upon the returns' processing. These have since been resolved by Tax Policy; however, the taxpayer's account was not updated and reflects incorrect deficiencies.

Account Scope

A full audit review was conducted.

Federal Audit

The taxpayer completed IRS audits for the 2008 and 2009 returns during the summer of 2013. None of the adjustments affect the figures reported on the MBT 4590 forms.

Additional Records Request (during the audit)

There are no IDR's for this taxpayer. The initial records request was met by the taxpayer, as were any subsequent requests for additional information.

UBG Analysis

The taxpayer is a bank holding company that owns 39 subsidiary financial corporations including banks, investment firms, real estate holding companies, and captive insurance companies. See the **Business Description** note for a complete list of UBG members reviewed during the audit. All members are owned 100% by the taxpayer or by other 100%-owned subsidiaries of the taxpayer, which satisfies the Control Test set forth by RAB 2010-1. Significant flows of assets, liabilities, and equities amongst the members satisfy the Flow-of-

RECEIVED by MSC 8/30/2021 2:05:19 PM

Value Test of RAB 2010-2, as well as the interdependence amongst the entities to provide services and financial products to each other's customers (i.e. one entity holds a client's checking and savings accounts, while the other holds the client's mortgage and investment portfolio.)

It is noted that the taxpayer sold some of its subsidiaries during the look-back periods, but prior to the MBT years (1/1/2008 - 12/31/2011). Since these entities were sold - not consolidated or merged - they were excluded from the UBG because they ceased membership as of the dates of their sales. It is also noted that the following UBG members consolidated/merged into their parent entities within the look-back and audit periods: WAM Holdings II, Inc. (Member 41, merged 2006); Comerica Capital Markets (Member 26, merged 2011); Comerica West Financial Corp (Member 16, merged 2011); Comerica Equities, Inc. (Member 6, merged 2011); and Pacific Bancard Association (Member 4, merged 2007).

Audit Determination

Nexus and Apportionment
The taxpayer has significant physical nexus in Michigan.

Michigan Gross Business: Adjustments of -$519,640,845 (2008); -$561,184,954 (2009); -$447,850,922 (2010); and -$442,687,733 (2011) were made to reconcile the reported figures to the taxpayer's work papers in accordance with MCL 208.1261(o) and MCL 208.1269(f) apportionment definitions regarding the allocations of business activities. The adjustments are largely related to the allocations of federal investments.

Total Gross Business: The reported figures were verified with a breakdown of the taxpayer's income by state for all years of the audit period. All reported amounts reconcile to the taxpayer's work papers, so no adjustments were made. *See Schedule B1.*

Equity Capital
Equity amounts for each member were verified using the taxpayer's US 1120 Schedule L balance sheets for each of the look-back period. *See Schedule D3.*

Eliminations
Eliminations were made according to entity ownership verified in the taxpayer's US 1120 forms 851 and corporate organization charts. All eliminations were made at 100% of the eliminated entity's equity, as all entities are owned 100% by a single parent entity. Member 5 calculated negative equity capital prior to its eliminations from its parent, so its equity before eliminations is reflected as a '$0'. All other negative equity amounts remaining after eliminations were allowed in accordance with the public notice issued by the Department on 9/20/2013.

RECEIVED by MSC 8/30/2021 2:05:19 PM

After eliminations, the combined equity amounts for all of the UBG members substantially agrees with the consolidated equity of the taxpayer on the US 1120 Schedule L balance sheets and the consolidated balance sheets from the published Annual Reports for each year of the look-back and audit periods. *See Schedule D2.*

Goodwill

The reported amounts reconcile to the taxpayer's work papers, which listed goodwill amounts by entity (as opposed to consolidated goodwill reported to the FDIC). These amounts are accepted as reported with no adjustments.

MI Obligations

The taxpayer only reported Michigan Obligations for 2004, which was deemed appropriate per the provided work papers. No adjustments were made.

US Obligations

The reported figures were verified with the taxpayer's investment reports and deemed to reconcile; however, it was noted that no FHLB stocks were reported. The taxpayer provided the Average Daily Book Values for FHLB stocks from 2008 - 2011 because the taxpayer just opened the investment in February 2008 (verified with a detailed G/L Balance Sheet). The FHLB investments increased the US Obligations deductions significantly for audit period. *See Schedule D1.*

Current Year Net Capital

The current year net capital amounts for each entity were determined by subtracting goodwill and MI and US Obligations figures from equity capital after eliminations. The sums are generally divided by 5 years (MCL 208.1265(2)) to arrive at the current year net capital unless an entity did not exist for all 5 years of the look-back periods.

All entities except Member 37 were averaged by a denominator of 5. Member 37 was not created prior to 2006, and its average net capital was calculated as such. 2008's sum was divided by 3; 2009's sum was divided by 4; and 2010's and 2011's sums were divided by 5. *See Schedule C2.*

SBT Credit Carryforwards

The taxpayer claimed an SBT ITC Credit Carryforward, and Historic Preservation Credit and 'New' Brownfield Credit Carryforwards; however, these were disallowed when the 2007 SBT return was processed due to taxpayer's change of FEIN in October 2007. *(See letter to taxpayer attached to Tax Specific Forms and Correspondence.)* Since the SBT Historic Preservation and Brownfield credits were denied upon SBT processing, the 2008 carryforwards of SBT credits to the MBT returns were also denied upon processing. Based upon a detailed review of the certificates and applicable statutes the SBT Historic Preservation

RECEIVED by MSC 8/30/2021 2:05:19 PM

and Brownfield Credits originally claimed on the 2005 SBT return are also denied in audit. This adjustment resulted in a difference of $4,098,317 from the taxpayer's originally filed return, but this was not an adjustment from the processed return.

The SBT ITC Credit Carryforward was verified for Member 2 using CTC Bridge, which noted ITC Carryforwards for 2006 and 2007. Since the SBT ITC Credits could be carried forward nine years per the SBTA and recognized in 2008 and 2009 per the MBTA, a credit of $738,954 was allowed in the audit. (See attached CTC sheets.) *See Schedule F.*

Compensation Credit
The taxpayer claimed the Compensation Credit on each return in the audit period. Michigan UIA 1020 Quarterly Returns were used to verify Michigan Wages for 2009 - 2011. Detailed payroll information was not available for 2008. In its absence, the US 1120 Salaries and Wages, Pensions, and Employee Benefits were used and prorated by the 2008 MBT apportionment percentage (without more accurate information). The US 1120 Pensions and Employee Benefits deductions were added to the 2009 - 2011 Michigan Wages and allocated by the relevant apportionment percentages. *See Schedule G.*

Historic Preservation Credit
The taxpayer provided the Michigan Historic Preservation Tax Credit work sheet for 2008, showing that Comerica Bank (Member 2) was assigned a $605,605 Historic Preservation Tax Credit by New Amsterdam Activation II, LLC. No adjustments were made. (See attached.) *See Schedule J1.*

Brownfield Redevelopment Credit
The taxpayer provided the MEDC Brownfield Redevelopment Assignment Certificates, assigning the credit to Comerica Management Company for 2008 - 2010. No adjustments were made. (See attached.) *See Schedule J2.2*

Determined Tax Due

The audit resulted in a **credit of $12,454,941**, so interest and penalty are not applicable.

Records Examined

MBT returns
US 1120 returns
MBT work papers
Investment detail work papers
Credit certificates
Apportionment Workpapers

RECEIVED by MSC 8/30/2021 2:05:19 PM

Special Circumstances

The taxpayer's returns were all adjusted upon their filings in order to disallow negative equity capital and several credits. Notices of Adjustment/Additional Tax Due were issued for all years under audit, indicating large increases in the calculated Tax Due. The audit then results in a large credit amount that does not represent a true refund to the taxpayer. See the MBT payment reconciliation attached to the case file for a comparison of the reported tax due, the processed tax due, and the tax due per audit.

Contested Issues

The taxpayer has indicated a disagreement with the denial of the SBT Historic Preservation and New Brownfield Credits. The taxpayer was provided with a letter of explanation regarding the Department's position (attached to Tax Specific Forms and Correspondence).

Tax Specific Scanned Documents

Records Request (in Excel format)
Signed Letter to Comerica
SBT ITC CFWD
Historical Preservation Forms
Brownfield Credit Forms
SAP Screens
MBT Payment Worksheet (in Excel format)
NOPAD (unsigned by taxpayer)

Audit Results

Net Tax Due/(Net Credit)/Other adjustment	$	(12,454,941.07)
Penalty	$	0.00
Interest	$	0.00
Amount Due/(Net Refund or Credit)/Other adjustment	$	(12,454,941.07)

Primary Auditor: Caroline June

RECEIVED by MSC 8/30/2021 2:05:19 PM

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

COMERICA, INCORPORATED,

Petitioner,

v

MTT Docket No. 17-000150

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.

_______________________________/

Jerrold M. Bigelman (P26626)
Thomas P. Bruetsch (P57473)
BODMAN PLC
Attorney for Petitioner
Comerica, Incorporated
6th Floor at Ford Field
1901 St. Antoine Street
Detroit, MI 48226
(313) 259-7777
jbigelman@bodmanlaw.com
tbruetsch@bodmanlaw.com

Scott L. Damich (P74126)
David W. Thompson (P75356)
Michigan Dep't of Attorney General
Assistant Attorneys General
Revenue & Tax Division
Attorneys for Respondent
Michigan Department of Treasury
P.O. Box 30754
Lansing, MI 48909
(517) 373-3203
DamichS@michigan.gov
ThompsonD18@michigan.gov

_______________________________/

JOINT STIPULATION OF FACTS

1. Comerica, Inc., ("Comerica") is a publically traded financial services company headquartered in Dallas, Texas.

2. Comerica (including its predecessors) has been in business since 1849.

3. Until October 31, 2007, a Comerica subsidiary, Comerica Bank, was a Michigan Banking Corporation organized as a state-chartered bank regulated by the State of Michigan ("Comerica-Michigan").

4. As of October 31, 2007, Comerica-Michigan was capitalized with

RECEIVED by MSC 8/30/2021 2:05:19 PM

5,852,732 shares of common stock and 350,000 shares of preferred stock.

5. For strategic business purposes, on October 8, 2007, Comerica created Comerica Bank, a Texas Banking Association, under the laws of the State of Texas, with authority to issue 500 shares of common stock ("Comerica-Texas").

6. On October 16, 2007, Comerica-Michigan and Comerica-Texas entered into an "Agreement and Plan of Merger," under which Comerica-Michigan would be merged into Comerica-Texas.

7. Concurrently, Comerica-Texas adopted Amended and Restated Articles of Association.

8. Pursuant to the Agreement and Plan of Merger and the certification of the Texas authorities, Comerica-Michigan was merged into Comerica-Texas on October 31, 2007 at 11:59:59 PM.

9. Comerica provided a document titled "Comerica Incorporated and Subsidiaries Disclosure Statement" to the Michigan Department of Treasury on September 15, 2008.

10. Comerica-Texas was the only acquiring corporation in the merger. Comerica-Michigan was the only acquired corporation.

11. Immediately following the merger, on October 31, 2007 at 11:59:59 PM, Comerica-Michigan ceased to exist and was no longer a state chartered bank.

12. Comerica filed 2008, 2009, 2010, and 2011 Michigan Business Tax returns for its unitary business group. It included Comerica-Texas as a member of the unitary business group, but did not separately include Comerica-Michigan as a

RECEIVED by MSC 8/30/2021 2:05:19 PM

member of the unitary business group.

13. The Michigan Department of Treasury ("Department") conducted a Michigan Business Tax (MBT) audit of Comerica, for the 2008-2011 tax years. It issued a Preliminary Audit Confirmation Letter to Comerica on September 27, 2013, notifying Comerica that it had been selected for audit.

14. The Department's audit was conducted by Caroline June.

15. At the time of the audit, Ms. June was a Senior Auditor.

Respectfully submitted,

COMERICA, INCORPORATED

By: */s/ Thomas P. Bruetsch* (w/ permission)

Jerrold M. Bigelman (P26626)
Thomas P. Bruetsch (P57473)
Bodman, PLC
Attorneys for Petitioner
6th Floor at Ford Field
1901 St. Antonie Street
Detroit, MI 48226
(313) 259-7777
jbigelman@bodmanlaw.com
tbruetsch@bodmanlaw.com

Dated: March 12, 2018

MICHIGAN DEPARTMENT OF TREASURY

By: */s/ David W. Thompson*

Scott L. Damich (P74126)
David W. Thompson (P75356)
Michigan Dep't of Attorney General
Assistant Attorneys General
Revenue & Tax Division
Attorneys for Respondent
P.O. Box 30754
Lansing, MI 48909
(517) 373-3203
DamichS@michigan.gov
ThompsonD18@michigan.gov

Dated: March 12, 2018

RECEIVED by MSC 8/30/2021 2:05:19 PM

Texas Department of Banking

Loren Svor
(512) 475-1303
loren.svor@banking.state.tx.us

October 30, 2007

Mr. Michael K. O'Neal
Winstead PC
1201 Elm Street
Dallas, TX 75270-2199

RE: Application submitted pursuant to Section 32.301 et seq. of the Texas Finance Code, by Comerica Bank, Dallas, Texas, to merge Comerica Bank, Detroit, Michigan, with and into Comerica Bank, Dallas, Texas

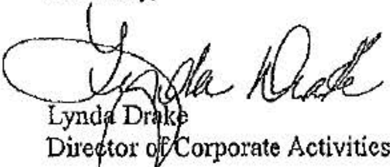
Dear Mr. O'Neal:

The above referenced application was approved on September 27, 2007.

We are pleased to enclose a certified copy of the Articles of Merger to be effective as of 11:59:59 p.m., October 31, 2007. Branch Certificates of Authority have been sent under separate cover, and the Certificate of Authority for Comerica Bank, Dallas, Texas, will be hand-delivered.

If I may be of further assistance, please do not hesitate to contact me.

Sincerely,



Lynda Drake
Director of Corporate Activities

LAD:LES:pt
Enclosures

cc: Mr. Stan Ivie, Regional Director, FDIC, Dallas
Mr. Dean Pankonien, FRB of Dallas

RECEIVED by MSC 8/30/2021 2:05:19 PM

EXHIBIT A

PLAN OF MERGER

Dallas_1\5071121\4
3370-20 10/12/2007

RECEIVED by MSC 8/30/2021 2:05:19 PM

AGREEMENT AND PLAN OF MERGER

This Agreement and Plan of Merger (the "Agreement") is dated as of October 16, 2007, by and between Comerica Bank, a Michigan banking corporation with a principal place of business at One Detroit Center, 500 Woodward Avenue, Detroit, Michigan 48226 (the "Michigan Bank"), and Comerica Bank, a Texas banking association with a principal place of business at 1717 Main St., Dallas, Texas 75201 (the "Texas Bank"), said entities being hereinafter sometimes collectively referred to as the "Constituent Entities".

RECITALS:

WHEREAS, the Texas Bank is a banking association organized and existing under the laws of the State of Texas with an authorized capitalization consisting of 500 shares of common stock, $10.00 par value per share ("Texas Common Stock"), of which 500 shares are issued and outstanding;

WHEREAS, the holders of Texas Common Stock are entitled to vote on this Agreement and the Merger (defined below);

WHEREAS, the Michigan Bank is a banking corporation with an authorized capitalization consisting of: (i) 5,852,732 shares of common stock, $10.00 par value per share ("Michigan Common Stock"), of which 5,852,732 shares are issued and outstanding, (ii) 300,000 shares of Series A Non-Cumulative Perpetual 5-Year Resettable Preferred Stock, no par value per share (the "Michigan Series A Preferred Stock"), of which 300,000 shares are issued and outstanding, and (iii) 50,000 shares of Series B Non-Cumulative Perpetual NC-20 Preferred Stock, no par value per share (the "Michigan Series B Preferred Stock"), of which 50,000 shares are issued and outstanding (the Michigan Common Stock, the Michigan Series A Preferred Stock, and the Michigan Series B Preferred Stock being hereafter collectively referred to herein as the "Michigan Capital Stock");

WHEREAS, the holders of Michigan Common Stock are entitled to vote on this Agreement and the Merger, but the holders of Michigan Series A Preferred Stock and Michigan Series B Preferred Stock are not entitled to vote on this Agreement or the Merger;

WHEREAS, upon consummation of the transactions contemplated by this Agreement, the authorized capitalization of the Texas Bank shall consist of: (i) 5,852,732 shares of common stock, $10.00 par value per share ("Texas Common Stock"), (ii) 300,000 shares of Series A Non-Cumulative Perpetual 5-Year Resettable Preferred Stock, no par value per share (the "Texas Series A Preferred Stock"), and (iii) 50,000 shares of Series B Non-Cumulative Perpetual NC-20 Preferred Stock, no par value per share (the "Texas Series B Preferred Stock"; together with the Texas Common Stock and the Texas Series A Preferred Stock, the "Texas Capital Stock"); and

WHEREAS, the respective boards of directors of the Texas Bank and the Michigan Bank have determined that it is advisable that the Michigan Bank be merged with and into the Texas Bank with the Texas Bank as the surviving entity on the terms and conditions hereinafter set forth (the "Merger").

RECEIVED by MSC 8/30/2021 2:05:19 PM

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, it is agreed that, in accordance with applicable state and federal law, the Michigan Bank will be, as of the Effective Time (defined hereafter), merged with and into the Texas Bank, with the Texas Bank to be the surviving entity governed under the laws of the State of Texas, and that the terms and conditions of such Merger, the mode of carrying it into effect, and the manner of converting shares will be as follows:

ARTICLE I
MERGER

At the Effective Time, the Michigan Bank will be merged with and into the Texas Bank, the separate existence of the Michigan Bank will cease, and the Texas Bank will be the surviving entity governed under the laws of the State of Texas (the "Survivor"), and such Merger will in all respects have the effect provided for in Section 32.301 of the Texas Finance Code and Section 10.008 of the Texas Business Organizations Code.

Prior to and from and after the Effective Time, the Constituent Entities will take all such action as will be necessary or appropriate to effectuate the Merger. If at any time after the Effective Time, the Michigan Bank or the Texas Bank are advised that any further assignments, conveyances, or assurances in law are necessary or desirable to carry out the provisions hereof, the proper officers and directors of the Michigan Bank and the Texas Bank will execute and deliver any and all proper deeds, assignments, and assurances in law, and do all things necessary or proper to carry out the provisions hereof.

ARTICLE II
TERMS OF MERGER

At the Effective Time:

(a) Effect of Merger. The separate existence of the Michigan Bank shall cease and the Michigan Bank shall be merged with and into the Survivor, and the Survivor shall succeed to, without further transfer, and shall possess all the rights, privileges, powers and franchises, whether of a public or of a private nature, and be subject to all the restrictions, disabilities and duties of each of the Constituent Entities; and all and singular, the rights, privileges, powers and franchises of each of the Constituent Entities, and all property, real, personal and mixed, and all debts due to each of the Constituent Entities on whatever account, whether for stock subscriptions or for any other things in action or belonging to each of the Constituent Entities, shall be vested in the Survivor; and all property, rights, privileges, powers and franchises, and all and every other interest of the Constituent Entities shall be thereafter the property of the Survivor; and the title to any real estate vested by deed or otherwise in each of the Constituent Entities shall not revert or be in any way impaired by reason of the Merger; provided, that all rights of creditors and all liens upon any property of the Constituent Entities shall be preserved unimpaired, and all debts, liabilities and duties of each of the Constituent Entities shall attach to the Survivor and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by the Survivor.

RECEIVED by MSC 8/30/2021 2:05:19 PM

(b) Articles of Association. The Articles of Association of the Texas Bank shall be the Articles of Association of the Survivor (except that the Articles of Association of the Texas Bank shall be amended and restated in accordance with Exhibit A attached hereto and incorporated herein by this reference), until the same shall be further altered, amended or repealed in accordance with law, the Articles of Association and the Bylaws of the Survivor.

(c) Bylaws. The Bylaws of the Texas Bank shall be the Bylaws of the Survivor until the same shall thereafter be altered, amended or repealed in accordance with law, the Articles of Association and said Bylaws of the Survivor.

(d) Conversion of Securities.

(i) Michigan Capital Stock.

(A) Michigan Common Stock. Each share of Michigan Common Stock issued and outstanding immediately prior to the Effective Time will be automatically converted into the right to receive one (1) share of Texas Common Stock.

(B) Michigan Series A Preferred Stock. Each share of Michigan Series A Preferred Stock issued and outstanding immediately prior to the Effective Time will be automatically converted into the right to receive one (1) share of Texas Series A Preferred Stock.

(C) Michigan Series B Preferred Stock. Each share of Michigan Series B Preferred Stock issued and outstanding immediately prior to the Effective Time will be automatically converted into the right to receive one (1) share of Texas Series B Preferred Stock.

(ii) Treasury Shares. Any treasury shares of the Michigan Bank shall be deemed canceled, and the Survivor will be deemed not to have any treasury shares.

(iii) Texas Capital Stock. Each share of Texas Common Stock issued and outstanding immediately prior to the Effective Time shall be cancelled and retired and shall cease to exist, and no consideration shall be delivered in exchange therefor.

(e) Directors. The directors of the Survivor (who shall hold office subject to the provisions of the Articles of Association and Bylaws of the Survivor from the Effective Time until their successors are elected and qualified) shall be the directors of the Texas Bank in office immediately prior to the Effective Time.

(f) Officers. The officers of the Survivor (who shall hold their respective offices subject to the provisions of the Bylaws of the Survivor from the Effective Time until their successors are elected and qualified) shall be the officers of the Michigan Bank in office immediately prior to the Effective Time.

(g) Board Vacancies. If, at the Effective Time, a vacancy exists in the Board of Directors or in any of the offices of the Survivor, such vacancy may be filled in the manner provided in the Articles of Association and Bylaws of the Survivor.

RECEIVED by MSC 8/30/2021 2:05:19 PM

(h) Books and Records. The assets, liabilities, reserves and accounts of the Constituent Entities shall be taken up on the books of the Survivor at the amounts at which they are then carried on the respective books of the Constituent Entities, subject to such adjustments or eliminations of intercompany items as may be appropriate in giving effect to the Merger.

(i) Plans and Policies. All corporate acts, plans, policies, approvals and authorizations of the Michigan Bank, its stockholders, board of directors, committees elected or appointed by the board of directors, officers and agents, which were valid and effective immediately prior to the Effective Time, shall be taken for all purposes as the acts, plans, policies, approvals, obligations and authorizations of the Survivor and shall be as effective and binding thereon as the same were with respect to the Michigan Bank.

ARTICLE III
STOCK CERTIFICATES

At the Effective Time of the Merger, each outstanding share of Michigan Capital Stock shall be automatically converted into the right to receive the consideration set forth above in Article II(d). In addition, the sole shareholder of the Michigan Bank shall deliver the certificates representing its shares of stock in the Michigan Bank to the principal place of business of the Texas Bank. On receipt of a shareholder's certificates, the Texas Bank shall deliver to that stockholder the consideration set forth above in Article II(d). Notwithstanding the foregoing, if any shareholder fails to deliver its certificates to the Texas Bank, its shares shall nevertheless be canceled automatically and converted into the right to receive the consideration set forth above in Article II(d).

ARTICLE IV
STOCKHOLDER APPROVAL; EFFECTIVENESS OF MERGER

This Agreement will be submitted to the sole shareholder of the Michigan Bank and the Texas Bank as provided by the applicable laws of the State of Michigan and the State of Texas, respectively. If this Agreement is duly authorized and adopted by consent or the requisite votes of such shareholder and is not terminated and abandoned pursuant to the provisions of Article V, then at such time as the proper officers of the Texas Bank shall deem proper, Articles of Merger shall promptly be executed, filed and recorded in accordance with the laws of the State of Texas and the State of Michigan. The Merger will become effective on October 31, 2007 at 11:59:59 p.m., herein sometimes called the "Effective Time".

ARTICLE V
TERMINATION

At any time prior to the time of filing of the Articles of Merger with the Texas Banking Commissioner, the boards of directors of the Michigan Bank or the Texas Bank may terminate and abandon this Agreement for any reason deemed appropriate by such boards of directors, notwithstanding favorable action on the Merger by the shareholders and/or board of directors of either of the Constituent Entities.

RECEIVED by MSC 8/30/2021 2:05:19 PM

ARTICLE VI
AMENDMENT

To the extent permitted by law, this Agreement may be amended, supplemented or interpreted at any time by action taken by the board of directors of both Constituent Entities, and in the case of an interpretation, the actions of such boards of directors shall be binding; provided, however, that paragraphs (b) and (d) of Article II of this Agreement may not be amended after the approval by the shareholders of the Michigan Bank and the Texas Bank of this Agreement, except by the vote of the shareholders of the Michigan Bank and the Texas Bank required for adoption of this Agreement.

ARTICLE VII
MISCELLANEOUS

This Agreement may be executed in counterparts, each of which when so executed will be deemed to be an original, and such counterparts will together constitute but one and the same instrument.

* * * * * *

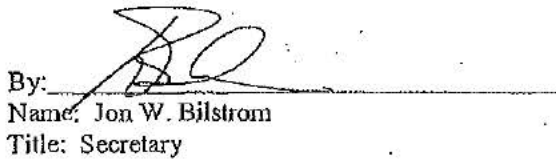
RECEIVED by MSC 8/30/2021 2:05:19 PM

EXECUTED as of the date first above written.

COMERICA BANK
a Michigan banking corporation

By:____________________
Name: Jon W. Bilstrom
Title: Executive Vice President

COMERICA BANK
a Texas banking association



By:____________________
Name: Jon W. Bilstrom
Title: Secretary

RECEIVED by MSC 8/30/2021 2:05:19 PM

STATE OF MICHIGAN

DEPARTMENT OF LICENSING & REGULATORY AFFAIRS

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

MICHIGAN TAX TRIBUNAL

- - - - - - - - - - - - - - - - - -

COMERICA, INCORPORATED,

Petitioner,

-vs-

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.

MTT Docket No. 17-000150

- - - - - - - - - - - - - - - - - -

D E P O S I T I O N

of DEBRA STOVER, a witness called by Respondent, taken before Tamara Staley Heckaman, Certified Shorthand Reporter and Notary Public, at 1901 St. Antoine Street, 6th Floor, Detroit, Michigan, on Thursday, November 16, 2017, noticed for the hour of 11:00 a.m.

HECKAMAN & NARDONE, INC.
Certified Shorthand Reporters
P.O. Box 27603
Lansing, Michigan 48909
(517) 349-0847
theckaman@live.com

5780c2ed-f6cb-4daa-83ca-5657a13d0a15

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 entity with a different FEIN, for example?
2 A. There is a different FEIN.
3 Q. Okay.
4 A. There is an FEIN.
5 Q. And what does it usually mean if an
6 entity has its own FEIN assigned to it?
7 MR. BRUETSCH: Form, calls for a
8 legal conclusion.
9 BY MR. THOMPSON:
10 Q. What's your understanding?
11 MR. BRUETSCH: Same objections.
12 THE WITNESS: So it's a taxpayer
13 number, that it's a taxpayer.
14 BY MR. THOMPSON:
15 Q. Is it a separate taxpayer?
16 A. I do not know.
17 MR. BRUETSCH: Same objections.
18 THE WITNESS: If it's a change of
19 taxpayer FEIN or a new FEIN, I don't know.
20 BY MR. THOMPSON:
21 Q. Typically in your understanding would two
22 entities, would two different FEINs, file two
23 separate returns?
24 MR. BRUETSCH: Form and foundation.
25 THE WITNESS: I would say typically

5780c2ed-f6cb-4daa-83ca-5657a13d0a15

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 paragraph.

2 A. Yes.

3 Q. It appears to me to be the third sentence

4 in that paragraph that starts with in order to

5 claim?

6 A. Yes.

7 Q. Do you see that? Can you just read that

8 sentence?

9 A. In order to claim the Brownfield MBT

10 credit original Brownfield MBT certificate of

11 completion must be attached to the assignee's MBT

12 annual return in the same year it was assigned for

13 the Brownfield MBT credit to be valid.

14 Q. Is this the type of instruction you would

15 have looked at to determine whether or not the

16 credit was being properly claimed?

17 A. Yes.

18 Q. So you'd have had to make sure that there

19 was an original certificate of completion

20 attached, correct?

21 A. In the year that it was assigned, yes.

22 Q. Okay, was that true in this case?

23 A. Well, 2005 was the year -- we attached --

24 in 2005 we attached our assigned -- we were the

25 assignee of the credit and we attached that to our

5780c2ed-f6cb-4daa-83ca-5657a13d0a15

1 2005 tax return.

2 Q. So was it attached to the 2007 return?

3 A. The 2005 assign -- I do not recall. The

4 same document, did we attach the same document to

5 the 2007 return? I do not recall.

6 Q. Is it fair to say that you also have to

7 attach the request for credit assignment as well?

8 MR. BRUETSCH: Calls for a legal

9 conclusion.

10 MR. THOMPSON: Based on these

11 instructions.

12 MR. BRUETSCH: Foundation. It calls

13 for a legal conclusion.

14 THE WITNESS: I guess -- could you

15 repeat the question?

16 BY MR. THOMPSON:

17 Q. Yeah, sure. I mean, based on these

18 instructions, I know you didn't prepare the

19 form --

20 MR. BRUETSCH: Or the tax --

21 BY MR. THOMPSON:

22 Q. -- and I know they're not your

23 instructions.

24 A. Right.

25 Q. Okay? I'm just asking you to kind of

RECEIVED by MSC 8/30/2021 2:05:19 PM

5780c2ed-f6cb-4daa-83ca-5657a13d0a15

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 read them and --
2 A. Right, yes.
3 Q. Is it your understanding that you have to
4 provide both a request for assignment and a
5 certificate of completion?
6 A. Is it assignor or is that -- we were the
7 assignee so I am -- I think I am getting confused.
8 MR. BRUETSCH: And just for the
9 record I'm objecting to foundation, it calls for a
10 legal conclusion, and I think you're asking her to
11 give an opinion on this document, which I don't
12 think she is qualified to do.
13 BY MR. THOMPSON:
14 Q. Okay, that's foundation. You can answer.
15 A. I'm just going to read the sentence.
16 MR. BRUETSCH: Just read it to
17 yourself so she doesn't have to take it down.
18 BY MR. THOMPSON:
19 Q. I withdraw the question.
20 A. Okay.
21 Q. Okay? Is it your understanding that this
22 form was provided for purposes of the 2007 claim
23 of credit?
24 A. Which -- this form?
25 Q. Correct. This is Exhibit 4 to the Coe

5780c2ed-f6cb-4daa-83ca-5657a13d0a15

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 deposition, did Comerica attach this form?
2 A. I do not recall.
3 (Whereupon Deposition Exhibit
4 No. 13 marked for identification.)
5 BY MR. THOMPSON:
6 Q. Ms. Stover, I'm handing you what's been
7 marked as Exhibit 13 to your deposition.
8 A. Yeah.
9 MR. THOMPSON: And copy provided to
10 counsel.
11 BY MR. THOMPSON:
12 Q. Can you tell me what this document is?
13 A. This is a letter I wrote in response to a
14 notice.
15 Q. And what were you essentially trying to
16 convey in this letter?
17 A. I provide an explanation why the return
18 was not e-filed, and I am explaining the
19 connection between the old bank and new bank.
20 Q. And it looks like if we go to your first
21 paragraph, item -- after items one and two --
22 A. Um-hum.
23 Q. -- in the last sentence of that paragraph
24 it says all documentation; do you see that?
25 A. Yes.

5780c2ed-f6cb-4daa-83ca-5657a13d0a15

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 in the Michigan Economic Growth Authority requests
2 a credit assignment and it just says, finally, to
3 claim an assigned Brownfield MBT credit each
4 assignee shall attach a copy of the Brownfield MBT
5 credit assignment certificate, in the last
6 sentence so -- oh, as I go up I see the --
7 MR. BRUETSCH: Yeah, just answer his
8 question.
9 THE WITNESS: Okay. Repeat the
10 question.
11 BY MR. THOMPSON:
12 Q. So the question is is there a certificate
13 of completion attached or enclosed with this
14 packet that's --
15 A. This packet I have in front of me, nope,
16 there is no certificate of completion --
17 Q. Okay.
18 A. -- attached.
19 Q. So if we were going to kind of just sum
20 this sequence up, you have credits that are being
21 assigned to old bank from KWA?
22 A. Yes.
23 Q. Is there anything in this packet that
24 indicates an assignment from old bank to new bank?
25 MR. BRUETSCH: Form.

5780c2ed-f6cb-4daa-83ca-5657a13d0a15

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 THE WITNESS: New bank didn't exist
2 in 2005, so no.
3 BY MR. THOMPSON:
4 Q. So if you flip back to the letter that we
5 were examining, this is the November 21, 2008,
6 letter?
7 A. Um-hum.
8 Q. Exhibit -- I can't remember?
9 A. 13.
10 Q. You'd indicated in that first paragraph
11 all documentation necessary to support the credit
12 was included with the 2005 filing, correct?
13 A. Correct.
14 Q. In order to claim the credit in the 2007
15 year you'd have had to have the notice of
16 completion, correct?
17 MR. BRUETSCH: Calls for a legal
18 conclusion, foundation.
19 THE WITNESS: I'm uncertain.
20 BY MR. THOMPSON:
21 Q. But suffice it to say that the
22 certificate of completion is not part of the 2005
23 packet?
24 A. It is not part of the 2005 --
25 MR. BRUETSCH: Per Exhibit 14.

5780c2ed-f6cb-4daa-83ca-5657a13d0a15

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 THE WITNESS: -- of Exhibit 14.
2 BY MR. THOMPSON:
3 Q. Are you aware that the notice of
4 completion was attached at all?
5 A. I do not know.
6 Q. So the only question in your mind is
7 whether or not this is a full version of the
8 packet as you intended?
9 A. Yes.
10 Q. Do you have any reason to doubt that it
11 wasn't there to begin with? Let me rephrase the
12 question. Is there any reason that you would
13 dispute that the certificate of completion was not
14 originally enclosed with the '05 return?
15 MR. BRUETSCH: Form.
16 THE WITNESS: Repeat the question.
17 BY MR. THOMPSON:
18 Q. Sure, sure. The notice of completion is
19 not in this packet --
20 A. Right.
21 Q. -- that we've handed to you today --
22 A. Correct.
23 Q. -- as Exhibit 14?
24 A. Yes.
25 Q. Do you have any reason to think that it

5780c2ed-f6cb-4daa-83ca-5657a13d0a15

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 was, in fact, originally included in your
2 correspondence to treasury and since has been
3 omitted or left out?
4 A. I have no reason to believe that this
5 differs from what we filed.
6 Q. Okay.
7 A. But I do not know.
8 Q. In terms of new bank's claim of credit,
9 did new bank at any time obtain its own
10 certification under its own FEIN for either of the
11 credits?
12 MR. BRUETSCH: Foundation.
13 BY MR. THOMPSON:
14 Q. To the best of your knowledge?
15 A. To my knowledge, no.
16 Q. Did new bank at any time to the best of
17 your knowledge execute its own agreement with the
18 Michigan Economic Development Corporation?
19 A. To my knowledge, no.
20 Q. So to the best of your knowledge anyway
21 there is an agreement between -- and I'm going to
22 use the acronym MEDC for Michigan Economic
23 Development Corporation for the record. To your
24 knowledge there's only one agreement between MEDC
25 and old bank and to the best of your knowledge no

5780c2ed-f6cb-4daa-83ca-5657a13d0a15

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 such agreements between MEDC and new bank?
2 MR. BRUETSCH: Calls for a legal
3 conclusion.
4 THE WITNESS: To my knowledge that
5 is correct.
6 BY MR. THOMPSON:
7 Q. Okay. Did old bank at any time file at
8 your request for credit assignment to new bank?
9 MR. BRUETSCH: Foundation.
10 BY MR. THOMPSON:
11 Q. To the best of your knowledge?
12 A. To the best of my knowledge, no.
13 Q. Did -- well, I believe but I'm just going
14 to clarify, I believe we just established that
15 there was not a certificate of completion attached
16 for the '08 or '07 return?
17 MR. BRUETSCH: Form.
18 BY MR. THOMPSON:
19 Q. To the best of your knowledge?
20 A. To the best of my knowledge.
21 Q. That's correct?
22 A. That is correct.
23 Q. Is there any other paperwork that exists
24 that you're aware of indicating an intent for old
25 bank to assign the credits to new bank?

5780c2ed-f6cb-4daa-83ca-5657a13d0a15

RECEIVED by MSC 8/30/2021 2:05:19 PM

STATE OF MICHIGAN

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

MICHIGAN TAX TRIBUNAL

COMERICA, INCORPORATED,

Petitioner,

vs. MTT Docket No. 17-000150

MICHIGAN DEPARTMENT OF

TREASURY,

Respondent,

/

PAGE 1 TO 75

The Deposition of GERALD COE,

Taken at 1901 St. Antoine Street, 6th Floor,

Detroit, Michigan,

Commencing at 10:45 a.m.,

Tuesday, November 14, 2017,

Before Rose M. Gasiorek, CSR 4906.

Job No. CS2742416

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 MR. BRUETSCH: Objection. We don't know what
2 the date of this document is, which is Exhibit 1. We
3 know that there are two entities in this case called
4 Comerica Bank. So I want the record to be very clear
5 as to which Comerica Bank you're asking him to talk
6 about.
7 BY MR. DAMICH:
8 Q. Do you understand there are two separate Comerica
9 Banks in this case?
10 A. Yes.
11 Q. And they have two separate FEIN numbers?
12 A. Yes.
13 Q. So you admit that the Comerica Banks we're talking
14 about have separate FEIN numbers?
15 A. Yes.
16 Q. If you look at the bottom of this page, it's very
17 small print, and I apologize for that, do you see in
18 parens the date there?
19 A. Yes.
20 Q. Could you read that date, for the record?
21 A. 12-31-07.
22 Q. Okay. Did you create this document?
23 A. No.
24 Q. Have you ever seen this document before?
25 A. Yes.

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 Q. Do you have any reason to believe that this is
2 anything different than the corporate structure of
3 Comerica, Incorporated as of 12-31-07?
4 A. No.
5 Q. Okay. We had said there were two -- we just
6 discussed about there being two separate Comerica
7 Banks. What characteristics separates the two banks?
8 And let me clarify.
9 Did both banks exist at the same time?
10 MR. BRUETSCH: Form and foundation.
11 A. Can you rephrase the question.
12 BY MR. DAMICH:
13 Q. Certainly. We had previously discussed that there
14 were two Comerica Banks at issue in this case. Did
15 those Comerica Banks exist at the same time?
16 MR. BRUETSCH: Same objections.
17 A. Yes.
18 BY MR. DAMICH:
19 Q. They did?
20 A. Yes.
21 Q. When?
22 A. I don't know the dates.
23 Q. Okay. Was it some time in October of '07?
24 MR. BRUETSCH: Foundation.
25 A. I don't know the dates.

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 BY MR. DAMICH:
2 Q. Okay. Do you know for how long, roughly, they
3 co-existed?
4 A. Roughly?
5 Q. Yes, roughly.
6 A. Less than a month.
7 Q. Less than a month. Did one of the entities cease to
8 exist at any time?
9 A. Yes.
10 Q. Which one?
11 A. The Comerica Bank with the truncated EIN number
12 ending in 7375.
13 Q. So Comerica Bank ending with 7375 ceased to exist.
14 Do you know when Comerica Bank 7375 ceased to exist?
15 A. When it merged with Comerica Bank with the truncated
16 EIN number ending in 1646.
17 MR. BRUETSCH: Let's take a break.
18 MR. DAMICH: Off the record.
19 (A lunch recess was taken).
20 MR. DAMICH: Back on the record.
21 BY MR. DAMICH:
22 Q. Before we left, we were talking about the two
23 different Comerica Banks, correct, do you remember
24 that?
25 A. Yes.

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 BY MR. DAMICH:
2 Q. Your answer?
3 A. Yes.
4 Q. Do you know which entity from the Unitary Business
5 Group used capital to form the Comerica Bank 1646?
6 A. I don't know.
7 Q. Did Comerica Bank 1646 ever exist outside of the
8 Unitary Business Group?
9 MR. BRUETSCH: Foundation, calls for a legal
10 conclusion.
11 A. No.
12 BY MR. DAMICH:
13 Q. So Comerica Bank 1646 always existed as a member of
14 the Unitary Business Group?
15 MR. BRUETSCH: Same objections.
16 A. That's my understanding, yes.
17 BY MR. DAMICH:
18 Q. Okay. Was Comerica Bank 1646 in existence in the
19 2004 through 2006 tax years?
20 A. No.
21 Q. After Comerica Bank 1646 was formed, do you know if
22 it was combined with Comerica Bank 7375?
23 A. I'm not sure I understand the concept of combined.
24 Q. Okay. What happened to Comerica Bank 7375 after
25 Comerica Bank 1646 was formed?

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 A. Comerica Bank 1646, Comerica Bank 7375 merged.
2 Q. Okay. So Comerica Bank 1646 did not acquire Comerica
3 Bank 7375, correct?
4 MR. BRUETSCH: Objection to the form of the
5 question, calls for a legal conclusion, foundation.
6 A. Repeat the question.
7 MR. DAMICH: Could you read it back.
8 (Record repeated as requested).
9 A. I would just reiterate that they merged.
10 BY MR. DAMICH:
11 Q. Do you know why Comerica Bank 1646 and Comerica Bank
12 7375 were merged, as you indicated?
13 A. I don't know why.
14 Q. You don't know why, okay. Was it for any tax
15 advantage?
16 A. I don't know why.
17 Q. Okay. You don't know if it was for any business
18 advantage either, correct?
19 A. I don't know why.
20 Q. Okay. Did you take any part in the alleged merger?
21 A. No.
22 Q. Okay. If you could go back to what has been marked
23 as, I believe it was Exhibit 4, Summary of Schedules,
24 is that correct?
25 MR. BRUETSCH: 3.

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 Q. Okay. Why is that?
2 A. Because Comerica -- I think we dispute that there's
3 two separate members is one of the complaints.
4 Q. Okay. Is Comerica Bank 7375 separate from Comerica
5 Bank 1646?
6 MR. BRUETSCH: Calls for a legal conclusion,
7 foundation. When?
8 A. They are shown separately on Schedule C-2.
9 BY MR. DAMICH:
10 Q. Were they separate entities?
11 MR. BRUETSCH: When? Foundation.
12 A. They merged prior to 2008.
13 BY MR. DAMICH:
14 Q. And you had previously indicated for roughly a month
15 they co-existed, correct?
16 MR. BRUETSCH: No. That's not what he said.
17 Mischaracterization of the testimony.
18 A. Say that again.
19 BY MR. DAMICH:
20 Q. Did Comerica Bank 7375 and Comerica Bank 1646 ever
21 exist at the same time?
22 MR. BRUETSCH: Asked and answered.
23 A. Pardon me?
24 MR. BRUETSCH: My objection was asked and
25 answered. You can answer the question.

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 A. They did.
2 BY MR. DAMICH:
3 Q. They did?
4 A. Yes.
5 Q. And was that for a short period in the 2010 tax year?
6 MR. BRUETSCH: Objection, assumes facts not
7 in evidence, foundation. Did you mean to say 2010?
8 MR. DAMICH: No, I did not.
9 BY MR. DAMICH:
10 Q. The 2007 tax year?
11 A. Yes.
12 Q. So they existed at the same time for a short period
13 in 2007?
14 A. They existed for a period of time in 2007.
15 Q. Okay.
16 A. I think we said less than 30 days.
17 Q. They were both in existence at the same time for a
18 short period of time in 2007?
19 A. Is 30 days or shorter a short period of time?
20 Q. Yes, it is.
21 A. Yes.
22 Q. Okay. They had separate FEIN numbers at that time?
23 A. Yes.
24 Q. As a matter of fact, they've always had separate FEIN
25 numbers, correct?

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 MR. BRUETSCH: Foundation.
2 A. They had separate EIN numbers when they were in
3 existence during the same period of time.
4 BY MR. DAMICH:
5 Q. Was Comerica Bank 1646 in existence before October of
6 2007?
7 A. I don't know the dates.
8 Q. Was Comerica Bank 1646 in existence during the 2006
9 tax year?
10 A. 2006?
11 Q. Yes.
12 A. I don't know the dates.
13 Q. Okay. Was Comerica Bank 7375 in existence during the
14 2007 tax year?
15 A. Yes.
16 Q. Was Comerica Bank 7375 in existence during 2008 tax
17 year?
18 A. No.
19 Q. You had previously indicated when we were discussing
20 the Treasury's treatment of number 2 and number 42
21 that Comerica, Incorporated believes that they should
22 have been treated as one entity, is that correct?
23 A. I'm sorry. Can you repeat that question.
24 MR. DAMICH: Could you read it back.
25 (Record repeated as requested).

RECEIVED by MSC 8/30/2021 2:05:19 PM

Michigan Department of Treasury
4590 (Rev. 01-09), Page 1

2008 MICHIGAN Business Tax Annual Return for Financial Institutions

Issued under authority of Public Act 36 of 2007.

☐ Check if this is an amended return. Attach supporting documents.

1. Return is for calendar year 2008 or for tax year beginning: (MM-DD-YYYY) ____ and ending: (MM-DD-YYYY) ____

COMERICA INCORPORATED

[redacted]3421

411 WEST LAFAYETTE MC 3416

DETROIT | MI | 48226 | US

BANK HOLDING COMPANY | 07-31-1973

551111

8. Organization Type
☐ Fiduciary ☐ S Corporation / LLC S Corporation
☒ C Corporation / LLC C Corporation

8a. ☐ Check if taxpayer (or any UBG member) has authority to exercise trust powers only.

9. ☒ Check if Filing Michigan Unitary Business Group Return (Attach Form 4580.)

10. Special Computations
Apportionment Calculation

a. Michigan Gross Business	1,724,925,108	00
b. Total Gross Business	4,294,100,328	00
c. Apportionment %. Divide line (a) by line (b)	40.1697	%

d. If Fiscal Filer with Tax Year Ending in 2008 complete lines 10e and 10g.

e. Number of months in MBT tax period	12	
f. Total months in 2007-08 federal tax year	12	
g. Proration %. Divide line (e) by line (f)	100.0000	%

PART 1: FRANCHISE TAX

		A 2004	B 2005	C 2006	D 2007	E 2008
11. Equity Capital	11.	0	0	0	0	0
12. Goodwill	12.	0	0	0	0	0
13. Average daily book value of Michigan obligations	13.	0	0	0	0	0
14. Average daily book value of U.S. obligations	14.	0	0	0	0	0
15. Subtotal. Add lines 12 through 14	15.	0	0	0	0	0
16. Net Capital. Subtract line 15 from line 11	16.	0	0	0	0	0
17. a. Authorized insurance company subsidiary: Enter actual capital fund amount	17a.	0	0	0	0	0
b. Minimum regulatory amount required	17b.	0	0	0	0	0
c. Multiply line 17b by 125% (1.25)	17c.	0	0	0	0	0
d. Subtract line 17c from 17a. If less than zero, enter zero	17d.	0	0	0	0	0
18. Add lines 16 and 17d	18.	0	0	0	0	0

19. Enter amount from line 18E	19.	0	00
20. Add lines 18A, 18B, 18C, 18D and 19	20.	0	00
21. Net Capital for Current Taxable Year. Divide line 20 by number of years reported above	21.	5,312,326,155	00
22. Apportioned Tax Base. Multiply line 21 by percentage on line 10c	22.	2,133,945,479	00
23. Tax Before Surcharge. Multiply line 22 by 0.235% (0.00235)	23.	5,014,772	00
24. Surcharge. Multiply line 23 by 27.7% (0.277) *(For tax year ending in 2009, see instructions.)*	24.	1,389,092	00
25. Total Liability Before All Credits. Add lines 23 and 24	25.	6,403,864	00
26. Nonrefundable credits from Form 4568, line 37	26.	6,186,562	00
27. **Total Tax After Nonrefundable Credits.** Subtract line 26 from line 25. If less than zero, enter zero	27.	217,302	00

+ 0224 2008 87 01 27 8

F8.00.05 MI4590P1 Continue and sign on Page 2.

Form 4590, Page 2 COMERICA INCORPORATED AND SUBSIDIARIES FEIN or TR Number ████8421

RECEIVED by MSC 8/30/2021 2:05:19 PM

28.	Recapture of Certain Business Tax Credits from Form 4587, line 10	28.	0 00
29.	**Total Tax Liability.** Add lines 27 and 28	29.	217,302 00

PART 2: PAYMENTS, REFUNDABLE CREDITS AND TAX

30.	Overpayment credited from prior return (SBT or MBT)	30.	1,858,237 00		
31.	Estimated tax payments	31	300,000 00		
32.	Tax paid with request for extension	32	0 00		
33.	Refundable credits from Form 4574, line 23	33	0 00		
34.	Total Payments. Add lines 30 through 33. (Then, if not amending, skip to line 36)			34.	2,158,237 00
35.	AMENDED RETURN ONLY a. Payment made with the original return	35a	0 00		
	b. Overpayment received on the original return	35b.	0 00		
	c. Add lines 34 and 35a and subtract line 35b from the sum			35c.	0 00
36.	TAX DUE. Subtract line 34 (or line 35c, if amending) from line 29. If less than zero, leave blank			36.	0 00
37.	Underpaid estimate penalty and interest from Form 4582, line 38			37.	0 00
38.	Annual return penalty at 0.0000 % = 0 00 plus interest of 0 00 Enter total			38.	0 00
39.	**PAYMENT DUE.** If line 36 is blank, go to line 40. Otherwise, add lines 36 through 38			39.	0 00

PART 3: REFUND OR CREDIT FORWARD

40.	Overpayment Subtract lines 29, 37 and 38 from line 34 (or line 35c, if amending) If less than zero, leave blank. (See instructions)	40.	1,940,935 00
41.	CREDIT FORWARD. Amount of overpayment on line 40 to be credited forward	41.	1,940,935 00
42.	REFUND. Amount of overpayment on line 40 to be refunded	42.	0 00

Taxpayer Certification. I declare under penalty of perjury that the information in this return and attachments is true and complete to the best of my knowledge.

☐ By checking this box, I authorize Treasury to discuss my return with my preparer.

Taxpayer Signature: Barbara L. McArthur

Taxpayer Name (print or type): BARBARA MCARTHUR

Date: 12-30-09

Title: VICE PRESIDENT

Telephone Number: 313-222-3215

Preparer Certification. I declare under penalty of perjury that this return is based on all information of which I have any knowledge.

Preparer's PTIN, FEIN or SSN

Preparer's Business Name (print or type)

Preparer's Business Address and Telephone Number (print or type)

Return is due April 30 or on or before the last day of the 4th month after the close of the tax year.

WITHOUT PAYMENT - Mail return to:

Michigan Department of Treasury
P.O. Box 30783
Lansing, MI 48909

WITH PAYMENT - Pay amount on line 39 and mail check and return to:

Michigan Department of Treasury
P.O. Box 30113
Lansing, MI 48909

Make check payable to "State of Michigan." Print the FEIN or TR Number and "MBT" on the front of the check. Do not staple the check to the return.

+ 0224 2008 87 02 27 6

F8.00.04 MI4590P2

RECEIVED by MSC 8/30/2021 2:05:19 PM

2008 MICHIGAN Business Tax Nonrefundable Credits Summary

Issued under authority of Public Act 36 of 2007.

COMERICA INCORPORATED AND SUBSIDIARIES	[redacted]8421

Line	Description	Line	Amount
1.	Tax before all credits from Form 4567, line 34, or Form 4590, line 25	1.	6,403,864 00
2.	SBT credit carryforwards from Form 4569, line 35	2	4,434,438 00
3.	Tax After SBT credit carryforwards. Subtract line 2 from line 1. If less than zero, enter zero	3	1,969,426 00
4.	a. Compensation and Investment Tax Credit from Form 4570, line 34	4a.	290,167 00
	b. If Form 4570, line 28, is negative, enter here as a negative number. Otherwise, leave blank	4b.	0 00
5.	Research and Development Credit from Form 4570, line 41	5	0 00
6.	Tax After Research and Development Credit. Subtract lines 4a, 4b and 5 from line 3. Cannot be less than zero	6	1,679,259 00
7.	Small Business Alternative Tax Credit from Form 4571, line 11 or 17, whichever applies	7.	0 00
8.	Gross Receipts Filing Threshold Credit from Form 4571, line 25	8	0 00
9.	Tax After Gross Receipts Filing Threshold Credit. Subtract lines 7 and 8 from line 6. Cannot be less than zero	9.	1,679,259 00
10.	Community or Education Foundation Credit from Form 4572, line 5	10.	0 00
11.	Homeless Shelter/Food Bank Credit from Form 4572, line 9	11.	0 00
12.	Tax After Homeless Shelter/Food Bank Credit. Subtract lines 10 and 11 from line 9. If less than zero, enter zero	12.	1,679,259 00
13.	NASCAR Speedway Credit from Form 4573, line 3	13.	0 00
14.	Stadium Credit from Form 4573, line 6	14.	0 00
15.	Start-up Business Credit from Form 4573, line 9. If less than zero, enter as a negative number	15	0 00
16.	Tax After Start-up Business Credit. Subtract lines 13, 14 and 15 from line 12. If less than zero, enter zero	16	1,679,259 00
17.	Public Contribution Credit from Form 4572, line 14	17.	0 00
18.	Arts and Culture Credit from Form 4572, line 19	18	0 00
19.	Tax After Arts and Culture Credit. Subtract lines 17 and 18 from line 16. Cannot be less than zero	19	1,679,259 00
20.	Next Energy Business Activity Credit from Form 4573, line 12	20.	0 00
21.	Renaissance Zone Credit from Form 4573, line 14	21.	0 00
22.	Historic Preservation Credit from Form 4573, line 21	22.	605,605 00
23.	Low Grade Hematite Credit from Form 4573, line 27	23.	0 00
24.	Entrepreneurial Credit from Form 4573, line 34	24.	0 00

Continue on Page 2.

2008 Return

FEIN or TR Number: [redacted]3421

Line	Description	Amount	
25	25. New Motor Vehicle Dealer Inventory Credit from Form 4573, line 38	0	00
26	26. Large Food Retailer Credit from Form 4573, line 42	0	00
27	27. Mid-size Food Retailer Credit from Form 4573, line 46	0	00
28	28. Bottle Deposit Administration Credit from Form 4573, line 50	0	00
29	29. Anchor Company Taxable Value Credit from Form 4573, line 52	0	00
30	30. Anchor Company Payroll Credit from Form 4573, line 54	0	00
31	31. MEGA Federal Contract Credit from Form 4573, line 56	0	00
32	32. Individual or Family Development Account Credit from Form 4573, line 58	0	00
33	33. Brownfield Redevelopment Credit from Form 4573, line 60	856,352	00
34	34. Private Equity Fund Credit from Form 4573, line 65	0	00
35	35. Film Job Training Credit from Form 4573, line 70	0	00
36	36. Film Infrastructure Credit from Form 4573, line 76	0	00
37	37. Total Nonrefundable Credits. Add lines 2, 4a, 4b, 5, 7, 8, 10, 11, 13, 14, 15, 17, 18, and 20 through 36. Enter total here and carry total to Form 4567, line 35, or Form 4590, line 26.	6,186,562	00
38	38. Tax After Nonrefundable Credits. Subtract line 37 from line 1. If less than zero, enter zero. (This line must be equal to Form 4567, line 36, or Form 4590, line 27.)	217,302	00

RECEIVED by MSC 8/30/2021 2:05:19 PM

+ 0224 2008 15 02 27 7

FB.00.03 MI4568P2

RECEIVED by MSC 8/30/2021 2:05:19 PM

MICHIGAN ECONOMIC DEVELOPMENT CORPORATION

300 N. WASHINGTON SQ.
LANSING, MI 48913

CUSTOMER
CONTACT CENTER
517 373 9808

WWW.MICHIGAN.ORG

Please Attach to Your Single Business Tax Return

Single Business Tax
Brownfield Redevelopment Credit
Assignment Certificate

EXECUTIVE COMMITTEE
MATTHEW P. CULLEN
Chair
General Motors
PHILIP H. POWER
Vice-Chair
HCN, Inc.
JAMES C. EPOLITO
President & CEO
RICHARD E. BLOUSE JR., CCE
Detroit Regional Chamber
JOHN W. BROWN
Stryker Corporation
DR. DAVID E. COLE
Center for
Automotive Research
JOANN CRARY
Saginaw Future Inc.
DR. HAIFA FAKHOURI
Arab American and
Chaldean Council
STEVEN K. HAMP
The Henry Ford
HAYDEN H. HARRIS
EDF Ventures
PAUL HILLEGONDS
DTE Energy Company
DAVID C. HOLLISTER
Michigan Department of
Labor & Economic Growth
GEORGE JACKSON JR.
Detroit Economic Growth
Corporation
MICHAEL J. JANDERNOA
Bridge Street Capital
Partners, LLC.
MAYOR ROBERT B. JONES
City of Kalamazoo
BIRGIT M. KLOHS
The Right Place, Inc.
DR. IRVIN D. REID
Wayne State University
RICHARD SHOEMAKER
UAW International
S. MARTIN TAYLOR
Detroit Renaissance
GARY TORGOW
Sterling Group
PETER S. WALTERS
Guardian Industries Corp.

Issued this 12th day of December 2005, by the Michigan Economic Growth Authority.

This is to certify that:

Comerica Bank
FEIN [redacted]7375
Project Number T-0064

As an assignee of KWA I, LLC is a qualified taxpayer eligible to claim the Single Business Tax Brownfield Redevelopment Credit under Section 38g of the SBTA. The total amount of credit assigned and available to use is:

Available Brownfield Credit
$717,000.00 (1)

The credit must be claimed in the tax year in which this certificate is issued. This certificate MUST be attached to the Single Business Tax Annual return in order to claim the credit. An assigned credit cannot be revoked or reassigned.

By: ______________________
Vern Taylor, Program Manager for Brownfield Redevelopment

RECEIVED by MSC 8/30/2021 2:05:19 PM

Michigan Department of Treasury
3514 (Rev. 4-03)

Michigan Historic Preservation Tax Credit Assignment

PART 1: ASSIGNOR IDENTIFICATION

1. Assignor Name KWA I, LLC	2. Tax Year End 12/31/05	3. Account No. (FEIN or TR No.) [redacted]2890
Street Address 220 W. Congress, Suite 500	4. Project Number 9038 3395	5. Date Project was Certified as Completed 12/27/05
City, State, ZIP Detroit, MI 48226	6. Organization Type (check one) [ ] Limited Liability Company-Corporation [X] Partnership/LLC-Partnership [ ] S Corporation	
	7. Indicate the Method Used to Assign the Credit [X] Alternative Method (attach details) [ ] % of Ownership	

PART 2: CREDIT CALCULATION

8. State Equalized Value (SEV) .... 8. 218,420 .00
9. Qualified Expenditures .... 9. 7,150,401 .00
10. Multiply line 9 by 25% (.25) .... 10. 1,787,600 .00
11. Enter the total amount of credit claimed on U.S. 3468, Investment Credit, line 1c .... 11. 1,430,080 .00
12. Michigan Historic Preservation Tax Credit. Subtract line 11 from line 10 .... 12. 357,520 .00

PART 3: ASSIGNING THE CREDIT (see back of form for more space)

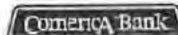
	A. Assignee Account Number (FEIN, TR or SSN) (Assignor)	B. Assignee Name	C. Date Assignee's Tax Year Ends	D. % of Credit to be Assigned	E. Assigned Credit (multiply line 12 by Column D. Enter here and on Form 3581, line 5, for each assignee)
13a.	[redacted]7375	Comerica Bank	December 31	100%	357,520
13b.					
13c.					
13d.					
13e.					
13f.					
13g.					
13h.					
				100%	

APPROVED [date stamp] 2006

I certify that the information provided on this return is accurate and that the assignees agree that the assigned credit is the amount to be claimed on their individual or single business tax return.

Assignor's Signature: KWA I, LLC
By: Schostak Brothers & Co, Inc, its Authorized Agent
[signature]
By: Stephen J. Duczynski, its Authorized Representative

Letter



RECEIVED by MSC 8/30/2021 2:05:19 PM

Comerica Incorporated
November 21, 2008

Michigan Department of Treasury
PO Box 30059
Lansing, MI 48909

RE: Comerica Bank
FEIN #: 1646
Former FEIN#: 7375

Dear Sir or Madam:

Attached please find the 2007 Form C-8000 for the above named taxpayer. The reason for this letter accompanying the return is two-fold:

1. To provide an explanation why the return is not e-filed
2. To explain the connection between new entity # 1646 and old entity # 7375

This return is not eligible for e-file because Form C-8000MC, Miscellaneous Credits, is included. Form C-8000MC is filed to report a carryforward of Historic Preservation and Brownfield credits. All documentation necessary to support the credit was included with the 2005 filing, the year the credits originated.

Please be advised that the above named Corporation 1646 was formed as the result of a plan of reorganization of Comerica Bank EIN 7375. Effective October 31, 2007 Comerica Bank EIN 7375 merged into Comerica Bank EIN 4164. This reorganization qualifed under IRC Section 368(a)(1)(F) as a mere change in identity, form or place of organization of one corporation. Pursuant to the federal regulations, one Federal income tax return was filed under EIN 1646 encompassing full year activity of former Comerica Bank 7375 and new Comerica Bank 1646. For Michigan state tax purposes we followed the Federal return and filed one state return under EIN 1646, return attached, for full year 2007 activity because it is our understanding that Michigan generally adopts the Federal Income Tax treatment of a C corporation as set out in IRC Sections 301 thru 385. All filings for former entity Comerica Bank 7375 will now be made under Comerica Bank, 1646.

Sincerely,

Debra Stover

Debra Stover
Tax Officer
Comerica Incorporated
411 W. Lafayette, MC 3415
Detroit, MI 48226

RECEIVED by MSC 8/30/2021 2:05:19 PM

STATE OF MICHIGAN

DEPARTMENT OF TREASURY

Comerica, Inc.
411 West Lafayette, MC 3415
Detroit, MI 48226

Docket No. 20140478
Michigan Business Tax
Intent to Assess: UB35645
Claimed Overpayment
Tax Period: 12/2010
Audit Period: 1/2008 - 12/2011

INFORMAL CONFERENCE RECOMMENDATION

An informal conference was held in this matter on May 17, 2016. Melanie Hamilton and Tom Cornett appeared at the informal conference on behalf of Comerica, Inc. ("Petitioner"). Caroline June, Kathy Debien and Robin Madaras appeared on behalf of the Department of Treasury (the "Department").

Three issues were raised in this matter: First, whether the Department erred in its application of MCL 208.1265 (calculation of net capital for a financial institution) to determine Petitioner's Michigan Business Tax ("MBT") tax base pursuant to a MBT audit for the audit period January 1, 2008 to December 31, 2011 (the "audit period")[1]; second, whether the Department erred in disallowing Petitioner's claimed Single Business Tax ("SBT") certificated credit carryforward amounts on its 2008 MBT annual return (at issue in related docket 20122043); third, ordering of the MBT compensation credit and the (asserted) unused SBT credit carryforwards.

FACTS

Petitioner is a financial institution consisting of a 41 member unitary business group ("UBG") under the MBTA. Comerica, Inc. (interchangeably with the UBG, herein referred to as Petitioner) is the designated member of the UBG. Petitioner is a C-corporation that files its tax returns on a calendar year basis. The Department conducted a MBT audit of Petitioner. The audit result in a net credit of $12,454,941.07, which was a reduced amount from the amount claimed by Petitioner as a result of the Department's recalculation of Petitioner's net capital and disallowance of certain credits.

Prior to the audit, Petitioner filed MBT returns for each of the years in issue. The Department made adjustments to the returns and issued Intent to Assess UB35645 on February 12, 2014. Petitioner requested an informal conference by letter dated February 18, 2014. The Hearings Division acknowledged the request by letter dated February 24, 2014, listing the foregoing intent to assess. On April 30, 2014, the instant docket was placed in abeyance pending the ongoing audit covering the tax period in issue. Upon completion of the audit, which resulted in an overall determined credit, Intent to Assess UB35645 was corrected to zero and will be canceled after the informal conference process is complete. The informal conference proceeded on Petitioner's request for additional refund based on the issues that were the subject of the informal conference, as stated above.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Department's Position

With respect to the SBT credit carryforwards (from 2007 SBT to 2008 MBT return), the Department maintained that the disputed credits are MEGA (Michigan Economic Growth Authority) certificated credits (SBT Historic Preservation Credit and Brownfield Credits) which were originally claimed by Petitioner (Comerica-Detroit) on its 2005 SBT return were properly denied. The original denial of the credits occurred upon the processing of Petitioner's 2008 MBT return, when Petitioner tried to carry the credits from its 2007 SBT return to its 2008 MBT return. Apparently, Petitioner filed a single 2007 SBT return which the Department did not process due to the merger of Comerica-Detroit, which had its own FEIN, into the newly-formed Texas entity ("Comerica Texas"), which had a different FEIN of its own, in 2007. A letter was issued by "SBT Tax Processing" on March 9, 2010 informing Petitioner that:

> The 2007 SBT return included a letter stating that effective October 31, 2007, Comerica Bank, EIN # 7375, merged into Comerica Bank, EIN # 1646 [sic].
>
> Therefore, this return cannot be accepted as a full 12 month return. Please submit a return for the tax period January 1, 2007 to October 31, 2007 for EIN # 7735 and a separate return for November 1, 2007 to December 31, 2007 for EIN # 1646. [Department's March 9, 2010 Business Tax Notification Letter]

A second letter with the same information was issued on February 28, 2011. On December 14, 2011, the Department issued a SBT Annual Return Notice of Adjustment showing an adjustment to Petitioner's Investment Tax Credit carryforward.

Per the Department's Audit Report of Findings (AROF):

> [Petitioner] claimed an SBT ITC Credit Carryforward, and Historic Preservation Credit and 'New' Brownfield Credit Carryforwards; however, these were disallowed when the 2007 SBT return was processed due to [Petitioner's] change of FEIN in October 2007. . . Since the SBT Historic Preservation and Brownfield credits were denied upon SBT processing, the 2008 carryforwards of SBT credits to the MBT returns were also denied upon processing. Based upon a detailed review of the certificates and applicable statutes the SBT Historic Preservation and Brownfield Credits originally claimed on the 200 SBT return are also denied in audit. This adjustment resulted in a difference of $4,098,317 from the taxpayer's originally filed return, but this was not an adjustment from the processed return. [The ITC credit was allowed in the audit]. [AROF, p 6.]

In a letter dated June 24, 2015 (referred to in the AROF, quoted above), Ms. June explained to Petitioner that:

> The original SBT New Brownfield and Historic Preservation Credit certificates were assigned to Comerica Bank - Detroit in 2005, which is when that taxpayer first claimed the credits at issue on the 12/31/2005

RECEIVED by MSC 8/30/2021 2:05:19 PM

> SBT return. The assignor was KWA I, LLC ("KWAI"). The unused portions of the credits were carried forward to the 12/31/2006 SBT return (filed under Comerica Bank - Detroit's FEIN).
>
> Per MCL 208.38(g) of the Single Business Tax Act (SBTA), the Brownfield Credit could only be assigned by a partnership, limited liability company, or subchapter S corporation to its partners, members, or shareholders based on their proportionate share of ownership of the entity or, on an alternative method approved by the [MEGA]. The assignment was irrevocable and the partner, member, or shareholder could not reassign the Brownfield Credits. For this reason, Comerica Bank - Texas . . . cannot claim the Brownfield credits assigned to Comerica Bank - Detroit because the names and FEINs represent two distinct and separate entities for purposes of claiming or assigning the Credits. Comerica Bank - Detroit . . . ceased to exist on November 1, 2007 and the credits assigned to it were extinguished.
>
> Per MCL 208.39c(7) of the SBTA, the Historic Preservation Credit could only be assigned by a partnership, limited liability company, or subchapter S corporation to its partners, members, or shareholders based on their proportionate share of ownership of the entity or on an alternative method. The assignment was irrevocable and the partner, member, or shareholder could not reassign the credit. Like the Brownfield Credit, the Historic Preservation Credit was assigned by KWA I, LLC to Comerica Bank - Detroit in the 2005 tax year. Once assigned, the credit could not be reassigned to Comerica Bank - Texas in 2007.
> So, the entity remaining after the described merger, Comerica Bank - Texas (████1646) could not claim the aforementioned credits as the single assignment permitted by the SBTA had already occurred between KWA I, LLC and Comerica Bank - Detroit (████7373). The Department's denial of these credits upon processing the 12/31/2007 SBT return was correct, as was the denial of the credits to be carried forward on the 12/31/2008 MBT return. [Department's 6/24/2015 letter]

At the informal conference, Ms. June further explained that, since the audit period commenced with the tax period January 1, 2008, and did not include the SBT tax period ending December 31, 2007, she could not make adjustments to Petitioner's 2007 SBT return, which also did not appear to be under appeal. The Department maintained that its denial of the Brownfield Credit and Historic Preservation Credit carryforwards should be upheld as correct. The Department stated that if the Petitioner had something in writing from the MEGA stating that the certificated credits could be transferred or carried over to a new FEIN after the previous one time transfer, it would honor that. However, in the absence of any such authorization, the Department could not allow a second assignment or transfer; nor was there any evidence of an approval of a second assignment or transfer. The Department further stated that it could not simply move a certificated credit from one FEIN to another.

With respect to the averaging used for the current audit years, the Department maintained that its averaging (dividing Comerica - Texas by 2, 3, 4, and 5 years, and Comerica-Detroit by 5 years in each

RECEIVED by MSC 8/30/2021 2:05:19 PM

of the current audit years) was correct under MCL 208.1265(2), which instructs that net capital for a financial institution shall be determined 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, *if* the financial institution has been in existence for 5 years; if not, the Department must use the number of years the financial institution has been in existence. The Department stated that it applied section 265(2) in this case, to both Comerica-Texas and Comerica-Detroit, because even if the merger occurred in 2007, as Petitioner claims, there were two separate FEINs both before and after the merger. Accordingly, Comerica-Detroit "existed" for 5 years, but Comerica-Texas (per Petitioner, the surviving institution) "existed" for only 2 years. Thus, pursuant to subsection 265(2), the Department averaged Comerica-Detroit by 5 years, and averaged Comerica-Texas by 2, 3, 4 and 5 years during the audit years. The Department does not object to 2007 and the years *after*, in accordance with MCL 208.1265(4)(a), but, in order to apply subsection 265(2), the Department maintains that it has to include the years that Comerica-Detroit was in existence before the merger as a member of the UBG in order to determine the net capital of the UBG for each current tax year in the audit period.

Petitioner's Position

Issue #1: Averaging. Petitioner argued that the Department's calculation of net capital is incorrect due to an error in averaging. Petitioner maintained that Comerica-Detroit and Comerica-Texas were merged in 2007, creating a single entity, of which Comerica-Texas is the surviving entity. Petitioner maintained that, contrary to the Department's determination that Comerica-Texas did not exist prior to 2007, the combined entity is the entity that was previously in existence and continues to exist after 2007 pursuant to MCL 208.1265(4)(a). Petitioner argued that it engaged in a section 368(a)(1)(F) reorganization under the Internal Revenue Code. Petitioner stated that a F-reorganization means a "mere change in identity, form, or place of organization of one corporation, however effected[.]" IRC §368(a)(1)(F). Petitioner argued that section 265(4)(a) almost "mimics" the language of IRC §368(a)(1)(F). Accordingly, Petitioner maintained that Comerica-Detroit and Comerica-Texas were one entity that was in existence for more than 5 years, and that, therefore, the Department erred in separating the two entities by FEIN numbers for averaging.

At the informal conference, Petitioner responded to the Department's argument by asserting that the previous entity does not exist; you must start with the entities that are in the UBG for the current year and determine the net capital only for those entities, not for entities that existed prior to the merger in previous years. (Ms. June replied that, if she looked at it that way, she could not reconcile the other FEIN in 2007 - recall there were 2 FEINs in that year). Petitioner argued that Comerica Texas had no equity or net capital prior to the merger. Thus, it was Comerica-Detroit's net capital until it reorganized into Comerica-Texas; there never were two separate entities with net capital.

In its informal conference letter dated May 9, 2016, Petitioner stated that section 265(4)(a) applies under these facts because "it merely changed FEINs and its place of organization from Michigan to Texas." Petitioner argued that, under the Department's application of averaging:

> The auditor's workpapers present "Current Net Capital" of Comerica Bank [Texas] and Comerica Bank [Michigan] as that of separate entities on Schedule C2 (Appendix B). In the auditor's calculation, Comerica Bank under [Michigan FEIN] has net capital in 2004-2006. The capital then "moves" to Comerica Bank under [Texas] for years 2007 - 2011. Because Comerica Bank's net capital was presented as if it were two

RECEIVED by MSC 8/30/2021 2:05:19 PM

> unrelated entities, the years used in averaging is erroneously calculated as if Comerica Bank is a new entity that was formed in 2007. As previously enumerated, an IRC Section 368(a)(1)(F) reorganization results in no real change to an entity and ends with the same corporation. Furthermore, a "F reorganization encompass[es] only the simplest and least significant of corporate changes. The (F)-type reorganization presumes that the surviving corporation is the same corporation as the predecessor in every respect, except for minor or technical differences." [Petitioner's 5/9/2016 letter (quoting Preamble to REG-106889-4, 69 Fed. Reg. 49836 (8/12/04)).]

Issue #2: SBT certificated credit carryforwards. First, Petitioner argued that it never received any formal notice from the Department specifically disallowing the carryforward of the Brownfield and Historic credits from its 2007 SBT return to its 2008 MBT return. Rather, the first notice Petitioner received of the disallowance of these credits was Intent to Assess TP34119 which Petitioner properly appealed (in the instant docket), and which appeal was held in abeyance pending the completion of the MBT audit. Accordingly, the disallowance of the credit carryforward from the 2007 SBT return is properly a subject of this informal conference. As to the Department's argument that Petitioner's 2007 SBT return was not accepted because Petitioner failed to submit separate short period returns (one for Comerica-Texas and one for Comerica-Detroit) as requested in the Department's March 9, 2010 and February 28, 2011 letters, Petitioner asserted that because it engaged in a reorganization that qualified under IRC Section 368(a)(1)(F) as a mere change in identity, form or place of organization of one corporation, it was not required to file two federal income tax returns, and so it followed its federal return and filed only one state return under the new Comerica-Texas FEIN for the full year of activity of both Comerica-Texas *and* Comerica- Detroit based on its understanding that Michigan generally adopts the Federal income tax treatment of a C corporation as set out in IRC sections 301 through 305. See, Petitioner's 11/21/2008 letter accompanying its 2007 SBT annual return.

At the informal conference, Petitioner further argued that, if a corporation goes through a 368(a)(1)(F) reorganization, nothing changes, so the corporation still gets all of its same credits. Petitioner used the CAD as an example, stating that the survivor entity takes the business loss carryforward. In its informal conference letter, Petitioner cited RAB 1992-3 as support for the allowance of a business loss carryforward for a corporation under a section 368(a)(1)(F). Petitioner further argued that, because the entity went through a mere change in form, identity or location, there was no need for an assignment or transfer of the Brownfield or Historic Preservation credits from Comerica-Detroit to Comerica-Texas; rather, the credits were merely reflected under the new FEIN of Comerica Bank (the survivor, Comerica-Texas). Petitioner further stated that it had posed the question to the Office of General Counsel for the State of Michigan and was told in a letter that they did not have to assign or transfer the credits.

Petitioner was allowed 2 weeks after the conference to provide a copy of the letter and also to provide further information regarding the formation of Comerica - Texas under Texas law. While Petitioner did provide additional information regarding the formation of Comerica-Texas, and regarding its appeal of the first notice disallowing the credits, Petitioner did not provide a letter or statement from MEGA or the Michigan Office of General Counsel.

Issue #3: Ordering of credits: Petitioner argued that if the credits are allowed, the credit ordering should be corrected as set forth in the Department's Notice to Taxpayer's Regarding *Ashley Capital, LLC v Michigan Department of Treasury,* dated March 1, 2016, in which the Department "acquiesced to the

RECEIVED by MSC 8/30/2021 2:05:19 PM

computation and utilization of the MBT Compensation credit *before* the utilization of unused SBT credit carryforwards."

The Department had no issue with Petitioner's issue #3 if the credits were ultimately allowed as a result of the informal conference.

ANALYSIS AND CONCLUSIONS OF LAW

The Michigan Business Tax Act ("MBTA"), MCL 208.1101, *et seq.*, 2007 PA 36, replaced the Single Business Tax ("SBT") effective January 1, 2008 and applied to all business activity occurring after December 31, 2007. The MBTA was in effect during the entire audit period.

Calculation of Net Capital For a UBG of Financial Institutions Under MCL 208.1265

At issue here, in the case of financial institutions, section 265 of the MBTA provided the Department with instructions as to the determination of the tax base for "[t]axation of financial institutions . . ." in relevant part, as follows:

> (1) For a financial institution, *tax base means the financial institution's net capital. Net capital means equity capital as computed in accordance with generally accepted accounting principles [GAAP] less goodwill and the average daily book value of United States obligations and Michigan obligations. . .* Net capital does not include up to 125% of the minimum regulatory capitalization requirements of a person subject to the tax imposed under chapter 2A. [MCL 208.1265(1) (Emphasis added)]

Subsection 265(2) provided that:

> *Net capital shall be determined* 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. If* a financial institution has not been in existence for a period of 5 tax years, net capital shall be determined by adding together the financial institution's net capital for the number of tax years the financial institution has been in existence and dividing the resulting sum by the number of years the financial institution has been in existence. For purposes of this section, a partial year shall be treated as a full year. [MCL 208.1265(2) (Emphasis added)]

Section 265(2), above, is referred to as the "averaging" provision. There was no dispute here that the averaging provision applied. Rather, it is the application of the averaging provision where a combination of two entities (both of which are part of the UBG) occurred in a year prior to the current tax year (for which the net capital is being determined).

However, for purposes of applying the averaging provision, subsection 265(2), in the case of a UBG (the parties here do not dispute that Petitioner is a UBG), the Department also had to apply subsection 265(3). That subsection provided that:

RECEIVED by MSC 8/30/2021 2:05:19 PM

> For a unitary business group of financial institutions, net capital calculated under this section does not include the investment of 1 member of the unitary business group in another member of that unitary business group. [MCL 208.1265(3)]

Applying section 265(3) and 265(2), averaging is done separately for each member of the UBG, and then eliminations of the investment of 1 member in another member of the UBG are taken before the net capital is combined to determine the net capital for the group. Petitioner did not raise any arguments disputing the Department's interpretation or application of section 265(3).

Petitioner maintained that its merger of Comerica-Detroit into Comerica-Texas in 2007 encompassed the circumstances described in subsection 265(4)(a). That subsection provided that, for purposes of section 265:

> A change in identity, form, or place of organization of 1 financial institution *shall be treated as if a single financial institution* had been in existence *for the entire tax year in which the change occurred and each tax year after the change.* [MCL 208.1265(4)(a)]

Section 265(4) also provided for treatment of a combination of 2 or more financial institutions into 1:

> The combination of 2 or more financial institutions into 1 *shall be treated as if the constituent financial institutions had been a single financial institution* in existence for the entire tax year in which the combination occurred and each tax year after the combination, and the book values and deductions for United States obligations and Michigan obligations of the constituent institutions *shall be combined.* A combination shall include any acquisition required to be accounted for by the surviving financial institution in accordance with generally accepted accounting principles or a statutory merger or consolidation. [MCL 208.1265(4)(b) (Emphasis added)]

Petitioner argued in this case that it engaged in a "Section 368(a)(1)(F)" reorganization under the IRC. It was undisputed, however, that Petitioner created a new entity - Comerica-Texas, which had its own FEIN as a separate corporation, in 2007. Petitioner stated that establishing a new corporation in the desired location was required in order to change the bank charter. Assuming that is true, nonetheless, in 2007 the UBG included *2 separate financial institution corporations* with 2 FEINs that *combined into one* later in the year. The facts here are thus more consistent with a combination of 2 or more financial institutions into 1, as described in subsection 265(4)(b), rather than a circumstance where 1 corporation merely changes its identity, form or place of organization, as described in subsection 265(4)(a). Even if the same corporation (Comerica-Detroit) did merely change its form, identity or place of organization, it did so by creating a *second* corporation (Comerica-Texas) and then combined the 2 financial institutions into one, with Comerica-Texas being the surviving financial institution. It was undisputed that both entities existed during overlapping time periods in 2007. Regardless, section 265(4)(b) mirrors subsection 4(a) for combinations of 1 or more financial institutions, and provides guidance as to how the financial institution shall be treated *in the year of* the combination [265(4)(b)] or change in identity, form or place of organization [section 265(4)(a)] and *for all years after*; neither section speaks to the treatment of the constituent institutions in the years *before* the combination or change in identity, form

RECEIVED by MSC 8/30/2021 2:05:19 PM

or place of organization for purposes of averaging under section 265(2) and eliminations for a UBG under section 265(3).

In this case, whether it was a "Section 368(a)(1)(F) "reorganization" or whether it was a combination of 2 financial institutions into one, and regardless of the reasons for doing so (i.e., required to change the location of the bank charter), the reality of the facts and circumstances is that, during 2007, there were 2 separate corporations with 2 separate FEINs. The Department here did not dispute that, for purposes of applying section 265, in 2007 (the year of the combination or reorganization) and all years *after*, the constituent institutions are treated as though 1 financial institution had been in existence for the entire tax year in which the change or combination occurred (this treatment does not apply for purposes of the credit carryforward issue, which is discussed below, but is limited, as stated in the statute, to section 265). Therefore, it was undisputed that, for the year in which the combination occurred, Petitioner was treated as though a single financial institution - Comerica-Texas - existed for the entire year of the combination (2007) and for the years after. Comerica-Texas (FEIN [redacted]4164) was, therefore, in existence for 2 years in current year 2008, 3 years in current year 2009, 4 years in current year 2010, and 5 years in current year 2011. Comerica-Detroit (FEIN [redacted]7735) was in existence for purposes of applying subsection 265(2) and 265(3) for 5 years in determining the UBG's net capital for current year 2008 and after, because it had existed in the pre-2007 years which had to be included in the look-back years to correctly calculate net capital for the UBG since it existed as a member of the UBG prior to the 2007 merger year, and had been in existence for more than 5 years.

The primary goal of statutory construction is to ascertain and give effect to the Legislature's intent as expressed by the language of the statute. *Neal v* Wilkes, 470 Mich 661, 665; 685 NW2d 648 (2004). When determining legislative intent, it is necessary to first look at the language of the statute. If the language is clear and unambiguous, judicial construction is not permitted. *Yaldo v North Pointe Ins* Co, 457 Mich 341, 346; 578 NW2d 274 (1998). The factfinder may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Roberts v Mecosta Co General* Hosp, 466 Mich 57, 63; 642 NW2d 663 (2002). Once ascertained, the Legislature's intent must prevail despite any conflicting rule of statutory construction. *Terzano v Wayne Co*, 216 Mich App 522, 526-527; 549 NW2d 606 (1996). Parts of a statute must be harmonized to discern and carry out the intent of the Legislature. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001); *Mayor of Lansing*, 257 Mich App at 14. Generally, tax laws are construed against the government. However, tax exemption statutes are to be strictly construed in favor of the taxing unit. *DeKoning v Dep't of Treasury*, 211 Mich App 359, 361-362; 536 NW2d 231 (1995); see also, *Great Lakes Sales, Inc. v. State Tax Comm.*, 194 Mich.App. 271, 276, 486 N.W.2d 367 (1992). Moreover, it is well settled that when two statutes or provisions may be applicable to a matter, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails. *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994); *In re Brown*, 229 Mich App 496, 501; 582 NW2d 530 (1998).

Finally, as a general rule of statutory construction, the word "shall" is used to designate a mandatory provision. *Depyper v Safeco Ins Co of America*, 232 Mich App 433, 438; 591 NW2d 344 (1998). see *Mich Ed Ass'n v Secretary of State*, 489 Mich 194, 218; 801 NW2d 35 (2011) ("[t]he use of 'shall' in a statute generally indicates a mandatory and imperative directive.") (quotation marks and citation omitted).

Subsection (1) defines "net capital", subsection (2) instructs how a financial institution's net capital is "determined" for purposes of determining its tax base for the MBT. That section specifically states that the Department is to use an average, as specified in the statute, to determine a financial institution's net

RECEIVED by MSC 8/30/2021 2:05:19 PM

capital, and subsection 265(3) instructs that the calculation of net capital for the UBG does not include the investment of 1 member of the UBG in another member of the UBG. Thus, the statute mandates that net capital for each member of the UBG be determined under subsection 265(2), and then eliminations can be determined under subsection 265(3) to calculate the net capital for the UBG under subsection 265(1).

Thus, the first task is to determine the net capital for each member of the UBG under section 265(2). That section plainly states that, "[i]f a financial institution *has not been in existence* for a period of 5 tax years, net capital *shall be determined* by adding together *the* financial institution's net capital for the number of tax years *the* financial institution has been in existence and dividing the resulting sum by the number of years *the* financial institution has been in existence." Section 265(2) (Emphasis added). Accordingly, under the plain language of the statutory provision, the financial institution's net capital (and for a UBG, each financial institution that makes up the UBG) must be determined by reference to the number of years it has been "in existence." For a UBG, "the" financial institution is the group of members that comprise the UBG and are treated as a single taxpayer under the MBT. MCL 208.1265(3); 208.1511.

Subsection 265(4)(a) *or* (b), is the specific statutory provision with respect to the treatment of the financial institution(s) after a change in identity, form or location or after a combination of 2 financial institutions. Here, there were clearly 2 financial institutions in 2007 before the merger. For purposes of determining net capital, the Department properly treated the combined entities - Comerica- Detroit and Comerica-Texas as if they were 1 entity for the entire year in which the merger (combination) occurred (2007), and for all of the years *after*. MCL 208.1265(4)(a) and (b).

The language in subsection 265(4)(a) and (b) refers only to the "tax year in which the combination occurred and each tax year after the combination" and does not refer to the years prior to the combination. Therefore, the reality of the facts and circumstances will determine the application of section 265(2) to the surviving entity, and may have an impact as well on the calculation of average net capital for the UBG pursuant to the application of section 265(3). In a case where 1 financial institution acquires or merges with another financial institution that was not a part of the UBG, but separately existed in the years prior to the merger *and* the surviving entity (the acquiring entity) existed for more than 5 years, the surviving entity is the same entity that existed prior to the acquisition (combination) and continues into the future tax years as the same entity with the same federal tax identification number. Under that circumstance, it would be an incorrect application of subsection 265(2) to calculate the surviving entity's net capital by including the acquired entity's separate net capital in years prior to the acquisition/merger (where that entity was not a member of the UBG in the years prior to the merger) - in that case, *the* surviving entity was "in existence" for 5 years, and its net capital would be determined by calculating net capital for the surviving entity for the current year and the preceding 4 years and dividing by 5. The circumstance here is quite different, because the entity that was not the survivor of the merger *was* previously in existence as a member of the UBG. Thus, a different approach is required, even though Comerica-Texas is the surviving entity and is the single financial institution for the year in which the combination occurred and each of the years *after* the combination or change of identity, form or place of organization.

The Department's application of section 265(2) under the facts and circumstances here correctly applied the mandate in section 265(4), while still giving proper effect to the directives of subsections 265(2) and 265(3).

RECEIVED by MSC 8/30/2021 2:05:19 PM

As subsection 265(4)(b) mandates, "the combination of 2 or more financial institutions *into 1 shall be* treated *as if* the constituent financial institutions had been a single financial institution *in existence* for the entire tax year in which the combination occurred and each tax year after the combination . . ." Thus, in this case, Comerica-Detroit and Comerica-Texas are treated "as if" they are a single financial institution for the year in which the combination occurred and for the years after. In order to apply subsections 265(2) and (3), the Department gave all net capital to Comerica-Texas in year 2007 and all years after; however, Comerica-Texas did not exist at all prior to 2007. Thus, the Department correctly divided net capital for that entity by 2 years in 2008, by 3 years in 2009, by 4 years in 2010, and by 5 years in 2011.

Because Comerica-Detroit was in existence as a member financial institution of the UBG in the years 2006, 2005 and 2004 which are part of the look-back years for the UBG (designated member) in current year 2008, in order to determine the net capital for the UBG, eliminations between the members in those look-back years must be taken, requiring the inclusion of any entity that existed and had net equity during those look-back years. Thus, Comerica-Detroit's net capital had to be included for those years in 2008 (and years 2005 and 2006 in current year 2008, and 2006 in current year 2009) in calculating net capital for the UBG. The Department correctly divided Comerica-Detroit by 5 years because it was in existence for more than 5 years. Comerica-Detroit gets the benefit of 5 years because its equity still existed on the year of the combination with Comerica-Texas and the years after, in the "single financial institution" known as Comerica-Texas. In other words, for purposes of section 265, the combination is treated "as if" a single financial institution is in existence for the year in which the combination occurred and the years thereafter; even where the reality is that two separate financial institutions existed in the year of the combination and where the merged entity's equity continues on in the equity of the single financial institution.

Petitioner's argument fails to take into consideration the application of section 265(3) where the merged entity (Comerica-Detroit) existed as a member of the UBG in the look back years for determining the UBG's net capital under section 265(2). Eliminations between members of the UBG can only be taken if all members of the UBG in the look-back years for averaging are included. Accordingly, the Department correctly included Comerica-Detroit's net capital as applicable in the look-back years to determine the net capital for the UBG.

Comerica-Texas did not exist prior to 2007, so the Department correctly applied subsection 265(2) by adding its net capital for the year 2007 and 2008 (in current year 2008), and then dividing by 2 (and by 3 in 2009, by 4 in 2010 and by 5 in 2011).

The Department's method of calculating the average net capital for Petitioner was consistent with the plain language of MCL 208.1265 and all of its subsections (sections 265(2), (3) and (4)), and its audit determination of Petitioner's MBT net capital should, therefore, be upheld.

SBT Certificated Credit Carryforwards

Certain facts were undisputed here: The certificated credits at issue - Historic Preservation credit and Brownfield credit - were SBT certificated credits authorized and awarded by the Michigan Economic Development Corporation (MEDC) to KWA I, LLC, as a qualified taxpayer eligible to receive the credits under the former MCL 208.38g. On December 12, 2005, KWA I, LLC assigned its Brownfield Redevelopment Credits to "Comerica Bank FEIN [redacted]7375" as shown on the SBT "Brownfield Redevelopment Credit Assignment Certificate[s]" attached to the Department's May 4, 2006 letter to KWA I, LLC, which letter refers to KWA I, LLC's assignment of its Michigan Historic Preservation Tax Credit(s) for the tax year ending December 2005. In addition to the attached Brownfield

RECEIVED by MSC 8/30/2021 2:05:19 PM

Redevelopment Credit Assignment Certificates, the record also contains copies of "Michigan Historic Preservation Tax Credit Assignment[s]" showing that KWA I, LLC assigned its Historic Preservation Tax Credits to Assignee Comerica Bank, with FEIN [redacted]7375.

Petitioner's Senior Vice President & General Counsel further explained in a post-conference letter that:

> In order for a bank to change its charter, the bank must merge into a bank chartered in the targeted jurisdiction. . . . In Comerica's case, a new Texas shell bank was organized . . . and a merger agreement was entered into between *the Michigan bank* and that *new Texas bank,* which, at the time, had no assets or liabilities. That merger agreement provided for the merger of *the Michigan bank* into the *new Texas bank, with the new Texas bank being the surviving bank.* [Petitioner's 5/31/2016 letter (Emphasis added)]

In its letter, Petitioner also asserted that, when the merger "became legally effective, all of the assets of the Michigan bank transferred by operation of law to the Texas bank, and all of the liabilities and obligations of the Michigan bank became, by operation of law, liabilities of the Texas bank." Petitioner's 5/31/2016 letter. Petitioner argued that, as a result, "there was no need to execute assignments or transfer agreements relative to property leases or financing agreements, and no such assignments or agreements were executed." Petitioner's 5/31/2016 letter.

In this case, the issue is not whether "property leases or financing agreements" were required to be assigned to transfer from "the Michigan bank" to the "Texas bank" (i.e., from Comerica-Michigan to Comerica-Texas); rather, the issue is whether *SBT certificated credits*, previously assigned by KWA I, LLC to Comerica-Detroit, automatically transferred to Comerica-Texas, a separate and "new" entity with its own FEIN, to allow Petitioner to claim a carryforward of the credits on its MBT return for the year 2008.

The SBT certificated credits (meaning that a Certificate authorizing the credits is required), were authorized under the former SBTA, section 38g and its subparts, (1) - (34). That section provided, in pertinent part, that:

> *Subject to the criteria under this section, an eligible taxpayer* may claim a credit against the tax imposed by this act as determined under subsections (20) to (25); and subject to the criteria under this section, a *qualified taxpayer* that has a preapproval letter issued after December 31, 1999 and before January 1, 2008, provided that the project is completed not more than 5 years after the preapproval letter for the project is issued, *or an assignee under subsection (17) or (18) or section 35e* may claim a credit that has been approved under subsection (2), (3), or (33) against the tax imposed by this act . . . [MCL 208.38g(1) (Emphasis added)]
>
> * * *
>
> The Michigan economic growth authority [MEGA] *shall review all applications* for projects under subsection (3) and, if an application is approved, *shall determine* the maximum total of all credits for that project. [MCL 208.38g(6) (Emphasis added)]

RECEIVED by MSC 8/30/2021 2:05:19 PM

Assignment of approved projects was allowed under subsection 38g(18), which provided, in relevant part, as follows:

> Except as otherwise provided in this subsection, for projects for which a certificate of completion is issued before January 1, before January 1, 2006, if a qualified taxpayer is a partnership, limited liability company, or subchapter S corporation, the qualified taxpayer may assign all or a portion of a credit allowed under subsection (2) or (3) to its partners, members, or shareholders, based on their proportionate share of ownership of the partnership, limited liability company or subchapter S corporation or based on an alternative method approved by the Michigan economic growth authority. A credit assignment under this subsection is irrevocable . . . A partner, member, or shareholder that is *an assignee shall not subsequently assign a credit or any portion of a credit assigned under this subsection*. The credit assignment under this subsection *shall* be made on a form prescribed by the Michigan economic growth authority. The qualified taxpayer *shall* send a copy of the completed assignment form to the Michigan economic growth authority in the tax year in which the assignment is made. . . [MCL 208.38g(18) (Emphasis added)]

Section 38g also allowed for the carryforward of unused credits. For purposes of the Brownfield credit, the term "Assignee" was defined as "an assignee under subsection (15) or (18) or under section 35e." MCL 208.38g(34)(g)(*i*). The term "Eligible taxpayer" was defined as "an eligible business that meets the criteria under section 8(5) of the Michigan economic growth authority act, 1995 PA 24, MCL 207.808." MCL 208.38g(35)(g). The term "Qualified taxpayer" meant a taxpayer that met both requirements set forth in subsections 38g(35(n)(*i*) and (*ii*).

Importantly, a taxpayer asserting the right to a tax credit bears the burden of proving entitlement. *Auto-Owners Ins Co v Dep't of Treasury*, 226 Mich App 618, 621-622; 575 NW2d 770 (1997), citing *Elias Bros Restaurants, Inc v Dep't of Treasury*, 452 Mich 144, 150; 549 NW2d 837 (1996). This burden must be satisfied by a preponderance of the evidence. See, e.g., *ProMed Healthcare v City of Kalamazoo*, 249 Mich App 490, 495; 644 NW2d 47 (2002). Proof by a preponderance of the evidence requires that the factfinder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence. *Blue Cross and Blue Shield of Michigan v Milliken*, 422 Mich 1, 89; 367 NW2d 1 (1985). This burden of persuasion applies to proceedings before an administrative agency. *Blue Cross and Blue Shield*, 422 Mich at 89.

Based on the plain language of the statute, the SBT certificated credits at issue were available only to a "qualified taxpayer" which met the criteria in section 38g to qualify for the credits and obtained a certificate from MEGA. Based on the evidence presented, the qualified taxpayer which obtained the credits was KWA I, LLC, a limited liability company. Also based on the evidence, KWA I, LLC assigned the credits to "Comerica Bank FEIN [redacted]7375" (Comerica-Detroit) as shown on the SBT "Brownfield Redevelopment Credit Assignment Certificate[s]" and to Comerica, FEIN [redacted]7375, as shown on the "Michigan Historic Preservation Tax Credit Assignment[s]" contained in the record. The plain language of section 38g(18) further mandates that the assignee "*shall not* subsequently assign a credit or any portion of a credit assigned under this subsection." MCL 208.38g(18) (emphasis added).

RECEIVED by MSC 8/30/2021 2:05:19 PM

Although eventually Comerica-Detroit merged with Comerica-Texas, with Comerica-Texas emerging as the surviving financial institution, it is clear that Comerica-Texas, FEIN [redacted]646, was initially formed as a separate entity (see, Petitioner's May 31, 2016 letter), and is not the "assignee" as that term was defined in subsection 38g(34)(g)(*i*). The assignee, which satisfied the criteria under subsection 38g(18), as demonstrated by the certificates showing the assignment, was "Comerica Bank FEIN [redacted]7375", or Comerica-Detroit. The Department has no authority under any of the SBT or MBT statutes to move the certificated credits from the qualified assignee's FEIN to a different FEIN, regardless of the circumstances.

Petitioner here has presented no statutory authority demonstrating that, in the event of a merger, the SBT certificated credits can be transferred without assignment to another separate entity with a different FEIN. Petitioner also failed to present the alleged letter from MEGA or the Office of General Counsel authorizing the Department to transfer the credits. While Petitioner argued that under Texas law, no assignment is required for the transfer of "all rights, title and interest to all *real estate and other property owned by* each organization that is a party to the merger" and that the separate existence of each domestic entity that is a party to the merger ceases (see, email from Mr. Cornett dated 5/16/2016, referencing Texas Business Organizations Code § 10.08. Effect of Merger), the SBT certified credits are not real estate or other property "owned by" either corporation, but rather are a statutory legislative grace that can only be allowed by reference to the language of the statute itself.

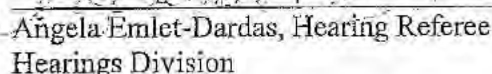
Notably, the multi-page statute does not anywhere discuss the allowance of a transfer or assignment of the credit from one FEIN to another in the case of merger of an authorized assignee. It is well established that exceptions to a statutory requirement must appear in the statute. See, e.g., *People v Jahner*, 433 Mich 490, 500; 446 NW2d 151 (1989); *Arends v Grand Rapids R Co*, 172 Mich 448; 138 NW195 (1912). If the Legislature had intended that SBT certificated credit could be moved from one FEIN to another in the case of a merger, it could have stated that in the plain language of the statute. It did not. "[S]ound principles of statutory construction require that Michigan Courts determine the Legislature's intent from its *words*, not from its silence." *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999) (Emphasis original). Therefore, the absence of such an exception must be interpreted as intentional.

Based on the law and the evidence presented here, Petitioner failed to satisfy its burden of demonstrating entitlement to the claimed SBT credit carryforwards. *Auto-Owners Ins Co, supra*, at 621-622; *Elias Bros Restaurants, Inc, supra*, at 150; *ProMed Healthcare, supra*, at 495. Because Petitioner does not prevail here on the issue of the SBT certificated credit carryforwards, issue #3 (ordering of those SBT credits under the MBTA) is moot.

RECOMMENDATION

For the reasons stated above, it is recommended that Intent to Assess UB35645 should be canceled, as previously determined by the Department, and that the Department's audit determination should be upheld for the tax year in issue.

Respectfully submitted,



Angela Emlet-Dardas, Hearing Referee
Hearings Division

---

[1] The instant docket includes the tax year ending 12/2010, part of the audit period; related dockets 20122043 and 20140723 include the tax years ending 12/2008 an 12/2009, and 12/2011, respectively. The intents to assess on each of the instant and related dockets have been corrected to zero as a result of the audit credit determination, and Petitioner's informal conference claims are converted to a claimed overpayment dispute as Petitioner is claiming entitlement to an increased credit amount than the credit amount determined by the audit for all years.

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
Lansing

RICK SNYDER
GOVERNOR

NICK A. KHOURI
STATE TREASURER

June 24, 2015

Comerica, Inc.
Gerald E. Coe,
Vice President, Corporate Tax
411 West Lafayette, MC: 3415
Detroit, MI 48226

Dear Mr. Coe,

After a significant review of the facts and applicable statute, the Department has determined the appropriate position regarding the New Brownfield and Historic Preservation Credits carried forward from the Single Business Tax (SBT) to the Michigan Business Tax (MBT). The information of greatest importance in this situation surrounds the recipients of the assigned SBT Brownfield and Historic Preservation Credits and, how the assignments affect the acceptance or denial of Comerica Bank's claims of those credits on the 2007 SBT and 2008 MBT returns.

Moving forward, "Comerica Bank – Detroit" refers to the entity with the FEIN ████7375 and "Comerica Bank – Texas" refers to the entity with the FEIN ████1646.

Background:

The Department denied the taxpayer's claim of carrying forward the New Brownfield and Historic Preservation Credits from the 2007 SBT return to the 2008 MBT return. The original denial occurred upon the processing of the filed 2008 MBT return.

Comerica Bank – Texas filed the 12/31/2007 SBT return under its FEIN (████1646) as of 10/31/2007 for the entire 12-month period – 10 months of which Comerica Bank – Detroit operated under its own FEIN (████7375). The Department sent a Notice to Comerica Bank – Texas on March 9, 2010 indicating that it should file two short-period SBT returns to reflect the portions of the 2007 SBT return year under which Comerica Bank operated under the two FEINs. Comerica Bank – Texas had sent a letter with its 2007 SBT return explaining that it was complying with IRC 368(a)(1)(F) by not filing two short-period returns in the year of the identity change. Consolidated entity Comerica Inc.'s [FEIN (████8421)] Annual Report as filed with the SEC identifies the transition as such: "On October 31, 2007, Comerica Bank, a Michigan banking corporation, was merged with and into Comerica Bank, a Texas banking association ('Comerica Bank')."

The original SBT New Brownfield and Historic Preservation Credit certificates were assigned to Comerica Bank – Detroit in 2005, which is when that taxpayer first claimed the credits at issue on the 12/31/2005 SBT return. The assignor was KWAI, LLC. The unused portions of the

RECEIVED by MSC 8/30/2021 2:05:19 PM

credits were carried forward to the 12/31/2006 SBT return (filed under Comerica Bank-Detroit's FEIN).

Conclusion:

Per MCL 208.38g(18) of the Single Business Tax Act (SBTA), the Brownfield Credit could only be assigned by a partnership, limited liability company, or subchapter S corporation to its partners, members, or shareholders based on their proportionate share of ownership of the entity or, on an alternative method approved by the Michigan Economic Growth Authority (MEGA). The assignment was irrevocable and the partner, member, or shareholder could not reassign the Brownfield Credits. For this reason, Comerica Bank – Texas (█████1646) cannot claim the Brownfield Credits assigned to Comerica Bank – Detroit because the names and FEINs represent two distinct and separate entities for purposes of claiming or assigning the Credits. Comerica Bank-Detroit, FEIN (█████7375) ceased to exist on November 1, 2007 and the credits assigned to it were extinguished.

Per MCL 208.39c(7) of the SBTA, the Historic Preservation Credit could only be assigned by a partnership, limited liability company, or subchapter S corporation to its partners, members, or shareholders based on their proportionate share of ownership of the entity or on an alternative method. The assignment was irrevocable and the partner, member, or shareholder could not reassign the credit. Like the Brownfield Credit, the Historic Preservation Credit was assigned by KWA I, LLC to Comerica Bank – Detroit in the 2005 tax year. Once assigned, the credit could not be reassigned to Comerica Bank – Texas in 2007.

So, the entity remaining after the described merger, Comerica Bank – Texas (█████1646) could not claim the aforementioned credits as the single assignment permitted by the SBTA had already occurred between KWAI, LLC and Comerica Bank-Detroit (█████7375). The Department's denial of these credits upon processing the 12/31/2007 SBT return was correct, as was the denial of the credits to be carried forward on the 12/31/2008 MBT return.

In closing, the audit work papers and Notice of Preliminary Audit Determination (NOPAD) letter issued to you in April 2015 will not be adjusted further for the purpose of the SBT Credit Carryforwards. Please sign and return the NOPAD indicating your agreement or disagreement with the audit's results. Please note that upon the completion of the MBT audit covering the 1/1/2008 – 12/31/2011 period within the Department's internal review process, a Final Audit Determination Letter will be issued to notify you of the applicable Statute of Limitations and the process to appeal the audit's determination. If you need additional assistance or have questions, please feel free to contact me.

Sincerely,

Caroline A. June
Auditor Manager – Litigation
Tax Compliance Bureau
(517) 636-4189

7285 PARSONS SRIVE – DIMONDALE, MI 48221
www.michigan.gov/treasury ◆ (517) 636-4200

RECEIVED by MSC 8/30/2021 2:05:19 PM

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

COMERICA, INCORPORATED

Petitioner,

vs. MTT Docket No. 17-000150

MICHIGAN DEPARTMENT OF
TREASURY,

Respondent.
_______________________________________/

C O N T I N U E D D E P O S I T I O N

of CAROLINE JUNE, taken in the above-entitled cause, before Stefanie S. Pohl, Certified Shorthand Reporter, CSR 5616, and Notary Public for the County of Clinton, at 525 West Ottawa Street, in the City of Lansing, Michigan, on Tuesday, October 24, 2017, Noticed for 10:00 a.m.

APPEARANCES: THOMAS P. BRUETSCH, ESQUIRE
JERROLD M. BIGELMAN, ESQUIRE
Bodman PLC
1901 St. Antoine Street
6th Floor at Ford Field
Detroit, Michigan 48226
Appearing on Behalf of the Petitioner.

DAVID W. THOMPSON, ESQUIRE
Michigan Department of Attorney General
Michigan Department of Treasury
525 West Ottawa Street
P.O. Box 30754
Lansing, Michigan 48909

Appearing on Behalf of the Respondent.

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 when the two entities merged?

2 A I don't explicitly know that the credits weren't

3 intended to be transferred. However, I don't have any

4 documentation of reassignment, if there was one. I

5 believe in the letter that I sent to Comerica I

6 indicated that, according to the statute and my

7 understanding, the credits couldn't be reassigned to a

8 different member.

9 But at the end of the day I don't think I have any

10 evidence in writing, by an assignment certificate, from

11 the MEDC that the credits can be claimed by the new

12 Comerica Bank.

13 Q What about merger law, state merger law?

14 MR. THOMPSON: Form and foundation, relevance.

15 THE WITNESS: I don't know what you're asking.

16 Q (By Mr. Bruetsch) Okay. Well, you told me that you

17 didn't see any kind of document that evidenced an

18 assignment of the tax credits from Comerica Michigan to

19 Comerica Texas. And whether or not there could be an

20 assignment being a different question, since you didn't

21 see some kind of evidence that they were in fact,

22 quote-unquote, assigned, that would be a reason to

23 disallow those credits. Is that an accurate

24 understanding of your testimony?

25 MR. THOMPSON: Form.

RECEIVED by MSC 8/30/2021 2:05:19 PM

1 THE WITNESS: Absent documentation that the credits
2 have been assigned to any specific entity, I wouldn't
3 be able to grant them in my position.
4 Q (By Mr. Bruetsch) Okay. Are you aware that state
5 law -- both Michigan and Texas have statutes relating
6 to mergers?
7 MR. THOMPSON: Relevance.
8 THE WITNESS: I don't know that I've really
9 inquired about the specific state laws related to
10 mergers.
11 Q (By Mr. Bruetsch) Okay. If Michigan had a statute
12 that said, in effect, that upon a merger all assets,
13 rights, property of any sort automatically transfer as
14 a matter of law from the merging entity into the merged
15 entity, would that be something you'd want to take a
16 look at to determine if there had been a valid transfer
17 of the tax credits?
18 MR. THOMPSON: Form. Is this premised on some
19 unidentified Michigan statute and, therefore,
20 foundation?
21 THE WITNESS: I don't know.
22 Q (By Mr. Bruetsch) You don't know?
23 A I don't know. My review with respect to the
24 application of the certificated credits, based upon my
25 understanding that the certificate issued by the MEDC,

RECEIVED by MSC 8/30/2021 2:05:19 PM

Michigan Department of Treasury
168 (Rev. 5-10)

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 .*

Tax Division	Tax Division Telephone Number
BUSINESS TAX	517-636-6925
Assessment Number	Date Issued
UB35645	02/12/14
Social Security/Account Number	
████8421	
Collection Division Telephone Number	
517-636-5265	

COMERICA INC
411 W LAFAYETTE MC 3415
DETROIT MI 48226

BILL SUMMARY

Tax Due	$	690,296.00
Penalty	$	524,611.00
Interest	$	118,854.72
Total Due *	$	1,333,761.72

Detail of Tax Liability

Type of Tax	Taxable Period	Tax Due	Penalty	Interest
MICHIGAN BUSINESS TAX	12/10			
RTID100000410429R001		690,296.00		
INTEREST ONLY			0.00	81,823.72
UNDERPYT OF ESTIMATE			524,611.00	37,031.00

Reason for Tax Bill

RETURN RECEIVED WITH INSUFFICIENT PAYMENT.
DEFICIENCY DUE PER PREVIOUS COMMUNICATION.
PENALTY AND/OR INTEREST DUE FOR UNDERPAYMENT AND/OR LATE PAYMENT OF ESTIMATED RETURNS AS PROVIDED BY LAW.

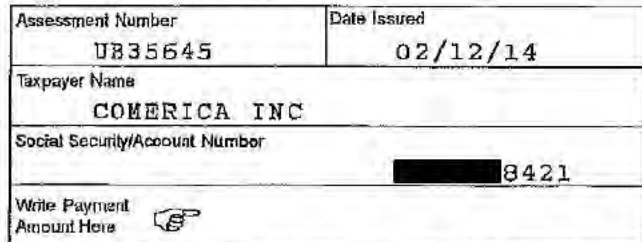
168 (Rev. 4-10) *Detach and mail the payment voucher with your payment. Do not staple.*

Bill for Taxes Due

Payment due within 30 days (see penalty and interest provisions on page 2). Make your check payable to "State of Michigan-CD." Write your Social Security/Account No. and Assessment No. on all checks and correspondence. Allow up to 14 days for mailing and processing. A return envelope is enclosed for your convenience. Mail payment and this voucher to:

489097699002

COLLECTION DIVISION
MICHIGAN DEPARTMENT OF TREASURY
PO BOX 30199
LANSING MI 48909-7699



Assessment Number	Date Issued
UB35645	02/12/14
Taxpayer Name	
COMERICA INC	
Social Security/Account Number	
████8421	
Write Payment Amount Here	

Notify the Collection Division in writing if your address above is incorrect.

▼ ***DO NOT WRITE IN THIS SPACE*** ▼

RECEIVED by MSC 8/30/2021 2:05:19 PM

168, Page 2

GENERAL INFORMATION

If you don't understand why you received this bill, call the Tax Division whose telephone number is printed on the front of this form. If you have questions about payment, call the Office of Collections telephone number printed in the upper right corner on the front of this form. Any correspondence about original or amended returns or questions about payment should be mailed to Michigan Department of Treasury, Office of Collections, P.O. Box 30199, Lansing, MI 48909-7699.

INFORMAL CONFERENCE REQUEST INFORMATION

You may contest all or part of this Bill for Taxes Due by requesting an informal conference. The uncontested portion must be paid immediately. If you want a conference, your written request must be made to the Michigan Department of Treasury, Office of Hearings, Lansing, MI 48922, within 60 days of the date of this bill. When filing your request for a conference, provide a copy of the Bill for Taxes Due or the following information: full name, account number, assessment number and the specific tax involved. Include in your letter a statement of the reason you are requesting a conference.

*PENALTY AND INTEREST CHARGES

(Effective March 1, 2003 under P.A. 122 of 1941, as amended.)

*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, call Treasury for a current balance. Interest is computed at 1 percent above the prime rate adjusted July 1 and January 1 each year.

REASON FOR BILL	PENALTY CHARGE
Failure to file or pay tax for Notices of Intent to Assess/Assessments issued on or before 2/28/03.	Each month or part of month 5% of tax, to a maximum of 50%. Minimum $10. Interest applies.*
Failure to file and pay tax for Notices of Intent to Assess/Assessments issued after 2/28/03.	A penalty of 5% of the tax if the failure is for not more than 2 months, with an additional 5% penalty for each additional month to a maximum of 25%. Interest applies.*
Negligence in filing tax.	10% of tax. Minimum $10. Interest applies.*
Intentional disregard in filing taxes.	25% of tax. Minimum $10. Interest applies.*
Fraudulent evasion of tax.	100% of tax. Minimum $10. Interest applies.*
Bad check for Notices of Intent to Assess/Assessments issued on or before 2/28/03.	25% of tax paid by check.
Bad check for Notices of Intent to Assess/Assessments issued after 2/28/03.	$50 penalty.
Frivolous protest of tax due.	25% of tax.
Failure to file information return or report.	$10 each day to maximum $400 each return.
Control or possession of untaxed tobacco products for periods on or before 12/27/04.	100% of tax.
Control or possession of untaxed tobacco products for periods after 12/27/04.	500% of tax.

RECEIVED by MSC 8/30/2021 2:05:19 PM

EXHIBIT "C"

This Exhibit "C" contains the Amended Petition of Petitioner, which is an exhibit to today's (7/31/17) filing of a Motion by Petitioner.

The Exhibits to the original Petition of Petitioner have not changed.

Thus, the exhibits "A" through "G" of Petitioner's orignal Petition, filed with the MTT on July 9, 2017, are not again being included with today's Motion filing – unless othewise indicated.

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATION HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

COMERICA, INCORPORATED,

Petitioner, MTT Docket No. MT 17-000150

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.

______________________________/

PETITIONER'S AMENDED PETITION

(Entire Tribunal / Non-Property Tax Petition)

Petitioner, COMERICA, INCORPORATED, ("Taxpayer"),[1] petitions the Michigan Tax Tribunal for a re-determination of the enclosed Informal Conference Recommendations and Decisions and Orders of the Michigan Department of Treasury ("MDOT" or the "Department"),

---

[1] Taxpayer is a Delaware corporation. Prior to October 31, 2007, Taxpayer and its primary operating subsidiary, Comerica Bank, a Michigan banking corporation, had their principal places of business in Detroit, Michigan. For strategic reasons, in 2007, Taxpayer decided to move its principal place of business to Dallas, Texas, and to convert Comerica Bank to a Texas banking association. As set out below, it accomplished this by incorporating a no-asset shell corporation, Comerica Bank, a Texas banking association ("New Bank"), and merging Comerica Bank, a Michigan banking corporation ("Old Bank"), into it.

Taxpayer will use the phrase "Comerica Bank" when discussing the merged entity, and will use "Old Bank" and "New Bank" when necessary to distinguish among the entities that existed before and after October 31, 2007.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Hearings Division, as to (i) the calculation of net capital for purposes of the financial institutions franchise tax for the audit period of January, 2008 through December, 2011 (the "Audit Period"); and (ii) the denial of carryover Brownfield Credits and Historic Preservation Credits first earned under the Michigan Single Business Tax ("SBT"), and continued under the Michigan Business Tax ("MBT"), but denied by the Michigan Department of Treasury (the "Department"), as continuing credits after the effective date of the Michigan Corporate Income Tax ("CIT").

INTRODUCTION

1. The docket numbers, assessment numbers, and years during the audit period are as follows:

Docket No.	Assessment No.	Audit Periods Ending/Tax Year
20122043	TP34119	December, 2008
20122043	TP73498	December, 2009
20140478	UB35645	December, 2010
20140723	UB54592	December, 2011

[The foregoing table is subject to Footnote 1 at the end of each of the three (3) Referee Informal Conference Recommendations; page 14 of each.]

2. The type of State of Michigan taxes that are at issue are (i) the financial institutions tax on net capital; and (ii) the carryover of unused Brownfield Credits and Historic Preservation Credits after the effective date of the CIT, which credits were first issued and approved under the SBT, and continued under the MBT.

3. This appeal involves issues relating to the following:

   A. The proper calculation of net capital, for purposes of the Michigan financial institutions franchise tax, with regard to combining entities that have undergone a state law corporate merger, which qualifies under Sections 368(a)(1)(A) and (F) of the U.S. Internal Revenue Code ("IRS Code").

RECEIVED by MSC 8/30/2021 2:05:19 PM

B. The disallowance of credit carryovers originating under the SBT, as claimed under the MBT, but not allowed by the Department as continuing under the MBT after the effective date of the CIT, under the theory that such credits were improperly "assigned" when the Old Bank was merged into the New Bank, without the recognition that the combining entities of the Old Bank and the New Bank are, in fact one continuous legal entity under generally accepted merger law, and that tax credits were not assigned from the Old Bank to the New Bank but, rather, passed by operation of law.

C. Recognition of the ordering of credits in accordance with Michigan Court of Appeals decision in *Ashley Capital, LLC v MDOT,* 314 Mich. App. 1; 884 NW2d 848 (2016).

4. The actions that prompted this appeal are the following: Informal Conference Recommendations of the Referee dated December 14, 2016 (the "Referee"), under the docket and assessment numbers referred to in Paragraph 1 hereof, which followed from an Informal Conference held on May 17, 2016.

5. Petitioner's current principal office address is 1717 Main Street, Dallas, Texas 75201.

6. The Department and the Referee have erred in their interpretation as to both:

(i) the determination of net capital of Comerica Bank, in a manner which effectively "double counts" capital, contrary to recent Department guidance and applicable merger law, including the Internal Revenue Code, Texas Business Code, the Michigan Banking Code, and Michigan Compiled Laws ("MCL") Section 208.1265(4)(a).

(ii) the determination by the Department and Referee that the carryover credits were "assigned" to New Bank and their treatment of Old Bank and New Bank as two separately existing entities, when in fact the type of State-law merger, and its Federal tax characteristics result in a merged / combined entity, without any substantive change, whether as to its business, employees, properties, or tax items, and the transfer of the credits by operation of law.

7. Summary of Amounts in Controversy - - Net Capital Issue:

a. Petitioner's actual net capital for the Audit Period is approximately $5.0 billion.

RECEIVED by MSC 8/30/2021 2:05:19 PM

b. If the Department's calculation of net capital were to stand; to wit., the double counting described in Paragraphs 33 and 34, below, the total approximate net capital of Petitioner would be $8.0 billion in 2008; $7 billion in 2009; and $6.0 billion in 2010.

c. This erroneous calculation would overstate Petitioner's net capital by approximately $3.0 billion in 2008; $2.0 billion in 2009; and $1 billion in 2010.

d. For the Audit Period, the Department's approximate total overstatement of Michigan financial institution tax is $5.7 million; to wit; $4.5 million of regular tax and $1.2 million of surcharge. This is further set forth on the attached calculation, Exhibit "A".

8. Summary of Amounts in Controversy - - Credit Carryover Issue:

a. The unused Brownfield Credits of Petitioner, which would be denied by the Department for use by Petitioner, are approximately $3.3 million.

b. The unused Historic Preservation Credits of Petitioner, which would be denied by the Department for use by Petitioner, are approximately $800,000.

BACKGROUND – TAXPAYER'S RELOCATION TO TEXAS AND THE MERGER OF ITS PRIMARY OPERATING SUBSIDIARY

9. Taxpayer is a publically traded financial service company headquartered in Dallas, Texas, and has been in business, when considering its predecessors, since 1849. Taxpayer decided, for strategic business purposes, to move its headquarters from Detroit, Michigan to Dallas, Texas, in 2007, and to charter its primary operating subsidiary as a Texas banking association. To effectuate the change in form, it created New Bank and engaged in a State law merger under an "Agreement and Plan of Merger" (Exhibit "B").

10. The Agreement and Plan of Merger states that, Old Bank "will be merged with and into the [New] Bank, the separate existence of the [Old] Bank will cease, and the [New] Bank will be the surviving entity governed by the State of Texas … and such Merger will in all respects have the effect provided for in Section 32.301 of the Texas Finance Code and Section 10.008 of the Texas Business Organizations Code."

RECEIVED by MSC 8/30/2021 2:05:19 PM

11. Article II, Section (a) of the Agreement and Plan of Merger states that New Bank, "shall succeed to , without further transfer, and shall possess all of the rights, privileges, powers and franchises ... of the Constituent Entities, ... and all property, real, personal and mixed, and all debts due to each of the Constituent Entities...".

12. The corporate merger laws of both Michigan and Texas recognize that the properties, rights and privileges of the merged corporation (Old Bank) become those of the surviving corporation (New Bank), by operation of law.

13. Under section 10.008(a)(2) of the Texas Business Code, when a merger takes effect, "all rights, title, and interests to all real estate and other property owned by each organization that is a party to the merger is allocated to and vested ... in one or more of the surviving or new organizations as provided in the plan of merger **without**: (A) reversion or impairment; (B) any further act or deed; or (C) **any transfer or assignment having occurred**." (Emphasis added)

14. Likewise, the Michigan Banking Code expressly permits a bank to consolidate with any number of "consolidating organizations" to form a consolidated bank. (MCL 487.13701(1)). This includes an out-of-state bank within the meaning of the term "consolidating organizations". (MCL 13701(6)). Interstate consolidations are permitted. (MCL 487.13702)). The statute expressly provides that "the corporate existence of each consolidating organization is merged into and continued in the consolidated bank", which then "possesses all the rights, interests, privileges, powers, and franchises and is subject to all the restrictions, disabilities, liabilities, and duties of each of the consolidating organizations". (MCL 487.13703(1)).

15. Further, the reorganization was undertaken pursuant to a State-law merger under Section 368(a)(1)(A) of the IRS Code, which also qualified as a mere change in identity, form, or

RECEIVED by MSC 8/30/2021 2:05:19 PM

place of organization, however effected, per IRS Code Section 368(a)(1)(F). In such transactions, assets and liabilities, and tax attributes, are deemed to be transferred by the merged corporation into the surviving corporation, by operation of law, without any further action on the part of merging parties.

16. Pursuant to the Agreement and Plan of Merger, and as a matter of pure fact and law, there was no change in the business of Comerica Bank as a result of the merger; no change in its employees, no change in its shareholders, and no change in its assets, liabilities, or other rights, after the effective date of the Agreement and Plan of Merger, except that the bank was chartered in Texas.

MERE CHANGES IN IDENTITY, FORM, OR PLACE OF ORGANIZATION

17. A central error by both the Department and the Referee on all issues involved in this matter was their treatment of Comerica Bank as two independent entities, rather than a single, merged corporation. As set out above, under both Texas and Michigan law, the surviving entity in a merger inherits all of the rights, titles, and interests of the merged corporation by operation of law.

18. This treatment by the Department and the Referee did not comport with MCL 208.1265(4), which states that "a change in identity, form, or place of organization of I financial institution shall be treated as if a single financial institution had been in existence for the entire tax year in which the change occurred and each tax year after the change."

19. MCL 208.1265(4) mirrors Section 368(a)(I)(F) of the IRS Code, the latter of which discusses what is commonly called an "F" reorganization. These are transactions that are conducted to effect "a mere change in identity, form, or place of organization of one corporation, however effected." An "F" reorganization generally involves, in form, two corporations, one of

RECEIVED by MSC 8/30/2021 2:05:19 PM

which transfers or is deemed to transfer assets to the other. However, for tax purposes, the IRS Code treats the reorganized company as if it were the same entity as the corporation in existence before the reorganization.

20. "F" reorganizations are well recognized in tax law. These concepts have been in the IRS Code since 1925 (under current and predecessor IRS Code sections).

21. An "F" reorganization can include multiple steps, such as a state law statutory merger. Federal Income Tax Regulations, Section 1.368-2(m), illustrate how a series of transactions can encompass an "F" reorganization, including a state statutory merger into a new shell corporation in the State where the survivor of the merger will reside.

22. An "F" reorganization may include an actual or deemed transfer of property from one corporation to another. Section 1.368-2(m)(1) of the Federal Income Tax Regulations. In this case a deemed transfer occurred, with no requirement to physically transfer assets, liabilities, and other rights.

23. Example (5) in Section 1.368-2(m)(4) of the Federal Income Tax Regulations follows steps similar to those undertaken by Comerica Bank. It reads, in pertinent part, as follows:

> Example (5). *Series of related transaction - - mere change.* P owns all of the stock of S1, a State A corporation. The management of P determines that it would be in the best interest of S1 to change its place of incorporation to State B. Accordingly, under an integrated plan, P form S2, a new State B corporation; P contributes the S1 stock to S2; and S1 merges into S2 under the laws of State A and State B. Under paragraph (m)(3)(i) of this section, a series of transactions that together result in a mere change of one corporation may qualify as a reorganization under section 368(a)(1)(F). The contribution of S1 stock to S2 and the merger of S1 into S2 together constitute a mere change of S1. Therefore, the potential F reorganization qualifies as a reorganization under section 368(a)(1)(F). Without regard to its qualification under section 368(a)(1)(F), the potential F

RECEIVED by MSC 8/30/2021 2:05:19 PM

> reorganization would also qualify as a reorganization under both section 368(a)(1)A) and section 368(a)(1)(D). Under paragraph (m)(3)(iv)(B) of this section, if a potential F reorganization qualifies as a reorganization under section 368(a)(1)(F) and would also qualify under one or more of section 368(a)(1)(A) or 368(a)(1)(D), it qualifies only as a reorganization under 368(a)(1)(F), and neither of section 368(a)(1)(A) nor section 368(a)(1)(D) will apply.

24. In *Davant v. Commissioner,* 366 F. 2d 874 (CA 5th 1966), the court explained:

> "The term "mere change in identity or form obviously refers to a situation which represents a mere change in form as opposed to a change in substance. Whatever the outer limits of Section 368(a)(1)(F), it can clearly be applied where the corporate enterprise continues uninterrupted, except for a distribution of some liquid assets or cash. Under such circumstances, there is a change of corporate vehicles **but not a change in substance**." (emphasis added).

25. The legislative history for "F" reorganizations makes clear that the use of more than one corporation to effectuate an F reorganization of a single operating entity does not prevent a transaction from satisfying the one corporation requirement. See House Report No. 760-248, 97th Congress, 2d Session 541 (1982).

26. An "F" reorganization does not terminate the transferor corporation's tax year. There is no basis to split the fiscal year into 2 separate years.

27. Section 381 of the IRS Code, entitled *Carryovers in certain corporate reorganizations,* provides, in paragraph 381(b)(1), in part, as follows:

> "Except in the case of an acquisition in connection with a reorganization described in in subparagraph (F) of section 368(a)(1) - - (1) the taxable year of the distributor or transferor corporation shall end on the date of the distribution or transfer…".

28. The acquiring corporation in a type "F reorganization is treated just as the transferor corporation would have been treated if there had been no reorganization. Section 1.381(b)-1(a)(2) of the Federal Income Tax Regulations provides as follows:

RECEIVED by MSC 8/30/2021 2:05:19 PM

> "*(2) Reorganizations under section 368(a)(1)(F).* In the case of a reorganization qualifying under section 368(a)(1)(F) (whether or not such reorganization also qualifies under any other provision of section 368(a)(1)), the acquiring corporation shall be treated (for purposes of section 381) just as the transferor corporation would have been treated if there had been no reorganization. Thus, the taxable year of the transferor corporation shall not end on the date of transfer merely because of the transfer; a net operating loss of the acquiring corporation for any taxable year ending after the date of transfer shall be carried back in accordance with Section 172(b) in computing the taxable income of the transferor corporation for a taxable year ending before the date of transfer; and the tax attributes of the transferor corporation enumerated in section 381(c) shall be taken into account by the acquiring corporation **as if there had been no reorganization**" (emphasis added)

29. The Department and the Referee should have treated the merger of Old Bank into New Bank as if there had been no reorganization, which would have caused it to properly average Comerica Bank's net capital, and would have caused it to properly accept Comerica Bank's Brownfield Credits and Historic Preservation Credits.

FIRST ISSUE – DETERMINATION OF NET CAPITAL

30. Under the MBT, a financial institution's "tax base" was its "net capital." MCL 208.1265(1). Net capital was determined by averaging a financial institution's net capital for the five preceding years. MCL 208.1265(2). Where a financial institution had been in existence less than five years, its net capital was determined by taking the average of net capital for the years the entity had been in existence.

31. When calculating net capital for Comerica Bank, the Department and the Referee treated the merged entity as if it were two unrelated entities for net capital purposes, independently calculating average net capital for Old Bank and New Bank for tax years 2008-2011 and taxing both. This had the effect of double counting net capital.

32. That net capital was double taxed is evident by simply reviewing Comerica Bank's net capital before and after the merger. As of the end of 2006, Comerica Bank's net

RECEIVED by MSC 8/30/2021 2:05:19 PM

capital was $5.194 billion dollars. All of this capital was held by Old Bank. New Bank did not yet exist. As of the end of 2007, Comerica Bank's net capital was $5.381 billion. All of this capital was held by New Bank. Old Bank was merged into New Bank. Yet, the Department and the Referee determined that, to determine net capital, the average net capital of both Old Bank (determined on a five-year average) and New Bank (determined by averaging only the years New Bank was in existence) were to be added together to determine tax base. Thus, for 2008, the Department concluded that Comerica Bank's net capital was $8.338 billion, literally creating $3.118 billion in capital out of thin air.

33. The Department reached this result as follows. For the year 2008, New Bank had been in existence for two years, 2007 and 2008. The Department averaged net capital for those two years, which yielded a result of $5.197 billion dollars. But the Department also independently considered Old Bank. It determined that the five-year average net capital of Old Bank (which merged into New Bank and ceased existing in 2007) was $3.141 billion (averaging $5.262 billion in 2004, $5.249 billion in 2005, $5.194 billion in 2006, and $0 in 2007 and 2008). It then added the average net capital for Old and New Banks together to reach a total net capital of $8.338 billion, even though the combined capital of Old and New Bank for 2008 was only $5.012 billion.

34. Below is a chart for each tax year that shows the capital "created" by the Department.

RECEIVED by MSC 8/30/2021 2:05:19 PM

	Total Capital (per audit)	As Filed (adjusted to use capital per audit)		Per MDOT 5 year average	2, 3, 4, 5 yr. average		Capital
		5-year average	Years incl.	"Old Bank"	"New Bank"	Audit Total	"Created"
2004	5,261,816,056						
2005	5,248,615,346						
2006	5,194,400,994						
2007	5,381,750,034						
2008	5,012,039,101	5,219,724,306	2004-2008	3,140,966,479	5,196,894,568	8,337,861,047	3,118,136,741
2009	3,800,641,868	4,927,489,469	2005-2009	2,088,603,268	4,731,477,001	6,820,080,269	1,892,590,800
2010	5,317,436,509	4,941,253,701	2006-2010	1,038,880,199	4,877,966,878	5,916,847,077	975,593,376
2011	6,035,432,756	5,109,460,054	2007-2011	0	5,109,460,054	5,109,460,054	-

35. This manner of net capital calculation ignores the Department's own guidance. Recently, the Department issued the attached notice (Exhibit "C"), dated November 21, 2016, entitled *Notice to Taxpayers Regarding Five-Year Averaging Calculation of Net Capital Capital for Financial Institutions Combining with Other Financial Institutions* (the "11/21 Notice").

36. The 11/21 Notice recognizes that the Department has, in the past, doubled up on the calculation of net capital for combining companies, and provides, as a correct solution, the following:

> "**The Department will no longer calculate net capital for years prior to the combination year using both the surviving and acquired entities' net capital.** When two or more financial institutions combine, only the surviving financial institution's net capital for the year prior to the combination is used to calculate the surviving entity's tax base. Thus, for the years prior to the combination, the surviving financial institution will use only its own books and records to compute the five-year look-back averaging calculation. **In the year of the acquisition and for all years following the combination, the surviving financial institution will merge its books and records with those of the acquired financial institution and the combined books and records will be used to compute the net capital tax base.**
>
> The Department will give this change in policy full retroactive effect, and will apply it to all open tax years. Whether a period is open under the statute of limitations may dependent on whether

Detroit_14603551_1

RECEIVED by MSC 8/30/2021 2:05:19 PM

> and when an audit of a taxpayer's books and records commenced. If a taxpayer previously filed a return under MBT FAQ F5 and the tax period remains open, the taxpayer may amend accordingly." (Emphasis added).

37. Application of the 11/21 Notice in this case would result in (i) years prior to 2007's determination of net capital being those of Old Bank; (ii) for 2007, the year of the merger, being one (1) calculation of one (1) continuing legal corporate entity - - and not two (2) entities; and (iii) the calculation of net capital after 2007 of one (1) continuing entity, New Bank.

38. The Notice should be dispositive, and the Department should apply it in this case.

39. But even notwithstanding the Notice, the Department incorrectly applied Michigan law. MCL Section 208.1265(2), when correctly applied, does not cause the double counting and fictional creation of net capital. MCL Section 208.1265(4)(b) provides as follows:

> "(4) For purposes of this section, each of the following applies:
>
> "(a) A change in identity, form, or place or organization of 1 financial institution **shall be treated as if a single financial institution has been in existence for the entire tax year in which the change occurred and each tax year after the change.**
>
> "(b) The combination of 2 or more financial institutions into 1 shall be treated as if the constituent financial institutions had been a single financial institution in existence for the entire tax year in which the combination occurred and each tax year after the combination, and the book values and deductions for United States obligations and Michigan obligations of the constituent institutions shall be combined. A combination shall include any acquisition required to be accounted for by the surviving financial institution in accordance with generally accepted accounting principles or a statutory merger or consolidation." (Emphasis added)

40. The Department should have applied this section and treated Comerica Bank as a combined entity for 2007 and later years. The Department and the Referee, in not understanding the nature of a merger, as the mere continuance of one (1) entity, attempt to create net capital in two (2) entities, where it does not exist. They ignore the above words "statutory merger", in

RECEIVED by MSC 8/30/2021 2:05:19 PM

MCL Section 208.1265(4)(b), which refer to a statutory merger under Section 368(a)(1)(A) of the U.S. Internal Revenue Code [an "A" merger].

41. This error "created capital", which resulted in additional tax of approximately $2 million, $1.7 million, and $0.7 million in 2008, 2009, and 2010, respectively.

42. The Tribunal should vacate the calculations of the Department and the decision of the Referee, which result in a double counting of net capital for purposes of the Michigan franchise tax on financial entities, and direct the Department to re-calculate Comerica Bank's tax liability based on the Notice and in accordance with MCL 208.1265(4)(b).

SECOND ISSUE – DISALLOWANCE OF TAX CREDITS

43. In addition, the Department denied the availability of unused SBT New Brownfield and Historic Preservation Credits. The Department treated Comerica Bank, as merged in 2007 as two (2) separate entities, and decided that a merger of these entities acted as an "assignment" which voided the credits. The Referee followed this treatment.

44. This treatment was erroneous because there was no "assignment" here. Michigan cases hold that a merger does not result in an assignment, and extensive tax law on mergers and "F" reorganizations is in accord.

45. The tax credits at issue were originally obtained by KWA I, LLC (Exhibit "D"). KWA I, LLC was a "qualified taxpayer" eligible to receive the credits.

46. MCL 208.38g(18) provides that a qualified taxpayer "may assign all or a portion of a credit … to its partners, members or shareholders ... or based on an alternative method approved by the Michigan economic growth authority."

47. Comerica Bank was a partner in KWA I, LLC. In this case, investments were made in a Detroit mixed use development, which resulted in employment opportunities for low-

RECEIVED by MSC 8/30/2021 2:05:19 PM

to-moderate income people due to commercial activities on the ground floor. Such activities are encouraged by the Federal Reserve, pursuant to the Community Reinvestment Act, *42 United States Code, Section 5301, et seq.*, in order to provide benefits to local communities. Some of the activities result in state tax credits for the involved bank to further encourage such investments.

48. KWA I, LLC, assigned the credits to Comerica Bank in 2005.

49. As set out above, Old Bank was merged into New Bank in October, 2007.

50. Under Michigan and Texas law, a merger does not result in an assignment. Rather, all rights and interests of the merging entity become rights and interests of the merged entity by operation of law. MCL 487.13703(1); Texas Banking Code 10.008(a)(2).

51. The Michigan Supreme Court, in the case of *KIM v. JP Morgan Chase Bank, N.A.,* 493 Mich. 98; 825 N.W. 2d 329 (2012), discussed the concepts of assignment and conveyance "by operation of law." In that case, the Court expressly distinguished an "assignment" from an acquisition by merger, because during a merger an asset transfer "occur[s] without any voluntary or affirmative action." 493 Mich. 98, at 110-111; citing *Miller v. Clark*, 56 Mich. 337 (1855).

52. Following *KIM,* the Michigan Court of Appeals held in *The Angela Sinacola Living Trust v. PNC Bank, N.A.,* No. 317481 (Unpublished, Nov. 13, 2014) "a merger results in the automatic transfer of assets." In such cases, the rights and interests of a party transfer by operation of law and no assignment occurs.

53. For purposes of the continuance of Brownfield and Historic Preservation credits, the corporate reorganization in this case results in no substantive change in the Comerica

RECEIVED by MSC 8/30/2021 2:05:19 PM

business entity, as a matter of both federal tax law, and Michigan tax law as to the franchise tax and the carryover of credits.

A. Old Bank participated in community investment partnerships that allowed it to obtain the Michigan Historical Preservation Credits and Michigan Brownfield Credits, and claimed the same in 2005.

B. The credits were claimed under the SBT and then the MBT. Taxpayer has elected to continue the use of the credits after the adoption of the CIT by continuing to file returns under the MBT, until the credits are exhausted, as it is authorized to do.

C. Based on a thin argument centering on Federal employer identification numbers, the Department and the Referee seek to deny earned credits.

D. They take this position despite the fact that for State of Michigan tax purposes, and IRS Code purposes, there is solely one continuing entity.

E. The 2007 merger / "F" reorganization had no substantive effect on the business of Comerica Bank, or its assets, shareholders, tax items, accounting, or physical locations

F. A great deal of merger law is unabashedly ignored by the Department and Referee in their treatment of Comerica Bank, by denying continued use of the credits.

G. As further indicated below, there is no substantive change in a merging entity due to the type of reorganization undertaken by Comerica Bank.

54. It was, therefore, inappropriate for the Department and the Referee to:

A. Adhere to the non-processing of the Taxpayer's 2007 MBT return due to merger of Old Bank (38-0477375) into New Bank (42-1741646).

B. Disallow credits on the 2007 return due to a change of EIN (as to New Bank). [It should be noted that the Department's auditor recommended that the 2007 year was closed; however, the Referee disagreed.]

C. Deny 2008 carryforwards of SBT credits to MBT returns; causing a difference of $4,098,317 from Taxpayer's originally filed return.

RECEIVED by MSC 8/30/2021 2:05:19 PM

D. Misinterpret normal business entity changes, such as the succession of entity changes in this case, New Bank and Old Bank being substantively the same entity.

E. State that, per the SBT, MCL Section 208.38(g), the Brownfield Credits and Historic Preservation Credits cannot benefit New Bank due to new EIN; and saying, based upon its lack of understanding of mergers and "F" reorganizations, that the Old Bank's tax credits ceased to exist on November 1, 2007.

55. It is critical that the Michigan Tax Tribunal reject the notion expressed in the Referee's Recommendations that Federal tax law does not apply, need not be considered, and can be ignored, when viewing a common, every-day, type of merger and "F" reorganization, as was the case here, where the surviving corporation is substantively the same as the merged corporation, a position that is well-recognized in MCL 208.1265(4), and elsewhere in Michigan law.

THIRD ISSUE – ORDERING

56. Should Petitioner prevail on the availability of SBT credit carryforwards, the ordering of the use of such credits should be changed. Taxpayer lost $1.5 million in MBT Compensation Credits. These compensation credits could not be carried forward. However, this was not an issue since the other credit carryforwards were not allowed.

FOURTH ISSUE – EQUAL PROTECTION

57. Article I, section 2 of the Michigan Constitution provides that "No person shall be denied the equal protection of the laws."

58. The Equal Protection Clause requires that legislation be rationally related to a legitimate government purpose.

RECEIVED by MSC 8/30/2021 2:05:19 PM

59. MCL 208.1265, as (wrongly) interpreted by the Department, arbitrarily discriminates against financial institutions (or their subsidiaries) undergoing a merger, particularly a merger designed to achieve a change in identity, form, or place of organization, by artificially imposing a tax base not upon the entities' true net capital, but rather on illusory capital manufactured by the Department's interpretation of the statute.

60. As a result, Petitioner's net capital has been overstated by more than one billion dollars in each tax year, and Petitioner has been assessed approximately $5.7 million more in taxes than it would have if Old Bank had not been merged into New Bank.

61. In addition, as noted above, on November 26, 2016, the Department issued the Notice.

62. The Notice states that "[w]hen two or more financial institutions combine, only the surviving financial institution's net capital for the years prior to the combination is used to calculate the surviving entity's tax base."

63. The Notice states that "The Department will give this change in policy full retroactive effect, and will apply it to all open tax years."

64. On information and belief, the Department is applying the rules set out in the notice to certain taxpayers.

65. However, the Department has refused to apply the rules set out in the Notice to Petitioner, further discriminating against Petitioner in an arbitrary and capricious fashion.
This differentiation is not rationally related to any legitimate government purpose, but rather it is arbitrary, capricious and unreasonable.

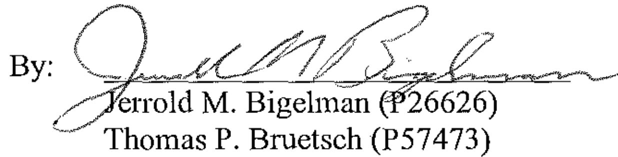
CONCLUSION AND RELIEF

RECEIVED by MSC 8/30/2021 2:05:19 PM

66. Petitioner therefore requests: That the Tribunal (a) vacate the proposed assessments listed at the beginning of this Petition, in paragraph 1, or any substituted assessments in lieu thereof, and allow the full use of any remaining credits of the Petitioner, without limitation, through the filing of MBT returns until such credits are fully utilized, (b) vacate the calculations of the Department which result in a double counting of net capital for purposes of the Michigan franchise tax on financial entities, and recognize the well-established, and continuing net capital of Comerica-Detroit, and then Comerica-Texas, in the historic amount of $5 billion; and (c) direct that any continuing credits be ordered in the manner determined by the Michigan Court of Appeals, in *Ashley Capital, LLC v. MDOT,* supra.

Respectfully Submitted,

BODMAN PLC

By: 

Jerrold M. Bigelman (P26626)
Thomas P. Bruetsch (P57473)
Attorneys for Petitioner
1901 St. Antoine Street
6th Floor at Ford Field
Detroit, Michigan 48226
(313) 259-7777
jbigelman@bodmanlaw.com
tbruetsch@bodmanlaw.com

Dated: July 31, 2017

RECEIVED by MSC 8/30/2021 2:05:19 PM

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

COMERICA, INCORPORATED,

Petitioner,

v

MTT Docket No. 17-000150

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.
_________________________________/

Jerrold M. Bigelman (P26626)
Thomas P. Bruetsch (P57473)
BODMAN PLC
Attorney for the Petitioner
Comerica, Incorporated
6th Floor at Ford Field
1901 St. Antoine Street
Detroit, MI 48226
(313) 259-7777
jbigelman@bodmanlaw.com
tbruetsch@bodmanlaw.com

Scott L. Damich (P74126)
David W. Thompson (P75356)
Michigan Dep't of Attorney General
Assistant Attorneys General
Revenue & Collections Division
Attorneys for the Respondent
Michigan Department of Treasury
P.O. Box 30754
Lansing, MI 48909
(517) 373-3203
DamichS@michigan.gov
ThompsonD18@michigan.gov
_________________________________/

RESPONDENT MICHIGAN DEPARTMENT OF TREASURY'S ANSWER TO PETITIONER'S FIRST AMENDED PETITION

Respondent, MICHIGAN DEPARTMENT OF TREASURY, by and through its attorneys, Bill Schuette, Attorney General, and Scott L. Damich and David W. Thompson, Assistant Attorneys General, states as follows in response to the Petition:

1. Treasury asserts that its assessments and related dockets speak for themselves.

RECEIVED by MSC 8/30/2021 2:05:19 PM

2. Neither admitted nor denied for the reason that Treasury lacks knowledge or information sufficient to form a belief as to the truth of the factual allegations and leaves Petitioner to its proofs.

3. Neither admitted nor denied for the reason that Petitioner sets forth a statement of its claims of appeal in the form of compound allegations and legal conclusions that are not in proper pleading form and to which a response is not required. By way of further response, Treasury denies that Petitioner is entitled to the relief it seeks.

4. Neither admitted nor denied for the reason that Treasury lacks knowledge or information sufficient to form a belief as to the truth of the factual allegations and leaves Petitioner to its proofs. By way of further response, Treasury asserts that the Informal Conference Recommendation speaks for itself.

5. Neither admitted nor denied for the reason that Treasury lacks knowledge or information sufficient to form a belief as to the truth of the factual allegations and leaves Petitioner to its proofs.

6. Neither admitted nor denied for the reason that Petitioner sets forth compound allegations and legal conclusions that are not in proper pleading form and to which a response is not required. To the extent a response is required, Treasury denies as untrue that its determination was erroneous.

7. Neither admitted nor denied for the reason that Petitioner sets forth compound allegations and legal conclusions that are not in proper pleading form and to which a response is not required. By way of further response, Treasury denies that Petitioner is entitled to the relief it seeks.

RECEIVED by MSC 8/30/2021 2:05:19 PM

8. Neither admitted nor denied for the reason Petitioner sets forth legal conclusions and a statement of its claim of relief, to which no response is necessary.

9. Neither admitted nor denied for the reason that Treasury lacks knowledge or information sufficient to form a belief as to the truth of the factual allegations and leaves Petitioner to its proofs.

10. Neither admitted nor denied for the reason that Treasury lacks knowledge or information sufficient to form a belief as to the truth of the factual allegations and leaves Petitioner to its proofs.

11. Neither admitted nor denied for the reason that Treasury lacks knowledge or information sufficient to form a belief as to the truth of the factual allegations and leaves Petitioner to its proofs.

12. Neither admitted nor denied for the reason that Petitioner asserts a legal conclusion to which no response is required, and any applicable Michigan law speaks for itself. By way of further response, Treasury denies that Texas law has any application in this matter.

13. Neither admitted nor denied for the reason that Petitioner asserts legal conclusions to which no response is required. By way of further response, Treasury asserts that the Texas Business Code, § 10.008 speaks for itself. However, Treasury denies that § 10.008 has any application in this matter.

14. Neither admitted nor denied for the reason that Petitioner asserts compound legal conclusions that are not in proper pleading form and to which no response is required. By way of further response, Treasury asserts that MCL 487.13701 and MCL 487.13703 speaks for themselves.

RECEIVED by MSC 8/30/2021 2:05:19 PM

15. Neither admitted nor denied for the reason that Petitioner asserts compound legal conclusions that are not in proper pleading form and to which no response is required. By way of further response, Treasury asserts that IRC § 368 speaks for itself.

16. Neither admitted nor denied for the reason that Petitioner asserts compound legal conclusions that are not in proper pleading form and to which no response is required. By way of further response, Treasury lacks knowledge or information sufficient to form a belief as to the truth of the factual allegations and leaves Petitioner to its proofs.

17. Neither admitted nor denied for the reason that Petitioner asserts compound legal conclusions that are not in proper pleading form and to which no response is required.

18. Neither admitted nor denied for the reason that Petitioner asserts a legal conclusion to which no response is required, and MCL 208.1265 speaks for itself. To the extent a response is required, denied for the reason that Treasury treated Petitioner as a single financial institution "for the entire tax year in which the change occurred and each tax year after the change," and, therefore, properly applied the statute.

19. Neither admitted nor denied for the reason that Petitioner asserts compound legal conclusions that are not in proper pleading form and to which no response is required, and MCL 208.1265 and IRC § 368 speak for themselves.

20. Neither admitted nor denied for the reason that Petitioner asserts a legal conclusion to which no response is required.

RECEIVED by MSC 8/30/2021 2:05:19 PM

21. Neither admitted nor denied for the reason that Petitioner asserts a legal conclusion to which no response is required, and IRS Regulation § 1.368-2 speaks for itself.

22. Neither admitted nor denied for the reason that Petitioner asserts legal conclusions to which no response is required, and IRS Regulation § 1.368-2 speaks for itself.

23. Neither admitted nor denied for the reason that Petitioner asserts legal conclusions to which no response is required, and IRS Regulation § 1.368-2 speaks for itself.

24. Neither admitted nor denied for the reason that Petitioner asserts legal conclusions to which no response is required, and the case of *Davant v Commissioner* speaks for itself. However, Treasury denies that *Davant v Commissioner* bears on the calculation of the franchise tax as dictated by Michigan law.

25. Neither admitted nor denied for the reason that Petitioner asserts legal conclusions to which no response is required, and the cited legislative history speaks for itself. However, Treasury denies that the legislative history has any application in this matter.

26. Neither admitted nor denied for the reason that Petitioner asserts compound legal conclusions that are not in proper pleading form and to which no response is required.

27. Neither admitted nor denied for the reason that Petitioner asserts a legal conclusion to which no response is required, and IRC § 381 speaks for itself.

RECEIVED by MSC 8/30/2021 2:05:19 PM

28. Neither admitted nor denied for the reason that Petitioner asserts compound legal conclusions that are not in proper pleading form and to which no response is required. By way of further response, Treasury asserts that IRS Regulation § 1.381 speaks for itself.

29. Denied for the reason that Treasury properly averaged Petitioner's net capital, and properly denied Petitioner's Brownfield Credits and Historic Preservation Credits.

FIRST ISSUE – DETERMINATION OF NET CAPITAL

30. Neither admitted nor denied for the reason that Petitioner asserts compound legal conclusions that are not in proper pleading form and to which no response is required, and MCL 208.1265 speaks for itself.

31. Denied as untrue for the reason that Treasury treated Petitioner as a single financial institution "for the entire tax year in which the change occurred and each tax year after the change," and, therefore, properly applied MCL 208.1265. By way of further response, Treasury asserts that for a unitary business group, the "financial institution" is the group of member institutions, for which reason a determination of the group's net capital requires reference to each member institution's number of years in existence. MCL 208.1265(2)-(3). Accordingly, Treasury analyzed the years in existence for both the "Old Bank" and the "New Bank," and, therefore, properly determined the group's net capital.

32. Neither admitted nor denied for the reason that Petitioner asserts compound allegations and legal conclusions that are not in proper pleading form and to which no response is required. To the extent a response is required,

RECEIVED by MSC 8/30/2021 2:05:19 PM

Treasury asserts that it treated Petitioner as a single financial institution "for the entire tax year in which the change occurred and each tax year after the change," and, therefore, properly applied MCL 208.1265. By way of further response, Treasury asserts that for a unitary business group, the "financial institution" is the group of member institutions, for which reason a determination of the group's net capital requires reference to each member institution's number of years in existence. MCL 208.1265(2)-(3). Accordingly, Treasury analyzed the years in existence for both the "Old Bank" and the "New Bank," and, therefore, properly determined the group's net capital.

33. Neither admitted nor denied for the reason that Petitioner asserts compound allegations that are not in proper pleading form and to which no response is required. To the extent a response is required, Treasury asserts that it treated Petitioner as a single financial institution "for the entire tax year in which the change occurred and each tax year after the change," and, therefore, properly applied MCL 208.1265. By way of further response, Treasury asserts that for a unitary business group, the "financial institution" is the group of member institutions, for which reason a determination of the group's net capital requires reference to each member institution's number of years in existence. MCL 208.1265(2)-(3). Accordingly, Treasury analyzed the years in existence for both the "Old Bank" and the "New Bank," and, therefore, properly determined the group's net capital.

34. Neither admitted nor denied for the reason that Petitioner asserts compound allegations that are not in proper pleading form and to which no response

RECEIVED by MSC 8/30/2021 2:05:19 PM

is required. To the extent a response is required, Treasury asserts that it treated Petitioner as a single financial institution "for the entire tax year in which the change occurred and each tax year after the change," and, therefore, properly applied MCL 208.1265. In further response, Treasury denies that it "created" capital.

35. Neither admitted nor denied for the reason that Petitioner asserts compound allegations that are not in proper pleading form and to which no response is required. To the extent a response is required, Treasury asserts that the 11/21 Notice speaks for itself and that Treasury properly applied MCL 208.1265.

36. Neither admitted nor denied for the reason that the 11/21 Notice speaks for itself.

37. Neither admitted nor denied for the reason that Petitioner asserts compound allegations and legal conclusions that are not in proper pleading form and to which no response is required. To the extent a response is required, Treasury asserts that the 11/21 Notice speaks for itself and that Treasury properly applied MCL 208.1265.

38. Neither admitted nor denied for the reason that Petitioner asserts a legal conclusion to which no response is required. To the extent a response is required, Treasury asserts that the 11/21 Notice speaks for itself and that Treasury properly applied MCL 208.1265.

39. Neither admitted nor denied for the reason that Petitioner asserts compound allegations and legal conclusions that are not in proper pleading form and to which no response is required, and MCL 208.1265 speaks for itself. To the

RECEIVED by MSC 8/30/2021 2:05:19 PM

extent a response is required, Treasury asserts that it treated Petitioner as a single financial institution "for the entire tax year in which the change occurred and each tax year after the change," and, therefore, properly applied MCL 208.1265. By way of further response, Treasury asserts that for a unitary business group, the "financial institution" is the group of member institutions, for which reason a determination of the group's net capital requires reference to each member institution's number of years in existence. MCL 208.1265(2)-(3). Accordingly, Treasury analyzed the years in existence for both the "Old Bank" and the "New Bank," and, therefore, properly determined the group's net capital.

40. Neither admitted nor denied for the reason that Petitioner asserts compound allegations and legal conclusions that are not in proper pleading form and to which no response is required, and MCL 208.1265 speaks for itself. To the extent a response is required, Treasury asserts that it treated Petitioner as a single financial institution "for the entire tax year in which the change occurred and each tax year after the change," and, therefore, properly applied MCL 208.1265. By way of further response, Treasury asserts that for a unitary business group, the "financial institution" is the group of member institutions, for which reason a determination of the group's net capital requires reference to each member institution's number of years in existence. MCL 208.1265(2)-(3). Accordingly, Treasury analyzed the years in existence for both the "Old Bank" and the "New Bank," and, therefore, properly determined the group's net capital.

41. Denied that Treasury's determination constituted "error" for the reason Treasury treated Petitioner as a single financial institution "for the entire

RECEIVED by MSC 8/30/2021 2:05:19 PM

tax year in which the change occurred and each tax year after the change," and, therefore, properly applied MCL 208.1265. In further response, Respondent denies that Treasury created capital.

42. Neither admitted nor denied for the reason Petitioner sets forth its claim of relief, to which no response is necessary. By way of further response, Treasury denies that Petitioner is entitled to the relief it seeks.

SECOND ISSUE – DISALLOWANCE OF TAX CREDITS

43. Admitted that Treasury denied the Brownfield and Historic Preservation Credits. Treasury denies that it treated "Comerica Bank" as two separate entities. By way of further response, Treasury asserts that it treated the two Comerica entities – one located in Michigan (Comerica-Detroit), one located in Texas (Comerica-Texas), each having separate federal employer identification numbers – as two separate entities, and determined that Comerica-Texas could not claim the credits previously assigned from a third-party limited liability company (KWA, LLC) to Comerica-Detroit. MCL 208.38g(18).

44. Denied as untrue that Treasury's determination was "erroneous." By way of further response, Treasury asserts that it treated the two Comerica entities – Comerica-Detroit and Comerica-Texas, each having separate federal employer identification numbers – as two separate entities, and determined that Comerica-Texas could not claim the credits previously assigned from a third-party limited liability company (KWA, LLC) to Comerica-Detroit. MCL 208.38g(18).

45. Admitted.

RECEIVED by MSC 8/30/2021 2:05:19 PM

46. Neither admitted nor denied for the reason that Petitioner sets forth a legal conclusion to which no response is required, and MCL 208.38g speaks for itself.

47. Neither admitted nor denied for the reason that Petitioner asserts compound allegations and legal conclusions that are not in proper pleading form and to which no response is required.

48. Admitted.

49. Neither admitted nor denied for the reason that Treasury lacks knowledge or information sufficient to form a belief as to the truth of the factual allegations and leaves Plaintiff to its proofs.

50. Neither admitted nor denied for the reason that Petitioner asserts legal conclusions to which no response is required. By way of further response, Treasury asserts that the Texas Business Code, § 10.008 and MCL 487.13703 speaks for themselves. However, Treasury denies that § 10.008 has any application in this matter.

51. Neither admitted nor denied for the reason that Petitioner asserts legal conclusions to which no response is required. By way of further response, Treasury asserts that the case of *KIM v JP Morgan Chase Bank* speaks for itself.

52. Neither admitted nor denied for the reason that Petitioner asserts legal conclusions to which no response is required. By way of further response, Treasury asserts that the case of *The Angela Sinacola Living Trust v PNC Bank, NA* speaks for itself.

RECEIVED by MSC 8/30/2021 2:05:19 PM

53. Neither admitted nor denied for the reason that Petitioner asserts compound allegations and legal conclusions that are not in proper pleading form and to which no response is required.

54. Neither admitted nor denied for the reason that Petitioner asserts compound allegations and legal conclusions that are not in proper pleading form and to which no response is required. To the extent a response is required, denied as untrue that Treasury's determination was "inappropriate." By way of further response, Treasury asserts that it treated the two Comerica entities – Comerica-Detroit and Comerica-Texas, each having separate federal employer identification numbers – as two separate entities, and determined that Comerica-Texas could not claim the credits previously assigned from a third-party limited liability company (KWA, LLC) to Comerica-Detroit. MCL 208.38g(18).

55. Neither admitted nor denied for the reason that Petitioner sets forth legal conclusions and a statement of its claim of relief, to which no response is necessary.

THIRD ISSUE - ORDERING

56. Neither admitted nor denied for the reason that Petitioner sets forth compound allegations, legal conclusions, and a statement of its claim of relief, to which no response is necessary. By way of further response, Treasury denies that Petitioner is entitled to the relief it seeks.

FOURTH ISSUE – EQUAL PROTECTION

57. Neither admitted nor denied as Article I, Section 2 of the Michigan Constitution speaks for itself.

RECEIVED by MSC 8/30/2021 2:05:19 PM

58. Neither admitted nor denied for the reason that Petitioner asserts a legal conclusion to which no response is required, and the Equal Protection Clause speaks for itself. In further response, the Michigan Tax Tribunal lacks the authority to hold statutes unconstitutional. Accordingly, whether the legislation at issue in this case is rationally related to a legitimate government purpose is irrelevant.

59. Neither admitted nor denied for the reasons that Petitioner asserts a legal conclusion to which no response is required, MCL 208.1265 speaks for itself. Additionally, Treasury submits that it is unclear what the terms "artificially," "true net capital," and "illusory capital manufactured by the Department's interpretation of the statute" mean. To the extent a response is required, Treasury denies Petitioner's allegations as untrue. It is Petitioner's interpretation that violates the plain language of MCL 208.1265, not Treasury's. In further response, Treasury denies as untrue that by applying the plain language of the statute it has somehow "artificially impos[ed] a tax base…on illusory capital." Finally, Treasury denies that it has violated any of Petitioner's constitutional rights for the reason that a proper application of the law cannot be considered a constitutional violation. See *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 293 (1998).

60. Denied as untrue for the reason that Treasury properly applied MCL 208.1265.

61. Admit that Treasury issued the Notice on that date.

62. Neither admitted nor denied as the Notice speaks for itself. In further response, the Notice also states that: "The Department will no longer calculate net

RECEIVED by MSC 8/30/2021 2:05:19 PM

capital for years prior to the combination year using both the surviving and ***acquired*** entities' net capital." (Emphasis added). Petitioner's factual circumstances and allegations do not involve any purchase/acquisition of new entities, but instead creation of a new (as opposed to an already existing) financial institution followed by combination. These are materially different facts that directly refute any claim by Petitioner that Treasury has treated Petitioner differently than other similarly situated taxpayers.

63. Neither admitted nor denied as the Notice speaks for itself. In further response, the Notice does not apply here. The Notice applies in situations involving "acquisition" (or purchase) of an existing financial institution and combination therewith. Petitioner's factual circumstances and allegations do not involve any purchase/acquisition of new entities, but instead creation of a new (as opposed to an already existing) financial institution followed by combination. Therefore, the Notice is inapposite to Petitioner's circumstances.

64. Treasury admits that it has applied the Notice to certain taxpayers. However, Treasury denies that those taxpayers are similarly situated to Petitioner.

65. Deny as untrue that Treasury has required Petitioner to calculate its taxes according to a different method than for other "similarly situated" taxpayers. In further response, Treasury denies that it has violated any of Petitioner's constitutional rights.

RECEIVED by MSC 8/30/2021 2:05:19 PM

CONCLUSION AND RELIEF

66. Neither admitted nor denied for the reason that Petitioner sets forth legal conclusions and a statement of its claim of relief, to which no response is necessary. By way of further response, Treasury denies that Petitioner is entitled to the relief it seeks.

AFFIRMATIVE DEFENSES

NOW COMES Respondent, MICHIGAN DEPARTMENT OF TREASURY, by and through its attorneys Bill Schuette, Attorney General, and Scott L. Damich and David W. Thompson, Assistant Attorneys General, and asserts the following Affirmative Defenses:

1. Petitioner has 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 pay the undisputed portion of the penalty and interest at issue, as required by MCL 205.22(1).

3. 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.

RECEIVED by MSC 8/30/2021 2:05:19 PM

4. 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,

BILL SCHUETTE
Attorney General

/s/ Scott L. Damich

Scott L. Damich (P74126)
David W. Thompson (P75356)
Michigan Dep't of Attorney General
Assistant Attorneys General
Revenue & Collections Division
Attorneys for the Respondent
Michigan Department of Treasury
P.O. Box 30754
Lansing, MI 48909
(517) 373-3203
DamichS@michigan.gov
ThompsonD18@michigan.gov

Dated: September 18, 2017

RECEIVED by MSC 8/30/2021 2:05:19 PM

STATE OF MICHIGAN

IN THE COURT OF APPEALS

COMERICA, INCORPORATED,

Petitioner/Appellee
and Cross-Appellant,

v

Court of Appeals Docket No. 344754
MTT Docket No. 17-000150

MICHIGAN DEPARTMENT OF TREASURY,

Respondent/Appellant and
Cross-Appellee

COMERICA, INCORPORATED'S CROSS-APPEAL BRIEF

ORAL ARGUMENT REQUESTED

RECEIVED by MCOA 12/4/2018 12:53:18 PM

THOMAS P. BRUETSCH (P57473)
CHRISTOPHER KWIECIEN (P77878)
Ottenwess, Taweel & Schenk, PLC
Attorneys for Petitioner/Appellee and
Cross-Appellant
535 Griswold, Suite 850
Detroit, MI 48226
(313) 965-2121
tbruetsch@ottenwesslaw.com

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES………………………………………………………….. iv

BASIS OF JURISDICTION………………………………………………………….. vi

QUESTIONS INVOLVED…………………………………………………………… vii

INTRODUCTION……………………………………………………………………. 1

STATEMENT OF FACTS…………………………………………………………… 1

I. COMERICA BANK'S REORGANIZATION…………………………… 2

II. THE TAX CREDITS…………………………………………………... 3

III. THE DEPARTMENT'S AUDIT…………………………………………. 4

IV. THE AUDITOR IMPROPERLY DISALLOWS THE CREDITS……….. 5

V. PROCEDURAL HISTORY………………………………………………. 6

A. The Parties file Cross-Motions for Summary Disposition……………. 6

B. The Tax Tribunal holds that mergers extinguish tax credits………… 7

ARGUMENTS

I. THE TRIBUNAL ERRED IN DETERMINING THAT SBT TAX CREDITS DID NOT VEST IN COMERIC-TEXAS AFTER THE REORGANIZATION…………………………………………………….. 8

A. Standard of Review……………………………………………………. 8

B. The Credits vested in Comerica-Texas…………………………….. 9

1. The Credits vested by operation of law, not via assignment….. 9

2. Even if the Credits were "privileges," they still vest in Comerica-Texas..…………………………………………………. 12

3. The Tax Tribunal wrote a non-existent prohibition into the statute. 14

RECEIVED by MSC 8/30/2021 2:05:19 PM

II. THE TRIBUNAL ERRED IN DETERMINING THAT FEDERAL TAX LAW SHOULD BE IGNORED.......... 16

A. Standard of Review.......... 16

B. The Tax Tribunal should have applied the comparable law of the IRC. 17

C. Comerica-Texas and Comerica-Michigan would be considered as the same entity in an F Reorganization.......... 18

RELIEF REQUESTED.......... 19

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

INDEX OF AUTHORITIES

Cases: ***Page***

Chrysler Corp. v. CIR, 436 F.3d 644, 654 (CA 6, 2006)………………………….. 7

Davant v. Commissioner, 366 F. 2d 874 (CA 5th 1966)…………………………… 19

Halloran v Bhan, 470 Mich 572, 577, 683 NW2d 129 (2004)……………………. 8

Helvering v. Metropolitan Edison Co., 306 U.S. 522, 529 (1939)……………….. 13

Herrick Dist Library v Library of Mich, 293 Mich App 571, 592 n 13; 810 NW2d 110 (2011)………………………………………………………………………… 15

In re Brackett Estate, 342 Mich 195, 204 (1955)………………………………… 1,13

Jefferson Schools v Detroit Edison Co, 154 Mich App 390, 393, 397 NW2d 320 (1986)……………………………………………………………………………….. 8,14

Kelvinator, Inc v Dep't of Treasury, 136 Mich App 218, 225 (1984)…………… 8,17

KIM v JP Morgan Bank, 493 Mich 98, 111 (2012)……………………………… 7,10,11

Klooster v Charlevoix, 488 Mich 289, 295-296 (2011)………………………….. 8,16

Lindsay Anderson Sagar Trust v Dep't of Treasury, 204 Mich App 128, 130, 514 NW2d 514 (1994)……………………………………………………………….. 15

Lisbon Shops, Inc. v. Koehler, 353 US 382 (1957)……………………………… 13

Mich Deferred Presentment Servs Ass'n, Inc v Comm'r of Office of Fin & Ins Regulation, 287 Mich App 326, 334; 788 NW2d 842 (2010)…………………… 15

Michigan Residential Care Ass'n v Department of Social Services, 207 Mich App 373, 526 NW2d 9, (1995)……………………………………………………….. 14

Neal v Wilkes, 470 Mich 661, 665, 685 NW2d 648 (2004)…………………….. 8

Omne Financial, Inc v Shacks, Inc, 460 Mich 305, 311, 596 NW2d 591 (1999). 8,14

Stanton Brewery v. Comm'r of Internal Revenue, 176 F.2d 573 (CA 2, 1949),,, 12

The Angela Sinacola Living Trust v PNC Bank, N.A., No. 317481 (Unpublished, Nov. 13, 2014)……………………………………………………………….. 7,10,11

RECEIVED by MSC 8/30/2021 2:05:19 PM

Statutes and Court Rules:

MCL 205.753………………………………………………………………. vi

MCL 208.2(2)……………………………………………………………… 8,17

MCL 208.38g……………………………………………………………… 8,14,16

MCL 208.39c……………………………………………………………… 8,9,14, 16

MCL 208.1103…………………………………………………………….. 17

MCL 208.1265(4)(a)………………………………………………………. 16

MCL 208.1265(4)(a)………………………………………………………. 18

MCL 400.711………………………………………………………………. 14

MCL 487.13703…………………………………………………………… 16

MCL 487.13703(1) & (2)………………………………………………….. 15

MCL 7.203(A)(2)………………………………………………………….. vi

MCL 7.204(A)(1)(b)……………………………………………………….. vi

MCL 7.207(A)……………………………………………………………… vi

MCL 7.207(B)(1)…………………………………………………………… vi

IRC § 368(a)(1)(F)…………………………………………………………. vii

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

BASIS OF JUIRISDICTION

MCL 205.753 provides that an appeal from a decision of the Michigan Tax Tribunal shall be by right to this Court. Therefore, this Court has jurisdiction under MCL 7.203(A)(2).

The Michigan Tax Tribunal entered a Final Opinion and Judgment on May 31, 2018. The Respondent, Michigan Department of Treasury ("Department"), filed a Motion for Reconsideration on June 20, 2018, within 21-days of the Tribunal's Final Opinion and Judgment. The Motion was denied on July 3, 2018. The Department timely filed its Claim of Appeal within 21-days of the denial, on July 24, 2018, meeting the requirements of MCL 7.204(A)(1)(b).

Petitioner, Comerica Incorporated ("Taxpayer"), timely filed its Claim of Cross-Appeal of right on August 14, 2018, within 21-days of the Department's Claim of Appeal. MCL 7.207(A), (B)(1).

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

QUESTIONS INVOLVED

Comerica Bank was a Michigan Banking Association, and held $4.1 million dollars of tax credits which had been assigned to it. For strategic business purposes, Comerica Bank sought to move its headquarters to Dallas, Texas and re-charter as a Texas Banking Association. To effectuate this change of location and form, a new Texas corporation was created, and Comerica Bank was merged into it.

Under the Michigan Single Business Tax act, the tax credits at issue could only be "assigned" once. The Michigan Department of Treasury viewed the merger as an attempted second assignment of the credits, and disallowed them. The Michigan Tax Tribunal implicitly agreed that the merger did not effectuate a second assignment, but disallowed the credits because the Single Business Tax act was silent as to whether such credits vested in a merged entity, and because contrary federal law was irrelevant to its analysis.

I. Should the Tax Tribunal's statutory construction be reversed where:

a. Under state merger law, a successor corporation by merger succeeds to all rights, property and interests of its component corporations by operation of law, and the Michigan Supreme Court and this Court have expressly distinguished transfers by operation of law from "assignments;"

b. Under comparable federal law, courts take a "substance over form" practical approach, holding that tax credits survive a merger so long as the successor by merger shares a continuity of business with the entity that originally earned the credits, where our Supreme Court has held that Michigan tax laws are to be given practical construction;

c. The Single Business Tax act prohibits only second "assignments" of tax credits and is silent as to the vesting of tax credits via merger, and the Michigan Supreme Court and this Court hold that a court is precluded from reading into a statute something not otherwise clearly therein?

The Taxpayer answers:	Yes.
The Department of Treasury answers:	No.
The Tax Tribunal answered:	No.

II. Should the Tax Tribunal have applied the persuasive authority interpreting a comparable federal tax statute, IRC § 368(a)(1)(F), which provides that, where a corporation undertakes a merger to effect a mere change in location or form, the reorganized corporation is treated as the "same entity as the corporation in existence before the reorganization," entitling it to the same tax treatment, where, by statute, terms used in the MBT "shall have the same meaning as when used in comparable

context in the laws of the United States relating to federal income taxes," and where the Department of Treasury has applied IRC section 368(a)(1)(F) in similar contexts?

The Taxpayer answers: Yes.

The Department of Treasury answers: No.

The Tax Tribunal answered: No.

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

INTRODUCTION

The Tax Tribunal's ruling in this case has unfavorable implications for corporate law in Michigan. The Tribunal read into the Michigan Single Business Tax statute a prohibition on the transfer of tax credits by operation of law – in this case, via merger. It held that when a company holding tax credits merges into another company, its tax credits are extinguished, even if the merger was conducted to effectuate a mere change in form or location of the company.

This holding puts Michigan at odds with federal tax law, which has long treated such mergers as non-events for tax purposes, and creates a conflict between Michigan tax law and Michigan corporate law, which provides that a successor by merger obtains all of the "rights, interests, privileges, powers, and franchises," of its predecessor companies by operation of law.

"[T]axing is a practical matter and … the taxing statutes must receive a practical construction." *In re Brackett Estate,* 342 Mich 195, 204 (1955). The Court should reverse the Tax Tribunal's form over substance ruling and reinstate the tax credits that were disallowed in this case.

STATEMENT OF FACTS

Comerica Incorporated ("Taxpayer") is a publicly traded financial services company headquartered in Dallas, Texas. *Appx at 0003, ¶1, Stip. of Facts.* It has been in business since 1849. *Id., ¶2.* The Michigan Department of Treasury ("Department") audited Taxpayer's Michigan Business Tax returns for the years 2008-2011. At issue in this cross-appeal is the Department's disallowance of approximately $4.1 million dollars of tax credits owned by one of Taxpayer's subsidiaries, Comerica Bank.

Comerica Bank is Taxpayer's primary operating subsidiary. The Department's treatment of Comerica Bank's 2007 reorganization is the point of origin for the dispute in this case. The Tax Tribunal erred when it held that tax credits are lost when the company holding the tax

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

credits merges into another company, even when the merger merely effects a change of form or location.

I. COMERICA BANK'S REORGANIZATION.

Until October 31, 2007, Comerica Bank was a Michigan Banking Corporation ("Comerica-Michigan"). *Id.,* ¶*3.* For strategic business purposes, in 2007 Taxpayer decided to move its headquarters to Dallas, Texas. *Appx at 0118, Press Release.*

The decision to move to Texas meant that Comerica Bank needed to convert its Michigan charter to a Texas Banking Association charter. To effectuate this change in location and form, Taxpayer reorganized Comerica Bank (the "Reorganization"). Effective October 8, 2007, Taxpayer created a new wholly-owned subsidiary, Comerica Bank, a Texas Banking Association ("Comerica-Texas"). *Appx at 0004,* ¶*5.* On October 16, 2007, Comerica-Michigan and Comerica-Texas entered into an Agreement and Plan of Merger ("Plan"), under which Comerica-Michigan would merge into Comerica-Texas. *Id.,* ¶*6*; *Appx at 0126-131, Plan of Merger.* Pursuant to the Plan, Comerica-Michigan merged into Comerica-Texas on October 31, 2007 at 11:59:59 PM. *Appx at 0129, Plan of Merger.* Comerica-Michigan ceased to exist and was no longer a bank. *Appx at 0004, Stip. of Facts,* ¶¶ *8, 11.*

Comerica-Texas maintained Comerica-Michigan's books and records following the Reorganization. *Appx at 129 (Plan of Merger).* All corporate acts, plans, policies, approvals and authorizations of Comerica-Michigan in effect immediately prior to the Reorganization were taken for all purposes as the acts, plans, policies, approvals and authorizations of Comerica-Texas after the Reorganization. *Id.* All of Comerica-Michigan's rights, interests, privileges, powers and franchises, and the rights and title to all of Comerica-Michigan's assets and property, vested in Comerica-Texas by operation of law at the time of the Reorganization. *Id. at 0127.* Likewise, Comerica-Michigan's debts, liabilities and duties attached to Comerica-Texas. *Id.*

RECEIVED by MSC 8/30/2021 2:05:19 PM

Thus, Comerica-Texas assumed, for example, Comerica-Michigan's obligation to pay taxes. Ironically, the Department asserts that Comerica-Texas did not assume the corresponding tax credits.

II. THE TAX CREDITS.

At the time of the Reorganization, Comerica-Michigan held numerous tax credits. These credits were earned prior to the January 1, 2008 effective date of the Michigan Business Tax, and thus were initially governed under the MBT's predecessor statute, the Single Business Tax.

Comerica-Michigan's credits included Investment Tax Credits,[1] Historic Restoration Credits,[2] and Brownfield Zone Credits[3] totaling $4,133.300. *Appx at 320-322, Credit Calculations. See, also, Appx at 0177, Audit Report.* [4] Providing such credits in the Single Business Tax statute expressed the public policy of the legislature and encouraged targeted investments.[5]

---

[1] The Investment Tax Credit was created by the legislature in 1999 as part of the legislation that provided for the phase out of the SBT. *House Fiscal Agency,* State of Michigan: The Single Business Tax (November, 2003) at 25. The legislation provided a tax credit on investments of tangible assets in Michigan.

[2] Historic Restoration credits were created in 1998 and provide tax credits for a taxpayer rehabilitation of a historic site or place. *Id.*

[3] The Brownfield Zone Credit was created in 1996 as part of a package of bills designed to spur redevelopment of contaminated industrial sites. *Id.*

[4] There is a small discrepancy between Taxpayer's calculation of the disallowed credits, and the auditor's statement in her report. The audit report states that the credit adjustment was $4,098,317. However, there was no issue of fact as to Taxpayer's damages calculation on summary disposition, as the Department did provide an alternative to Taxpayer's damages calculations. *See, e.g., Appx at 0444-0445, Hearing Transcript.*

[5] For example, the Michigan State Housing Development Authority acknowledges: "Historic resources are tangible links to our past. They impart a sense of identity, stability, and orientation to a community. Historic preservation tax incentives promote the preservation and rehabilitation of these resources." https://www.michigan.gov/documents/mshda/mshda_shpo__State_Tax_Credit_Jan_11_343988_7.pdf. United States public policy is also promoted by Taxpayer's investments, which are encouraged by the Federal Reserve pursuant to the Community Reinvestment Act, 42 U.S.C. 5301 *et seq.*

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

There is no dispute that, prior to the Reorganization, Comerica-Michigan was the owner of the Credits. Likewise, there is no dispute in this case that, had Comerica-Michigan never merged into Comerica-Texas and had claimed the Credits on its own behalf, the Department would have allowed them.

After the Reorganization, Comerica-Texas claimed the Credits. *Id.* But the Department disallowed the Credits during its audit of Taxpayer. *Id.*

III. THE DEPARTMENT'S AUDIT.

The Department decided to audit Taxpayer's 2008-2011 Michigan Business Tax returns. *Appx at 005, Stip. of Facts.* The purpose of a tax audit is to determine if taxpayer returns have been prepared and filed correctly. *Appx at 0142, C. June Deposition, Vol. I at 27.* According to the Department's auditor, those standards include the Michigan Business Tax statute, the Single Business Tax statute, and the Department's interpretive guidance on the statutes. *Appx at 0142, pp. 27-28.*

It was the auditor's job to protect Taxpayer's rights and to ensure the fair administration of Michigan's tax codes. *Appx at 0160, 0164.* She was required to have adequate technical training and proficiency to conduct her assigned audits. *Appx at 0145, C. June Dep. At 37.* The auditor was also subject to the Department's audit standards, which impose due care obligations. *Appx at 0145, pp. 39.*

Unfortunately, though Michigan Civil Service Commission job specifications require an auditor to have a "thorough knowledge" of business law, corporate finance, banking, economics, and all applicable statutes, rules and regulations, the auditor in this case lacked knowledge and experience with the Single Business Tax – the statute that governs the tax credits at issue in this appeal. *Appx at 0146, C. June Dep. at 41-42.* Just as critical, she was unfamiliar with relevant statues and regulations relating to state-law mergers, as well as with "F" reorganizations under

RECEIVED by MSC 8/30/2021 2:05:19 PM

the Internal Revenue Code. *Appx at 0146-0147, C. June Dep. Vol. I* at 44, 87; *Appx at 0155-0156, C. June Dep., Vol. II at 88-92.*

IV. THE AUDITOR IMPROPERLY DISALLOWS THE CREDITS.

During the audit, the Department disallowed the Credits, although its rationale was initially unclear. First, the Department informed Taxpayer that the Credits were "disallowed due to taxpayer's change of FEIN [Federal Employer Identification Number] in October, 2007. *Appx at 0176*.[6] Later, the Department took its current position, that when Comerica-Michigan merged into Comerica-Texas, the Credits were "assigned" to Comerica-Texas. *Appx at 0308.* Under the Single Business Tax, tax credits may only be assigned once, and the Department viewed the Reorganization as a second assignment. The Department claimed that "the entity remaining after the described merger, Comerica Bank Texas … could not claim the aforementioned credits as the single assignment permitted by the SBT[] had already occurred." *Id.*

The Department did not even review or consider the impact of state merger law on the question of whether a second assignment had occurred. *Appx at 0156, C. June Dep., Vol II at 89-90.* The Department's auditor testified that she had "never been trained to or asked about looking into state merger laws." *Id.* She also testified that she "didn't know" whether a transfer by operation of law (as occurs in a merger) would be different than an assignment. *Appx at 0156, C. June Dep. at 91-92*.[7]

RECEIVED by MCOA 12/4/2018 12:53:18 PM

---

[6] There is no provision in the Single Business Tax or Michigan Business Tax that would allow tax credits to be disallowed on the basis of a changed FEIN. The Tax Tribunal correctly found that "a new FEIN is not determinative." *Appx at 0317, Tax Tribunal Final Judgment*.

[7] "Q. If Michigan had a statute that said, in effect, that upon a merger all assets, rights, property of any sort automatically transfer as a matter of law from the merging entity into the merged entity, would that be something you'd want to take a look at to determine if there had been a valid transfer of the tax credits?

A. I don't know.

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

Taxpayer attempted to explain to the Department that "no transfer or assignment … occurred." *Appx at 0313.* Taxpayer also directed the Department to corresponding law under the Internal Revenue Code § 368(f), which had been applied by the Department in similar circumstances. *Id.* Federal tax law treats companies that merge to effect "a mere change in identity, form or place of organization" as if the "reorganized corporation were the same entity as the corporation in existence before the reorganization." *Preamble to REG-106889-04,* 69 Fed.Reg. 49836 (8/12/04).

No "assignment" of the Credits occurred when Comerica-Michigan merged into Comerica-Texas. Rather, the Credits transferred by operation of law. Reorganizations like the one that occurred in this case do not result in the loss of otherwise applicable tax credits.

V. PROCEDURAL HISTORY.

Taxpayer filed a petition with the tax tribunal on two primary grounds relating to the audit. The first was that the Department had improperly manipulated Taxpayer's tax base by double-counting the net equity of Comerica-Michigan and Comerica-Texas. Taxpayer prevailed on that issue, which is the subject of the Department's appeal in this case.

Taxpayer's petition also protested the Department's disallowance of the Credits, pointing out that Michigan and other jurisdictions treat surviving and merged corporations the same where the merger effects a mere change of form or place of organization.

A. The Parties file Cross-Motions for Summary Disposition.

Following discovery, the parties filed Cross-Motions for Summary Disposition. The Department's argument on summary disposition assumed, without support, that the Comerica-

---

Q. You don't know?
A. I don't know…. I've been never [sic] trained to or asked about looking into state merger law."
Appx at 0156, C. June Dep., Vol II, at 90 (objections omitted).

RECEIVED by MSC 8/30/2021 2:05:19 PM

Michigan had "assigned" the Credits to Comerica-Texas. The Department then made a technical argument that Comerica-Michigan had not followed the proper procedure to effect an assignment.

In response, Taxpayer argued that the key issue was whether an "assignment" occurred at all. It cited authority from the Michigan Supreme Court in *KIM v JP Morgan Bank,* 493 Mich 98, 111 (2012), and this Court's opinion in *The Angela Sinacola Living Trust v PNC Bank, N.A.,* 2014 WL 6088076 (Mich.App. Case No. 317481)(Unpublished, Nov. 13, 2014). These cases hold that when an entity obtains an interest through merger, it obtains that interest by operation of law, which is distinct from an "assignment." Taxpayer also cited the applicable Texas and Michigan merger statutes, which provide for the vesting of interests in a merged entity by operation of law.

Taxpayer also demonstrated that, under a comparable provision of the Internal Revenue Code, Comerica-Michigan and Comerica-Texas would be considered "the same entity" for tax purposes, meaning that no assignment would be deemed to have occurred.

B. <u>The Tax Tribunal holds that mergers extinguish tax credits.</u>

The Tribunal granted the Department's Motion with respect to the tax credit issue, although primarily for different reasons than advanced by the Department. *Appx at 0361-0367.* The Tribunal found that the Credits were "more akin to a privilege than to property," citing the Sixth Circuit's opinion in *Chrysler Corp. v. CIR,* 436 F.3d 644, 654 (CA 6, 2006). *Appx at 365.* The Tribunal held that, because the Credits were a privilege, state merger statutes did not apply. *Id.* And though the Tribunal tacitly agreed that no "assignment" had occurred, it concluded that the SBT's silence as to whether Comerica-Texas could obtain them by other means caused the Credits to be extinguished. *Appx at 0366.* The Tribunal also found comparable federal law under the Internal Revenue Code to be "irrelevant," *id.,* despite the statutory command in the

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

Single Business Tax act adopting provisions of the Internal Revenue Code "when used in comparable context." MCL 208.2(2); *Kelvinator, Inc v Dep't of Treasury,* 136 Mich App 218, 225 (1984).

The Tribunal entered a final Judgment for Taxpayer granting its Motion in part (on the tax base issue) and in favor of the Department in part (on the Credits issue). *Appx at 369-370.* The Department's appeal and Taxpayer's cross-appeal followed.

ARGUMENTS

I. THE TRIBUNAL ERRED IN DETERMINING THAT SBT TAX CREDITS DID NOT VEST IN COMERIC-TEXAS AFTER THE REORGANIZATION.

A. Standard of Review.

The Tax Tribunal's decision was based on its statutory interpretation. Issues of statutory construction are reviewed *de novo. Klooster v Charlevoix,* 488 Mich 289, 295-296, 795 NW2d 578 (2011).

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes,* 470 Mich 661, 665, 685 NW2d 648 (2004). The first criterion in determining intent is the language of the statute. *Halloran v Bhan,* 470 Mich 572, 577, 683 NW2d 129 (2004). Nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Omne Financial, Inc v Shacks, Inc,* 460 Mich 305, 311, 596 NW2d 591 (1999). A Court is precluded from reading into a statute something not otherwise clearly therein. *Jefferson Schools v Detroit Edison Co,* 154 Mich App 390, 393, 397 NW2d 320 (1986).

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

B. The Credits vested in Comerica-Texas.

The parties agree that SBT tax credits under MCL 208.38g and MCL 208.39c may only be assigned once, and that Comerica-Michigan received the Credits by a permissible first assignment and was entitled to claim them. MCL 208.38g reads, in relevant part:

> (18) Except as otherwise provided in this subsection … the qualified taxpayer may assign all or a portion of a credit allowed under subsection (2) or (3) to its partners, members, or shareholders…. A credit assignment under this subsection is irrevocable…. A partner, member, or shareholder that is an assignee shall not subsequently assign a credit or any portion of a credit assigned under this subsection. (Emphasis added).

Similarly, MCL 208.39c reads, in relevant part:

> (7) [T]he qualified taxpayer may assign all or any portion of a credit allowed under this section to its partners, members, or shareholders…. A credit assignment under this subsection is irrevocable…. A partner, member, or shareholder that is an assignee shall not subsequently assign a credit or any portion of a credit assigned to the partner, member, or shareholder under this subsection. (Emphasis added).

There is no question that these statutory sections prohibit a second "assignment" of the Credits from Comerica-Michigan to a third-party. The statute does not, however, define the term "assignment," nor does it prohibit the vesting of tax credits by other means, including by merger. The Tax Tribunal held that the statute's failure to expressly authorize vesting by merger led to the Credits' being extinguished. This holding was unsupported and is contrary to the opinions of the Michigan Supreme Court, US Supreme Court, and this Court.

1. The Credits vested by operation of law, not via assignment.

Mergers of state chartered banks are governed by state law. Under the laws of both Michigan and Texas, when entities merge, their rights, property and interests transfer by operation of law. Under Texas law, "[w]hen a merger takes effect … all rights, titles and interests to all … property … is allocated to and vested … in one or more of the surviving … organizations … **without** (a) reversion or impairment; (b) any further act or deed; or (c) **any**

transfer or assignment having occurred." *Texas Business Organizations Code, § 10.008 (Emphasis added).*

Though the Reorganization was conducted under Texas law, Michigan law is in accord:

> [T]he corporate existence of each consolidating organization is merged into and continued in the consolidated bank.... [T]he consolidated bank possesses all the rights, interests, privileges, powers, and franchises and is subject to all the restrictions, disabilities, liabilities, and duties of each of the consolidating organizations.... A consolidated bank holds and enjoys the same and all rights of property, franchises, and interests ... in the same manner and to the same extent as those rights and interests were held or enjoyed by each consolidating organization at the time of the consolidation. MCL 487.13703(1) and (2).

Where a transfer is made by operation of law, there is no assignment. In *KIM v JP Morgan Chase Bank, NA,* 493 Mich at 111, the Michigan Supreme Court analyzed the concepts of assignment and conveyance "by operation of law," and found them to be distinct. A transfer by operation of law "takes place involuntarily or as the result of no affirmative action. In such a case, there is no "assignment." *Id.* at 111 ("Had a merger occurred ... the transaction would have occurred without any voluntary or affirmative action [and] ... the transaction could have constituted a transfer by operation of law.").

Relying on *KIM,* the Michigan Court of Appeals decided *The Angela Sinacola Living Trust v PNC Bank, N.A., supra.* This case is directly on point. The question was whether the bank had acquired a foreclosable mortgage interest by assignment or operation of law. *Id. at 1.* The law requires mortgage assignments to be recorded, which the bank had not done. *Id.* At the time of foreclosure, PNC Bank claimed an interest in the mortgage as successor in interest by merger. *Id.*

This Court noted that the Michigan Supreme Court had "expressly distinguished" assignments from acquisitions by merger. *Id.* at 3. Because PNC "acquired its interest through a series of mergers and, as a result, acquired the mortgage by operation of law in accordance with

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

federal statute," "the assets of the old bank transfer to the new entity solely by virtue of the merger itself." *Id.* The court found that "the plain language of this statute could not more clearly provide that a merger results in the automatic transfer of assets." *Id.*

Here, like in *KIM* and *Sinacola,* Comerica-Texas succeeded to an interest in the carry-forward tax credits by merger. As in *KIM and Sinacola,* there was no "assignment" as a matter of law. Thus, Comerica Bank did not violate the provisions of the SBT barring a second assignment of the Credits, which should be allowed.

The Department did not even review or consider the impact of state merger law on the question of whether a second assignment had occurred. *Appx at 156, C. June Dep., Vol. II, at 89-90.* The Department's auditor testified that she had "never been trained to or asked about looking into state merger laws." *Id.* She also testified that she "didn't know" whether a transfer by operation of law would be different than an assignment. *Appx at 156, C. June Dep., Vol. II* at 91-92.[8]

An assignment and a transfer by operation of law are different and distinct concepts. The tax credits at issue transferred by operation of law under the Texas merger statute. No "assignment" occurred.

RECEIVED by MCOA 12/4/2018 12:53:18 PM

---

[8] Q. If Michigan had a statute that said, in effect, that upon a merger all assets, rights, property of any sort automatically transfer as a matter of law from the merging entity into the merged entity, would that be something you'd want to take a look at to determine if there had been a valid transfer of the tax credits?

A. I don't know.

Q. You don't know?

A. I don't know.... I've been never [sic] trained to or asked about looking into state merger law.

Appx at 0156, C. June Dep., Vol II, at 90 (objections omitted).

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

2. Even if the Credits were "privileges," they still vest in Comerica-Texas.

The Tribunal declined to apply state merger law on the basis that the Credits were "privileges," and not "property." While tax credits are commonly referred to in the authorities as "privileges" or matters of "legislative grace," instead of as "property," this has become a distinction without difference as courts have moved to a practical construction of the issue.

Stanton Brewery v. Comm'r of Internal Revenue, 176 F.2d 573 (CA 2, 1949) highlighted the initial form versus substance argument. The case involved the Excess Profits Tax, which was designed to prevent wartime profiteering. *Id.* at 574. The tax captured corporate profits that were deemed excessive in relation to like receipts during an earlier year or base period. *Id.* However, Congress decided that "it was considered equitable that lean years should be set off against lush ones to strike some sort of average," and allowed corporations to claim and carry forward an "excess profits credit" during years when their profits were below the base. *Id.*

The plaintiff in *Stanton* was formed by a merger. The original Stanton Brewery Inc., which held excess profits credits, was merged into a holding company. *Id.* at 573. The new company claimed the credits on its tax returns, which were disallowed. *Id.* The plaintiff appealed, contending that it was entitled to the credit.

Reversing, the Second Circuit defined the issue as turning "on the nature of merged corporations after a merger." *Id.* at 574. Noting the tension between form and substance, the court said:

> At the outset, we find ourselves confronted with one of those questions of legal semantics or categorization which constantly dog the judicial process. For here the decision seems to be sought in terms of which legal entity swallowed the other. Moreover there appears to be the further assumption, on the part of respondent, that necessarily the inactive holding company- which lost its identity in the other so far at least as its name is concerned- swallowed the really active part of the enterprise, so that an important privilege of the latter, taxwise, is irrevocably lost. And it seems that, had the converse been true and the swallower originally had the privilege, it would still be retained.

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

The Second Circuit eschewed this semantic approach.

> [The Commissioner] employs a mere change in corporate form … to bring about a yet more arbitrary destruction of a credit as to one only of two or more component parties to a merger…. More properly we must regard the 'resulting corporation' as the union of component corporations into an all-embracing whole which absorbs the rights and privileges, as well as the obligations, of its constituents. *Id.* at 575.

In reaching this substance over form decision, the Court cited the U.S. Supreme Court's decision in *Helvering v. Metropolitan Edison Co.,* 306 U.S. 522, 529 (1939). In that case, the Supreme Court upheld a tax deduction by a successor corporation, distinguishing a merger from a sale and declaring that, in a merger, "the corporate personality of the transferor is drowned in that of the transferee." *Id.* at 576.

The *Stanton* Court, like the Supreme Court in *Helvering,* also noted the irony that it was the authorities had no trouble finding that the corporation resulting from a merger took on the *obligations* of its components, including the obligations to pay taxes. *Id.* at 575. "All of these decisions deal with the substance of the transaction and are not to be brushed aside by the oversimplified formula suggested by the Commissioner – that involved only was the continued corporation and not the merged or submerged one." *Id.*

For all of these reasons, the Court held that the surviving corporation was "the taxpayer" obligated to pay the taxes of the corporations it had absorbed "and entitled to their credits." *Id.*

Other federal courts of the era disagreed with *Stanton*, until the Supreme Court provided a practical interpretation in *Lisbon Shops, Inc. v. Koehler,* 353 US 382 (1957). In *Lisbon Shops,* the Supreme Court accepted the argument of the government that a "privilege" – a prior year's loss carryover – could be deducted by a company resulting from a merger where "there is a continuity of business enterprise." *Id.* at 386. In other words, "the prior year's loss can be offset

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

against the current year's income … to the extent that this income is derived from the operation of substantially the same business which produced the loss." *Id.*

The practical logic of the federal cases should be applied in this case. "[T]axing is a practical matter and … the taxing statutes must receive a practical construction." *In re Brackett Estate,* 342 Mich 195, 204, 69 NW2d 164 (1955). Comerica-Texas was a no asset shell company before Comerica-Michigan, an operating company, was merged into it. Comerica-Texas continued the business of Comerica-Michigan, assuming its employees, its books and records, and its obligations – including the obligations to pay taxes. In the words of the Supreme Court in *Helvering,* Comerica-Texas was "drowned" in the corporate personality of Comerica-Michigan. To deprive Comerica-Texas of the Credits is a form over substance, semantic approach that makes little sense. The Tax Tribunal should be reversed, and the Credits restored to Comerica-Texas.

3. *The Tax Tribunal wrote a non-existent prohibition into the statute.*

The Tax Tribunal held the SBT's silence with regard to transfers by operation of law precluded the Credits vesting in Comerica-Texas, on the basis that the statute should be strictly construed against the taxpayer.

But nothing can be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Omne Financial, Inc v Shacks, Inc,* 460 Mich 305, 311, 596 NW2d 591 (1999). A court is precluded from reading into a statute something not otherwise clearly therein. *Jefferson Schools v Detroit Edison Co,* 154 Mich App 390, 393, 397 NW2d 320 (1986).

MCL 208.38g and MCL 208.39c prohibit second assignments of tax credits – and nothing more. When it read the SBT as prohibiting tax credit vesting via merger, the Tax Tribunal speculated on the intent of the legislature and read language into the statue that simply

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MCOA 12/4/2018 12:53:18 PM

isn't there. This Court disapproved of that approach in *Michigan Residential Care Ass'n v Department of Social Services*, 207 Mich App 373, 526 NW2d 9, (1995). The case involved MCL 400.711, which provides for health and sanitation inspections of adult foster care facilities. *Id.* at 374. The statute was silent about whether DSS or the adult foster care facilities would pay for the inspections. *Id.* DSS charged the institutions. *Id.*

This Court affirmed a declaratory judgment on behalf of the facilities. "[B]ecause the statute is silent with regard to who must pay for the inspections, this Court is precluded from attempting to determine what the Legislature may have intended regarding who should pay for health and sanitation inspections under § 11(1). 'Courts may not speculate about the probable intent of the Legislature beyond the words employed in the statute.'" *Id.* at 377, *quoting, Lindsay Anderson Sagar Trust v Dep't of Treasury*, 204 Mich App 128, 130, 514 NW2d 514 (1994).

This Court continued: "The constitutional duty of courts is to interpret and apply the law, not to enact laws. The Michigan Constitution vests the power to enact laws in the Legislature alone…. Therefore, if respondent seeks to impose upon petitioners the obligation to pay … respondent's remedy is … through the legislative process." *Id.* (internal case citations omitted).

Reading new language into the statute is particularly inappropriate where another statute affirmatively applies a right that is abrogated by the Court's reading. As noted above, MCL 487.13703(1) and (2) provide that, in a merger, "[a] consolidated bank holds and enjoys the same and all rights of property, franchises, and interests … in the same manner and to the same extent as those rights and interests were held or enjoyed by each consolidating organization at the time of the consolidation."

Statutes that relate to the same subject or that share a common purpose are in *pari materia* and must be read together as one law, even if they contain no reference to one another

RECEIVED by MSC 8/30/2021 2:05:19 PM

and were enacted on different dates. *Mich Deferred Presentment Servs Ass'n, Inc v Comm'r of Office of Fin & Ins Regulation,* 287 Mich App 326, 334; 788 NW2d 842 (2010). The object of the in *pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. *Id.* The Legislature is presumed to know of and legislate in harmony with existing laws. *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 592 n 13; 810 NW2d 110 (2011).

The legislature's enactment of MCL 487.13703, which allows all rights and interests of the components of a merging bank to vest in the merged bank, combined with the legislature's failure to expressly prohibit the vesting of tax credits via merger demonstrate the legislature's intent. Had the legislature intended tax credits to be subject to a different rule than other rights and interests that may pass by merger, it would have said so.

It was error for the Tax Tribunal to interpret legislative silence in MCL 208.38g and MCL 208.39c as a prohibition on the Credits vesting in Comerica-Texas after the Reorganization. The Tribunal's Judgment should be reversed.

II. THE TRIBUNAL ERRED IN DETERMINING THAT FEDERAL TAX LAW SHOULD BE IGNORED.

Under federal tax law, Comerica-Texas and Comerica-Michigan would have been considered the same entity after the Reorganization, and entitled to the Credits. But the Tax Tribunal held that provisions of the Internal Revenue Code concerning the treatment of merging companies were irrelevant.

A. Standard of Review.

The Tax Tribunal's decision was based on its statutory interpretation. Issues of statutory construction are reviewed *de novo. Klooster v Charlevoix,* 488 Mich 289, 295-296 (2011).

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

B. The Tax Tribunal should have applied the comparable law of the IRC.

The Michigan Business Tax has provisions on how to treat financial institutions that combine. MCL 208.1265(4)(a) is applicable and reads:

> (4) For purposes of this section, each of the following applies:
>
> (a) A change in identity, form, or place of organization of 1 financial institution shall be treated as if a single financial institution had been in existence for the entire tax year in which the change occurred and each tax year after the change….

This subsection is nearly to Internal Revenue Code section 368(a)(1)(F), which provides for a reorganization conducted to effect "a mere change in identity, form, or place of organization of one corporation, however effected." This is commonly referred to in tax parlance as an "F Reorganization." While the Michigan Business Tax section has not been subject to significant interpretation, there is exhaustive authority on IRC section 368(a)(1)(F). By statute, terms used in the Michigan Business Tax "shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes." MCL 208.1103.[9]

The Department has applied Internal Revenue Code section 368(a)(1)(F) in similar contexts. Michigan RAB 1992-3 provides that a "transferee is entitled to an SBT business loss carryover for any unused business loss of the transferor when the transferor completely discontinues operations and is no longer a taxpayer." This is available when there are "transfers of property through certain tax-free events," such as "a mere change in identity, form, or place of organization qualifying under Section 368(a)(1)(F)."

[9] The same is true under the Single Business Tax. MCL 208.2(2); *Kelvinator, Inc v Dep't of Treasury,* 136 Mich App 218, 225 (1984).

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

Nevertheless, the Department's auditor never even considered, and apparently is not knowledgeable concerning, the impact of an F Reorganization. *Appx at 0146-0147, C. June Dep. Vol. I* at 44, 87. Thus, the Department argued that "federal law is inapplicable," and the Tribunal agreed. This was error.

C. **Comerica-Texas and Comerica-Michigan would be considered as the same entity in an F Reorganization.**

Under IRS regulations, an "F Reorganization" occurs when six requirements are met: (1) the resulting corporation stock is distributed in exchange for transferor corporation stock; (2) identity of stock ownership; (3) the resulting corporation does not hold more than a *deminimus* amount of property immediately before the reorganization; (4) the transferor corporation is liquidated; (5) the resulting corporation is the only acquiring corporation; and (6) the transferor corporation is the only acquired corporation. *Section 1.368-2(m) of the Federal Income Tax Regulations*. All of those requirements were met here. *See, e.g., Appx at 128, Plan of Merger, Article II(d) (factors 1 and 2); Appx at 341, Interrogatory Responses, Response No. 3 (factor 3); Appx at 0127, Plan of Merger, Article II(a) and Appx at 0004, Stip. of Facts,¶ 11 (factor 4); Appx 0127, Plan of Merger,Article I and Appx at 0004,¶ 10 (factors 5 and 6).*

Indeed, IRS regulations provide an example of an F reorganization that precisely matches the facts of this case:

> P owns all of the stock of S1, a State A corporation. The management of P determines that it would be in the best interest of S1 to change its place of incorporation to State B. Accordingly, under an integrated plan, P forms S2, a new State B corporation; P contributes the S1 stock to S2; and S1 merges into S2 under the laws of State A and State B. Under paragraph (m)(3)(i) of this section, a series of transactions that together result in a mere change of one corporation may qualify as a reorganization under section 368(a)(1)(F). The contribution of S1 stock to S2 and the merger of S1 into S2 together constitute a mere change of S1. Therefore, the potential F reorganization qualifies as a reorganization under section 368(a)(1)(F). *Section 1.368-2(m)(4) of the Federal Income Tax Regulations*, Example (6).

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

Interpreting MCL 208.1265(4)(a) consistent with its IRC counterpart, and treating the Comerica-Texas and Comerica-Michigan merger as if "the reorganized corporation were the same entity as the corporation in existence before the reorganization," would result in allowing Comerica-Texas to claim the Credits. An "F" reorganization "presumes that the surviving corporation is the same corporation as the predecessor in every respect [and] … though it may involve an actual or deemed transfer of assets … such transaction effectively involves only one corporation." *Preamble to REG-106889-04,* 69 Fed.Reg. 49836 (8/12/04). As a result, "an F reorganization is treated for most purposes of the Code as if the reorganized corporation were the same entity as the corporation in existence before the reorganization." *Id.* According to IRS regulations:

> In the case of a reorganization qualifying under section 368(a)(1)(F) … the acquiring corporation shall be treated … just as the transferor corporation would have been treated if there had been no reorganization. *Section 1.381(b)-1(a)(2) of the Federal Income Tax Regulations.*[10]

Given that there was an "F" reorganization in this case, the Department should have considered Comerica-Michigan and Comerica-Texas as "the same entity" for purposes of the tax credits. No assignment can occur if the companies are considered the same entity. The Tribunal's decision should be reversed.

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RELIEF REQUESTED

The Department's audit disallowed $4,133,300 in tax credits. *Appx at 320-322, Credit Calculations.* Taxpayer requests that the Tax Tribunal's entry of summary disposition in favor of the Department concerning Taxpayer's entitlement to the Credits, and to direct the Tax

---

[10] *See, also, Davant v. Commissioner,* 366 F. 2d 874 (CA 5th 1966) ("The term "mere change in identity or form obviously refers to a situation which represents a mere change in form as opposed to a change in substance…. Under such circumstances, there is a change of corporate vehicles but not a change in substance."

RECEIVED by MSC 8/30/2021 2:05:19 PM

Tribunal on remand to reinstate the credits and provide Taxpayer with an additional refund for tax year's 2008-2010 of $4,133,300.

Respectfully Submitted,

OTTENWESS, TAWEEL & SCHENK PLC

By: /s/Thomas P. Bruetsch
Thomas P. Bruetsch (P57473)
535 Griswold, Suite 850
Detroit, Michigan 48226
(313) 965-2121
TBruetsch@OttenwessLaw.com

Dated: December 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2018, I electronically filed the foregoing paper with the Clerk of the Court using the TrueFiling system which will send notification of such filing to the attorneys of record.

By: /s/Diane Sutherland
OTTENWESS, TAWEEL & SCHENK, PLC

Dated: December 4, 2018

RECEIVED by MCOA 12/4/2018 12:53:18 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

COMERICA INCORPORATED AND SUBSIDIARIES
Disclosure Statement
Taxable Year Ended: 12/31/07
EIN: [redacted]

STATEMENT PURSUANT TO SECTION 1.368-3(a) by COMERICA BANK [redacted], A CORPORATION A PARTY TO A REORGANIZATION.

Effective October 31, 2007, Comerica Bank [redacted] was reorganized under IRC Section 368(a)(1)(F), a mere change in identity, form or place of organization of one corporation. The resulting new corporation is Comerica Bank [redacted]. Accordingly, pursuant to provisions of IRC Section 381(b), the taxable year for Comerica Bank continues uninterrupted.

File:\2007\Disclosure\1.368-3 Reorg disclosure.doc

RECEIVED by MSC 8/30/2021 2:05:19 PM

COMERICA BANK

CHARTER NO. 3187-26

AMENDED AND RESTATED ARTICLES OF ASSOCIATION

1. NAME AND AUTHORITY

Comerica Bank, a Texas banking association (the "Bank"), pursuant to the provisions of Section 32.008 of the Texas Finance Code and Section 21.056 of the Texas Business Organizations Code, hereby adopts restated articles of association which accurately copy the articles of association and all amendments thereto that are in effect to date and as further amended by such restated articles of association as hereinafter set forth and which contain no other change in any provision thereof.

2. ADOPTION OF AMENDED AND RESTATED ARTICLES

The articles of association of the Bank are amended by the restated articles of association as follows:

a. ARTICLE FOURTH is being rescinded and replaced by the new ARTICLE FOURTH.

3. PRIOR ARTICLES OF ASSOCIATION SUPERSEDED BY AMENDMENT AND RESTATEMENT

Each such amendment made by the restated articles of association has been effected in conformity with the provisions of the Texas Finance Code, the Texas Business Organizations Code, the articles of association of the Bank and the Bylaws of the Bank, and such restated articles of association and each such amendment made by the restated articles of association were duly adopted by the shareholder of the Bank on the 16th day of October, 2007.

4. ADOPTION

The number of shares outstanding was 500; the number of shares entitled to vote on the restated articles of association as so amended was 500; the number of shares voted for such restated articles as so amended was 500; and the number of shares voted against such restated articles as so amended was 0.

5. TEXT OF RESTATED ARTICLES OF ASSOCIATION

The articles of association and all amendments and supplements thereto are hereby superseded by the restated articles of association which accurately copy the entire text thereof and as amended as set forth as Exhibit A hereto.

RECEIVED by MSC 8/30/2021 2:05:19 PM

6. **EXCHANGE, RECLASSIFICATION OR CANCELLATION OF SHARES**

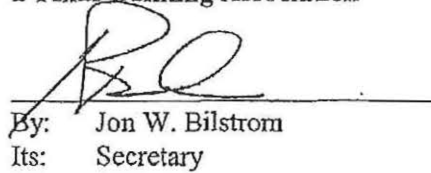
The amendment is being effectuated in connection with a merger involving the Bank. In connection with the merger, 500 shares of common stock will be cancelled and shares of common and preferred stock in the Bank will be issued to the shareholders of the entity merging into the Bank.

7. **CHANGE IN CAPITAL OR SURPLUS**

The amendment does effect a change in capital or surplus. Upon the effectiveness of the amendment and the merger referenced in the preceding paragraph, the capital and the surplus of the Bank will be the same as that of the entity that is merging into the Bank.

Dated the 16th day of October, 2007.

COMERICA BANK,
a Texas Banking Association



By: Jon W. Bilstrom
Its: Secretary

RECEIVED by MSC 8/30/2021 2:05:19 PM

Exhibit A

AMENDED AND RESTATED ARTICLES OF ASSOCIATION

OF

COMERICA BANK

Dallas, Texas

We, the undersigned, the majority of whom are residents of Texas, have this day and do by these presents voluntarily associate ourselves together for the purpose of establishing a state bank, and of incorporating and operating the same under and by virtue of the laws of the State of Texas, and to that end:

ARTICLE FIRST
NAME

The name of the bank shall be Comerica Bank.

ARTICLE SECOND
DURATION

The period of its duration is perpetual.

ARTICLE THIRD
POWERS

The bank organized hereby is to possess all powers granted by law to a state bank.

ARTICLE FOURTH
SHARES

The aggregate number of shares of capital stock that the Bank has authority to issue shall be 6,202,732 shares consisting of: (i) 5,852,732 shares of common stock, $10.00 par value per share ("Common Stock"), (ii) 300,000 shares of Series A Non-Cumulative Perpetual 5-Year Resettable Preferred Stock, no par value per share (the "Series A Preferred Stock"), and (iii) 50,000 shares of Series B Non-Cumulative Perpetual NC-20 Preferred Stock, no par value per share (the "Series B Preferred Stock"; together with the Common Stock and the Series A Preferred Stock, the "Capital Stock").

A statement of all designations, powers, preferences, and rights and the qualifications, limitations, and restrictions of each class of capital stock of the Bank is as follows:

RECEIVED by MSC 8/30/2021 2:05:19 PM

a. Series A Non-Cumulative Perpetual 5-Year Resettable Preferred Stock

Pursuant to the provisions of this Article Fourth(a), a series of preferred stock, no par value, is hereby designated as the Series A Non-Cumulative Perpetual 5-Year Resettable Preferred Stock, which Series A Preferred Stock shall consist of 300,000 shares, and which Series A Preferred Stock is hereby established and authorized to be issued, and in addition to such matters specified elsewhere in these Amended and Restated Articles of Association (the "Restated Articles") such Series A Preferred Stock shall have the following relative voting, distribution, dividend, liquidation and other rights, preferences and limitations:

(1) Designation and Amount. The liquidation preference of the Series A Preferred Stock shall be $1,000.00 per share ("Series A Liquidation Value").

(2) Rank. The Series A Preferred Stock shall, with respect to dividend rights and upon liquidation, winding up and dissolution, rank (i) senior to the Common Stock and to all classes and series of stock of the Bank now or hereafter authorized, issued or outstanding, which by their terms expressly provide that they rank junior to the Series A Preferred Stock as to dividend distributions and distributions upon the liquidation, winding up and dissolution of the Bank, or which do not specify their rank (collectively with the Common Stock, the "Series A Junior Securities"); (ii) on a parity with the Series B Preferred Stock and each other class of capital stock or series of preferred stock issued by the Bank after the date hereof, the terms of which specifically provide that such class or series will rank on a parity with the Series A Preferred Stock as to dividend distributions and distributions upon the liquidation, winding up and dissolution of the Bank (collectively including the Series B Preferred Stock referred to as "Series A Parity Securities"); and (iii) junior to each other class of capital stock or other series of preferred stock issued by the Bank after the date hereof, the terms of which specifically provide that such class or series will rank senior to the Series A Preferred Stock as to dividend distributions and distributions upon the liquidation, winding up and dissolution of the Bank (collectively referred to as "Series A Senior Securities").

(3) Dividends. Dividends are payable on the Series A Preferred Stock as follows:

(A) The holders of shares of the Series A Preferred Stock in preference to the Series A Junior Securities shall be entitled to receive, out of funds legally available for that purpose, and when, as, and if declared by the Board of Directors of the Bank, dividends payable in cash at the annual rate (based on a 360 day year at twelve 30-day months and the actual number of days) equal to the then current Adjusted CMT Rate (as defined below) of the Series A Liquidation Value per share of the Series A Preferred Stock.

(B) The Adjusted CMT Rate for the period from the Series A Issue Date (if the Series A Issue Date is a date prior to June 30, 2005) through and including June 30, 2005 will be 6.47%. Thereafter, the Adjusted CMT

RECEIVED by MSC 8/30/2021 2:05:19 PM

Rate will change to the then current Adjusted CMT Rate on July 1, 2005, and on July 1 every five years thereafter (but never greater than 11%). The Adjusted CMT Rate for each five-year period will be determined by the Bank on the second Business Day immediately preceding the first day of such period (each, a "CMT Determination Date"). The "Adjusted CMT Rate" means the CMT Rate determined as provided below plus 0.25% (but the Adjusted CMT Rate shall never be greater than 11%).

The "CMT Rate" for any CMT Determination Date will be the rate equal to:

(i) the weekly average interest rate of U.S. Treasury securities having an index maturity of five years for the week that ends immediately before the week in which the relevant CMT Determination Date falls, as such rate appears on page "7052" on Telerate (or such other page as may replace the 7052 page on that service or any successor service) under the heading "....Treasury Constant Maturities...Federal Reserve Board Release H.15...Mondays Approximately 3:45 p.m."

(ii) If the applicable rate described in clause (i) above is not displayed on Telerate page 7052 at 3:00 p.m., New York City time, on the relevant CMT Determination Date, then the CMT Rate will be the Treasury constant maturity rate applicable to a five-year index maturity for the weekly average as published in H.15 (519).

(iii) If the applicable rate described in clause (ii) above does not appear in H.15 (519) at 3:00 p.m., New York City time, on the relevant CMT Determination Date, then the CMT Rate will be the Treasury constant maturity rate, or other U.S. Treasury rate, applicable to a five-year index maturity with reference to the relevant CMT Determination Date, that:

(a) is published by the Federal Reserve or the Treasury; and

(b) is determined by the Bank to be comparable to the applicable rate formerly displayed on Telerate page 7052 and published in H.15 (519).

(iv) If the rate described in clause (iii) above does not appear at 3:00 p.m., New York City time, on the relevant CMT Determination Date, then the CMT Rate will be the yield to maturity of the arithmetic mean of the secondary market offered rates for Treasury notes having an original maturity of approximately five years and a remaining term to maturity of not less than four years, and

RECEIVED by MSC 8/30/2021 2:05:19 PM

in a representative amount, as of approximately 3:30 p.m., New York City time, on the relevant CMT Determination Date, as quoted by three primary U.S. government securities dealers in New York City selected by the Bank. In selecting these offered rates, the Bank will request quotations from five primary dealers and will disregard the highest quotation – or, if there is equality, one of the highest – and the lowest quotation – or, if there is equality, one of the lowest. Treasury notes are direct, non-callable, fixed rate obligations of the U.S. government.

(v) If the Bank is unable to obtain three quotations of the kind described in clause (iv) above, the CMT Rate will be the yield to maturity of the arithmetic mean of the secondary market offered rates for Treasury notes with an original maturity longer than five years and a remaining term to maturity closest to five years, and in a representative amount, as quoted by three primary U.S. government securities dealers in New York City selected by the Bank. In selecting these offered rates, the Bank will request quotations from five primary dealers and will disregard the highest quotation – or, if there is equality, one of the highest – and the lowest quotation – or, if there is equality, one of the lowest. If two Treasury notes with an original maturity longer than five years have remaining terms to maturity that are equally close to five years, the Bank will obtain quotations for the Treasury note with the shorter remaining term to maturity.

(vi) If fewer than five but more than two primary dealers are quoting offered rates as described above in clause (v), then the CMT Rate for the relevant CMT Determination Date will be based on the arithmetic mean of the offered rates so obtained, and neither the highest nor the lowest of those quotations will be disregarded.

(vii) If two or fewer primary dealers are quoting offered rates as described above in clause (v), the CMT Rate in effect for the new Series A Dividend Period will be the CMT Rate in effect for the prior Series A Dividend Period.

Absent manifest error, the Bank's determination of the CMT Rate and the Adjusted CMT Rate will be final and binding.

(C) Dividends on the Series A Preferred Stock shall be non-cumulative. Dividends not paid on any Series A Dividend Payment Date shall not accumulate thereafter. Dividends, if and when declared, shall be payable in arrears in cash on each Series A Dividend Payment Date of each year with respect to the Series A Dividend Period ending on the day immediately prior to such Series A Dividend Payment Date at the current

RECEIVED by MSC 8/30/2021 2:05:19 PM

Adjusted CMT Rate to holders of record at the close of business on the applicable Series A Record Date; provided that dividends payable on the Series A Preferred Stock on the Series A Dividend Payment Date immediately following the first quarterly Series A Dividend Period following the Series A Issue Date (and any dividend payable for a period less than a full quarterly period) shall be prorated for the period and computed on the basis of a 360-day year of twelve 30-day months and the actual number of days in such Series A Dividend Period; provided, further, that dividends payable on the Series A Preferred Stock on the Series A Dividend Payment Date immediately following the Series A Issue Date shall include any unpaid dividends accumulated since the immediately preceding CFI Series A Preferred payment date on the CFI Series A Preferred as of the Series A Time of Exchange as contemplated in Article III(a)(7)(E) of the Restated Articles of Incorporation of Comerica Financial Incorporated. Dividends on such Series A Preferred Stock shall be paid only in cash. If the Bank redeems the Series A Preferred Stock, the dividend that would otherwise be payable for the Series A Dividend Period ending on the date of redemption will be included in the redemption price of the shares redeemed and will not be separately payable.

(D) Holders of shares of Series A Preferred Stock shall not be entitled to any dividends in excess of full dividends declared, as herein provided, on the shares of Series A Preferred Stock. No interest, or sum of money in lieu of interest, shall be payable in respect of any dividend payment on the shares of Series A Preferred Stock that may be in arrears.

(E) (i) So long as any shares of Series A Preferred Stock are outstanding, no dividends (other than dividends or distributions paid in shares of, or options, warrants or rights to subscribe for or purchase shares of, Common Stock or Series A Junior Securities and other than as provided in clause (ii) below) shall be declared, paid or set aside for payment or other distribution upon the Common Stock, any Series A Junior Securities or any other Series A Parity Securities, nor shall any shares of the Common Stock, any other Series A Junior Securities or any Series A Parity Securities be redeemed, purchased or otherwise acquired for any consideration (or any moneys be paid to or set aside or made available for a sinking fund for the redemption of any shares of any such stock) by the Bank (except by conversion into or exchange for shares of, or options, warrants or rights to subscribe for or purchase, Common Stock or other Series A Junior Securities) unless, in each case, the full dividends on all outstanding shares of the Series A Preferred Stock shall have been declared and paid, when due, for the four consecutive Series A Dividend Periods terminating on or immediately prior to the date of payment in respect of such dividend, distribution, redemption, purchase or acquisition.

RECEIVED by MSC 8/30/2021 2:05:19 PM

(ii) When dividends for any Series A Dividend Period are not paid in full, as provided in clause (i) above, on the shares of the Series A Preferred Stock or any Series A Parity Securities, dividends may be declared and paid on any such shares for any dividend period therefor, but only if such dividends are declared and paid pro rata so that the amount of dividends declared and paid per share on the shares of Series A Preferred Stock and any other Series A Parity Securities, in all cases shall bear to each other the same ratio that the amount of unpaid dividends per share on the shares of the Series A Preferred Stock for such Series A Dividend Period and such other Series A Parity Securities for the corresponding dividend period bear to each other.

(F) (i) If, prior to eighteen (18) months after the CFI Series A Transfer Date, one or more amendments to the Internal Revenue Code of 1986, as amended (the "Code"), are enacted that reduce the percentage of the dividends-received deduction below seventy percent (70%) as specified in section 243(a)(1) of the Code or any successor provision (the "Dividends Received Percentage"), certain adjustments may be made in respect of the dividends payable by the Bank, and Series A Post Declaration Date Dividends (defined below) and Series A Retroactive Dividends (defined below) may become payable, as described in Articles Fourth(a)(3)(F)(ii), (iii), (iv) and (v) below.

(ii) The amount of each dividend payable (if declared) per share of Series A Preferred Stock for dividend payments made on or after the effective date of such change in the Code will be adjusted by multiplying the amount of the dividend payable pursuant to Article Fourth(a)(3) (before adjustment) by the following fraction (the "DRD Formula"), and rounding the result to the nearest cent (with one-half cent rounded up):

$$\frac{1-.35(1-.70)}{1-.35\,(1-\text{DRP})}$$

For the purpose of the DRD formula, "DRP" means the Dividends-Received Percentage (expressed as a decimal) applicable to the dividend in question; provided, however, that if the Dividends-Received Percentage applicable to the dividend in question shall be less than fifty percent (50%), then the DRP shall equal .50. No amendment to the Code, other than a change in the percentage of the dividends-received deduction set forth in section 243(a)(1) of the Code or any successor provision thereto, will give rise to an adjustment. Notwithstanding the foregoing provisions, if, with respect to any such amendment, the Bank receives either an unqualified opinion of nationally recognized independent tax counsel

RECEIVED by MSC 8/30/2021 2:05:19 PM

selected by the Bank or a private letter ruling or similar form of authorization from the Internal Revenue Service ("IRS") to the effect that such amendment does not apply to a dividend payable on the Series A Preferred Stock, then such amendment will not result in the adjustment provided for pursuant to the DRD Formula with respect to such dividend. The opinion referenced in the previous sentence shall be based upon the legislation amending or establishing the DRP or upon a published pronouncement of the IRS addressing such legislation.

(iii) If any such amendment to the Code is enacted after the dividend payable on a Series A Dividend Payment Date has been declared, the amount of the dividend payable on such Series A Dividend Payment Date will not be increased; instead, additional dividends (the "Series A Post Declaration Date Dividends") equal to the excess, if any, of (a) the product of the dividend paid by the Bank on such Series A Dividend Payment Date and the DRD Formula (where the DRD used in the DRD Formula would be equal to the greater of Dividends-Received Percentage applicable to the dividend in question and .50), over (b) the dividend paid by the Bank on such Series A Dividend Payment Date, will be payable if declared) to holders of Series A Preferred Stock on the record date applicable to the next succeeding Series A Dividend Payment Date in addition to any other amounts payable on such date.

(iv) If any such amendment to the Code is enacted and the reduction in the Dividends-Received Percentage retroactively applies to a Series A Dividend Payment Date as to which the Bank previously paid dividends on the Series A Preferred Stock (each, a "Series A Affected Dividend Payment Date"), the Bank will pay (if declared) additional dividends (the "Series A Retroactive Dividends") to holders of Series A Preferred Stock on the Series A Record Date applicable to the next succeeding Series A Dividend Payment Date (or, if such amendment is enacted after the dividend payable on such Series A Dividend Payment Date has been declared, to holders of Series A Preferred Stock on the Record Date following the date of enactment) in an amount equal to the excess of (a) the product of the dividend paid by the Bank on each Series A Affected Dividend Payment Date and the DRD Formula (where the DRP used in the DRD Formula would be equal to the greater of the Dividends-Received Percentage and .50 applied to each Series A Affected Dividend Payment Date), over (b) the sum of the dividends paid by the Bank on each Series A Affected Dividend Payment Date. The Bank only will make one payment of Series A Retroactive Dividends for any such amendment. Notwithstanding the foregoing provisions, if, with respect to any such amendment, the Bank receives either an

RECEIVED by MSC 8/30/2021 2:05:19 PM

unqualified opinion of nationally recognized independent tax counsel selected by the Bank or a private letter ruling or similar form of authorization from the IRS to the effect that such amendment does not apply to a dividend payable on a Series A Affected Dividend Payment Date for the Series A Preferred Stock, then such amendment will not result in the payment of Series A Retroactive Dividends with respect to such Series A Affected Dividend Payment Date. The opinion referenced in the previous sentence shall be based upon the legislation amending or establishing the DRP or upon a published pronouncement of the IRS addressing such legislation.

(v) No adjustment in the dividends payable by the Bank shall be made, and no Series A Post Declaration Date Dividends or Series A Retroactive Dividends shall be payable by the Bank, in respect of the enactment of any amendment to the Code eighteen (18) months or more after the CFI Series A Transfer Date that reduces the Dividends-Received Percentage. In the event that the amount of dividends payable per share of the Series A Preferred Stock is adjusted pursuant to the DRD Formula and/or Series A Post Declaration Date Dividends or Series A Retroactive Dividends are to be paid, the Bank will give notice of each such adjustment and, if applicable, any Series A Post Declaration Date Dividends and Series A Retroactive Dividends to the holders of Series A Preferred Stock. Unless the context otherwise requires, references to dividends in this sub-article (a) as to the Series A Preferred Stock include dividends as adjusted by the DRD Formula, Series A Post Declaration Date Dividends and Series A Retroactive Dividends. The Bank's calculation of the dividends payable, as so adjusted and as certified accurate as to calculation and reasonable as to method by the independent certified public accountants then regularly engaged by the Bank, shall be final and not subject to review absent manifest error.

(4) Liquidation Preference.

(A) In the event of any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Bank, the holders of shares of Series A Preferred Stock then outstanding shall be entitled to be paid out of the assets of the Bank available for distribution to its shareholders an amount in cash equal to the Series A Liquidation Value for each share outstanding, plus an amount in cash equal to all unpaid dividends thereon for the then current Series A Dividend Period, whether or not earned or declared, before any payment shall be made or any assets distributed to the holders of Series A Junior Securities. If the assets of the Bank are not sufficient to pay in full the liquidation payments payable to the holders of outstanding shares of the Series A Preferred Stock and any Series A Parity Securities, then the holders

RECEIVED by MSC 8/30/2021 2:05:19 PM

of all such shares shall share ratably in such distribution of assets in accordance with the amount which would be payable on such distribution if the amounts to which the holders of outstanding shares of Series A Preferred Stock and the holders of outstanding shares of such Series A Parity Securities are entitled were paid in full.

(B) For the purpose of this Article Fourth(a)(4), neither the voluntary sale, conveyance, exchange or transfer (for cash, shares of stock, securities or other consideration) of all or substantially all of the property or assets of the Bank, nor the merger, consolidation, reclassification or conversion of the Bank with or into any one or more other Persons shall be deemed to be a voluntary or involuntary liquidation, dissolution or winding up of the Bank, unless such voluntary sale, conveyance, exchange or transfer shall be in connection with a plan of liquidation, dissolution or winding up of the Bank.

(5) Redemption. Prior to June 30, 2005, the Series A Preferred Stock is not redeemable. On June 30, 2005 and on each of the fifth year (and integral multiple) anniversary dates thereafter, the Series A Preferred Stock shall be redeemable in whole or in part, at the option of the Bank, but with the consent of the Federal Reserve and any other appropriate regulatory authorities, if then required, for cash out of any source of funds legally available at a redemption price equal to 100% of the Series A Liquidation Value per share plus unpaid dividends thereon accumulated since the immediately preceding Series A Dividend Payment Date and any unpaid Series A Additional Amounts thereon (the "Series A Redemption Price"). If fewer than all the outstanding shares of Series A Preferred Stock are to be redeemed, the Bank will select those to be redeemed by lot or pro rata or by any other method as may be determined by the Board of Directors to be equitable.

The Series A Preferred Stock is not subject to any mandatory redemption, sinking fund or other similar provisions.

(6) Procedure for Redemption.

(A) Upon redemption of the Series A Preferred Stock pursuant to Article Fourth(a)(5) hereof, notice of such redemption (a "Series A Notice of Redemption") shall be mailed by first-class mail, postage prepaid, not less than thirty (30) days nor more than sixty (60) days prior to the Series A Redemption Date to the holders of record of the shares to be redeemed at their respective addresses as they shall appear in the records of the Bank; provided, however, that failure to give such notice or any defect therein or in the mailing thereof shall not affect the validity of the proceeding for the redemption of any shares so to be redeemed except as to the holder to whom the Bank has failed to give such notice or except as to the holder to whom notice was defective. Each such notice shall state: (i) the Series A Redemption Date; (ii) the Series A Redemption Price; (iii) the place or places

RECEIVED by MSC 8/30/2021 2:05:19 PM

where certificates for such shares are to be surrendered for payment of the Series A Redemption Price; and (iv) the CUSIP number, if any, of the shares being redeemed.

(B) If a Series A Notice of Redemption shall have been given as aforesaid and the Bank shall have deposited on or before the Series A Redemption Date a sum sufficient to redeem the shares of Series A Preferred Stock as to which a Series A Notice of Redemption has been given in trust with the Series A Transfer Agent with irrevocable instructions and authority to pay the Series A Redemption Price to the holders thereof, or if no such deposit is made, then on the Series A Redemption Date (unless the Bank shall default in making payment of the Series A Redemption Price), all rights of the holders thereof as shareholders of the Bank by reason of the ownership of such shares (except their right to receive the Series A Redemption Price thereof without interest) shall cease and terminate, and such shares shall no longer be deemed outstanding for any purpose. The Bank shall be entitled to receive, from time to time, from the Series A Transfer Agent the interest, if any, earned on such monies deposited with it, and the holders of any shares so redeemed shall have no claim to any such interest or any other interest payment. In case the holder of any shares of Series A Preferred Stock so called for redemption shall not claim the Series A Redemption Price for its shares within three (3) months after the date of redemption, the Series A Transfer Agent shall, upon demand, pay over to the Bank such amount remaining on deposit, and the Series A Transfer Agent shall thereupon be relieved of all responsibility to the holder of such shares, and such holder shall look only to the Bank for payment thereof.

(C) On the Business Day immediately preceding the Series A Redemption Date, the Bank shall irrevocably deposit with the Series A Transfer Agent sufficient funds for the payment of the Series A Redemption Price for the shares to be redeemed on the Series A Redemption Date and shall give the Series A Transfer Agent irrevocable instructions to apply such funds, and, if applicable and so specified in the instructions, the income and proceeds therefrom, to the payment of such Series A Redemption Price. The Bank may direct the Series A Transfer Agent to invest any such available funds, provided that the proceeds of any such investment will be available to the Series A Transfer Agent at the opening of business on such Series A Redemption Date.

(D) Except as otherwise expressly set forth in this Article Fourth(a)(6), nothing contained in this Article shall limit any legal right of the Bank to purchase or otherwise acquire any shares of Series A Preferred Stock at any price, whether higher or lower than the Series A Redemption Price, in private negotiated transactions, the over-the-counter market or otherwise.

RECEIVED by MSC 8/30/2021 2:05:19 PM

(7) Reacquired Shares. Shares of the Series A Preferred Stock that have been redeemed, purchased or otherwise acquired by the Bank are not subject to reissuance or resale as shares of Series A Preferred Stock and shall be cancelled.

(8) Voting Rights. Except as expressly set forth in this Article Fourth(a)(8), the Series A Preferred Stock shall be nonvoting and the holders of Series A Preferred Stock shall not have any right to vote as to any matter submitted to a vote or consent of the shareholders of the Bank.

(A) If at any time dividends on the Series A Preferred Stock or any other Series A Parity Securities shall not have been declared and paid in an amount equal to six (6) quarterly dividends, whether consecutive or not, the number of directors constituting the Board of Directors of the Bank shall be increased by two (2) and the holders of the Series A Preferred Stock and any other Series A Parity Securities with similar voting rights, voting together as a single class, shall be entitled to elect two (2) additional persons to fill such newly created directorships. The directors so elected shall meet the qualifications then set forth in the Bank's bylaws and any applicable statutory or regulatory qualifications. At such time as dividends for at least four (4) consecutive Series A Dividend Periods have been fully paid or set apart for full payment on the outstanding Series A Preferred Stock and any other Series A Parity Securities with similar voting rights, the rights of such holders to vote as provided in this Article Fourth(a)(8)(A) shall cease, subject to renewal from time to time upon the same terms and conditions. For clarification, the foregoing provisions of this Article Fourth(a)(8)(A) and any comparable provisions of any other Series A Parity Securities are not intended to operate to require the number of directors constituting the Board of Directors of the Bank to be increased by more than two (2) nor to permit the holders of the Series A Preferred Stock and Series A Parity Securities to elect more than two (2) additional persons to serve as directors of the Bank under any circumstances.

During any period when the holders of the Series A Preferred Stock and any other Series A Parity Securities have the right to vote as a class for directors as provided above, the directors so elected by the holders of the Series A Preferred Stock and any other Series A Parity Securities with similar voting rights shall continue in office until their successors shall have been elected or until termination of the right of the holders of the Series A Preferred Stock and any other Series A Parity Securities to vote as a class for directors. For purposes of the foregoing, the holders of the Series A Preferred Stock and any other Series A Parity Securities shall vote in proportion to their respective liquidation preference of the shares of such stock held by them.

(B) With respect to any right of the holders of shares Series A Preferred Stock to vote on any matter, whether such right is created by this Article Fourth(a)(8), by applicable law or otherwise, no holder of any share of

RECEIVED by MSC 8/30/2021 2:05:19 PM

Series A Preferred Stock shall be entitled to vote, and no share of Series A Preferred Stock shall be deemed to be outstanding for the purpose of voting or determining the number of shares required to constitute a quorum, if prior to or concurrently with a determination of shares entitled to vote or of shares deemed outstanding for quorum purposes, as the case may be, funds sufficient for the redemption of such shares are irrevocably deposited with the Series A Transfer Agent and a Series A Notice of Redemption has been given by the Bank or an Affiliate thereof to the holders of the Series A Preferred Stock.

(9) Series A Additional Amounts.

(A) If any distributions on the Series A Preferred Stock with respect to any fiscal year are not eligible for the dividends received deduction under section 243 of the Code because of insufficient current or accumulated earnings and profits, as determined for federal income tax purposes ("Qualifying Distribution"), the Bank shall, within 120 days after the end of such fiscal year, provide notice thereof to the Series A Transfer Agent. The Series A Transfer Agent will mail a copy of such notice to each Qualified Investor at the address specified in the records of the Series A Transfer Agent as promptly as practicable after its receipt of such notice from the Bank. The Bank shall, within fifteen (15) days after such notice is given to the Series A Transfer Agent, pay to the Series A Transfer Agent out of funds legally available therefor an amount equal to the aggregate Series A Additional Amount. The Series A Transfer Agent shall distribute to each Qualified Investor the Series A Additional Amount to which such Qualified Investor is entitled with respect to each Qualifying Distribution received by such Qualified Investor during such fiscal year. A "Qualified Investor" for purposes of this Article Fourth(a) is a holder of record of shares of Series A Preferred Stock during such fiscal year who was entitled to receive a Qualifying Distribution during any fiscal year.

(B) "Series A Additional Amount" shall mean payment with respect to a Qualifying Distribution of an amount which, when taken together with such Qualifying Distribution, would cause the net yield in dollars (after federal income tax consequences and treating, for purposes of calculating net yield in dollars, that portion of the Qualifying Distribution otherwise treated as a return of capital as capital gain received upon the taxable sale or exchange of Series A Preferred Stock) from the aggregate of both the Qualifying Distribution and the Series A Additional Amount to be equal to the net yield in dollars (after federal income tax consequences) that would have been realized if the amount of the aggregate Qualifying Distribution treated as a return of capital had instead been treated as a dividend for federal income tax purposes. Such Series A Additional Amount shall be calculated without consideration being given to the time value of money, assuming the Series A Additional Amount is subject to tax as ordinary income, and using

RECEIVED by MSC 8/30/2021 2:05:19 PM

the maximum marginal corporate federal tax rate applicable to ordinary income and capital gains, as the case may be.

(10) Definitions. For the purposes of sub-Article Fourth(a) of the Restated Articles, the following terms shall have the meanings indicated:

"Adjusted CMT Rate" has the meaning set forth in Article Fourth(a)(3)(B) hereof.

"Affiliate" has the meaning set forth in Rule 501(b) of the Securities Act of 1933, as amended.

"Bank" means Comerica Bank, a Texas banking association.

"Business Day" means a day on which the New York Stock Exchange is open for trading and which is not a day on which banking institutions in the State of Texas are authorized or required by law or executive order to close.

"CFI Series A Transfer Date" means the first date on which shares of CFI Series A Preferred are beneficially owned by any Person other than the Bank or any of its Affiliates.

"CFI Series A Preferred" means the Series A Non-Cumulative Perpetual 5-Year Resettable Preferred -Stock, no par value per share, of Comerica Financial Incorporated, a Michigan corporation.

"CMT Determination Date" has the meaning set forth in Article Fourth(a)(3)(B) hereof.

"CMT Rate" has the meaning set forth in Article Fourth(a)(3)(B) hereof.

"Code" has the meaning set forth in Article Fourth(a)(3)(F)(i).

"Dividends Received Percentage" has the meaning set forth in Article Fourth(a)(3)(F)(i) hereof.

"DRD Formula" has the meaning set forth in Article Fourth(a)(3)(F)(ii) hereof.

"DRP" has the meaning set forth in Article Fourth(a)(3)(F)(ii) hereof.

"Federal Reserve" means the Board of Governors of the Federal Reserve, or its successors.

"H.15 (519)" means the weekly statistical release entitled "Statistical Release H.15 (519)," or any successor publication, published by the Federal Reserve.

"IRS" has the meaning set forth in Article Fourth(a)(3)(F)(ii) hereof.

RECEIVED by MSC 8/30/2021 2:05:19 PM

"Person" means any individual, firm, corporation or other entity and shall include any successor (by merger or otherwise) of such entity.

"Qualified Investor" has the meaning set forth in Article Fourth(a)(9)(A) hereof.

"Qualifying Distribution" has the meaning set forth in Article Fourth(a)(9)(A) hereof.

"Series A Additional Amount" has the meaning set forth in Article Fourth(a)(9)(B) hereof.

"Series A Affected Dividend Payment Date" has the meaning set forth in Article Fourth(a)(3)(F)(iv) hereof.

"Series A Dividend Payment Date" means the first day of each January, April, July and October of each year.

"Series A Dividend Period" is the period from a Series A Dividend Payment Date to, but excluding, the next succeeding Series A Dividend Payment Date.

"Series A Issue Date" means the first date on which shares of Series A Preferred Stock are issued.

"Series A Junior Securities" has the meaning set forth in Article Fourth(a)(2) hereof.

"Series A Liquidation Value" has the meaning set forth in Article Fourth(a)(1) hereof.

"Series A Notice of Redemption" has the meaning set forth in Article Fourth(a)(6)(A) hereof.

"Series A Parity Securities" has the meaning set forth in Article Fourth(a)(2) hereof.

"Series A Post Declaration Date Dividends" has the meaning set forth in Article Fourth(a)(3)(F)(iii) hereof

"Series A Record Date" means the fifteenth day of the month immediately preceding the month in which the applicable Series A Dividend Payment Date occurs.

"Series A Redemption Date" means the applicable date for redemption as specified in the Series A Notice of Redemption.

"Series A Redemption Price" has the meaning set forth in Article Fourth(a)(5) hereof.

RECEIVED by MSC 8/30/2021 2:05:19 PM

"Series A Retroactive Dividends" has the meaning set forth in Article Fourth(a)(3)(F)(iv) hereof.

"Series A Senior Securities" has the meaning set forth in Article Fourth(a)(2) hereof.

"Series A Transfer Agent" means a bank or trust company as may be appointed from time to time by the Board of Directors of the Bank, or a committee thereof, to act as transfer agent, paying agent and registrar of the Series A Preferred Stock.

"Treasury" means the U.S. Department of the Treasury.

(11) Reservation of Series A Preferred Stock. The Series A Preferred Stock is reserved exclusively for issuance by the Bank in exchange for shares of CFI Series A Preferred to effect a Series A Exchange pursuant to the terms of Article III(a)(7) of the Restated Articles of Incorporation of Comerica Financial Incorporated and the Series A Preferred Stock may not be otherwise issued by the Bank.

(12) No Preemptive Rights. Holders of Series A Preferred Stock shall not have any preemptive rights as to Series A Preferred Stock or any other class or series of capital stock of the Bank.

(b) Series B Non-Cumulative Perpetual NC-20 Preferred Stock.

Pursuant to the provisions of this Article Fourth(b), a series of Preferred Stock, no par value, is hereby designated as the Series B Non-Cumulative Perpetual NC-20 Preferred Stock, which Series B Preferred Stock shall consist of 50,000 shares, and which Series B Preferred Stock is hereby established and authorized to be issued, and in addition to such matters specified elsewhere in these Restated Articles such Series B Preferred Stock shall have the following relative voting, distribution, dividend, liquidation and other rights, preferences and limitations:

(1) Liquidation Preference. The liquidation preference of the Series B Preferred Stock shall be $1,000.00 per share ("Series B Liquidation Value").

(2) Rank. The Series B Preferred Stock shall, with respect to dividend rights and upon liquidation, winding up and dissolution, rank (i) senior to the Common Stock and to all classes and series of stock of the Bank now or hereafter authorized, issued or outstanding, which by their terms expressly provide that they rank junior to the Series B Preferred Stock as to dividend distributions and distributions upon the liquidation, winding up and dissolution of the Bank, or which do not specify their rank (collectively with the Common Stock, the "Series B Junior Securities"); (ii) on a parity with the Series A Preferred Stock and each other class of capital stock or series of preferred stock issued by the Bank after the date hereof, the terms of which specifically provide that such class or series will rank on a parity with the Series B Preferred Stock as to dividend distributions and distributions upon the

RECEIVED by MSC 8/30/2021 2:05:19 PM

liquidation, winding up and dissolution of the Bank (collectively including the Series A Preferred Stock referred to as "Series B Parity Securities"); and (iii) junior to each other class of capital stock or other series of preferred stock issued by the Bank after the date hereof, the terms of which specifically provide that such class or series will rank senior to the Series B Preferred Stock as to dividend distributions and distributions upon the liquidation, winding up and dissolution of the Bank (collectively referred to as "Series B Senior Securities").

(3) Dividends. Dividends are payable on the Series B Preferred Stock as follows:

(A) The holders of shares of the Series B Preferred Stock in preference to the Series B Junior Securities shall be entitled to receive, out of funds legally available for that purpose, and when, as, and if declared by the Board of Directors of the Bank, dividends payable in cash at the annual rate (based on a 360-day year of twelve 30-day months and the actual number of days) of 6.29% of the Series B Liquidation Value per share of the Series B Preferred Stock.

(B) Dividends on the Series B Preferred Stock shall be non-cumulative. Dividends not paid on any Series B Dividend Payment Date shall not accumulate thereafter. Dividends, if and when declared, shall be payable in arrears in cash on each Series B Dividend Payment Date with respect to the Series B Dividend Period ending on the day immediately prior to such Series B Dividend Payment Date at the applicable dividend rate per share to holders of record at the close of business on the applicable Series B Record Date; provided that dividends payable on the Series B Preferred Stock on the Series B Dividend Payment Date immediately following the first quarterly Series B Dividend Period following the Series B Issue Date (and any dividend payable for a period less than a full quarterly period) shall be prorated for the period and computed on the basis of a 360-day year of twelve 30-day months and the actual number of days in such Series B Dividend Period; provided, further, that dividends payable on the Series B Preferred Stock on the Series B Dividend Payment Date immediately following the Series B Issue Date shall include any unpaid dividends accumulated since the immediately preceding CFI Series B Preferred payment date on the CFI Series B Preferred as of the Series A Time of Exchange as contemplated in Article III(b)(7)(E) of the Restated Articles of Incorporation of Comerica Financial Incorporated. Dividends on such Series B Preferred Stock shall be paid only in cash. If the Bank redeems the Series B Preferred Stock, the dividend that would otherwise be payable for the Series B Dividend Period ending on the date of redemption will be included in the redemption price of the shares redeemed and will not be separately payable.

(C) Holders of shares of Series B Preferred Stock shall not be entitled to any dividends in excess of full dividends declared, as herein

RECEIVED by MSC 8/30/2021 2:05:19 PM

provided, on the shares of Series B Preferred Stock. No interest, or sum of money in lieu of interest, shall be payable in respect of any dividend payment on the shares of Series B Preferred Stock that may be in arrears.

(D) (i) So long as any shares of Series B Preferred Stock are outstanding, no dividends (other than dividends or distributions paid in shares of, or options, warrants or rights to subscribe for or purchase shares of, Common Stock or Series B Junior Securities and other than as provided in clause (ii) below) shall be declared, paid or set aside for payment or other distribution upon the Common Stock, any Series B Junior Securities or any other Series B Parity Securities, nor shall any shares of the Common Stock, any other Series B Junior Securities or any Series B Parity Securities be redeemed, purchased or otherwise acquired for any consideration (or any moneys be paid to or set aside or made available for a sinking fund for the redemption of any shares of any such stock) by the Bank (except by conversion into or exchange for shares of, or options, warrants or rights to subscribe for or purchase, Common Stock or other Series B Junior Securities) unless, in each case, the full dividends on all outstanding shares of the Series B Preferred Stock shall have been declared and paid, when due, for the four consecutive Series B Dividend Periods terminating on or immediately prior to the date of payment in respect of such dividend, distribution, redemption, purchase or acquisition.

(ii) When dividends for any Series B Dividend Period are not paid in full, as provided in clause (i) above, on the shares of the Series B Preferred Stock or any Series B Parity Securities, dividends may be declared and paid on any such shares for any dividend period therefor, but only if such dividends are declared and paid pro rata so that the amount of dividends declared and paid per share on the shares of Series B Preferred Stock and any other Series B Parity Securities, in all cases shall bear to each other the same ratio that the amount of unpaid dividends per share on the shares of the Series B Preferred Stock for such Series B Dividend Period and such other Series B Parity Securities for the corresponding dividend period bear to each other.

(E) (i) If, prior to eighteen (18) months after the CFI Series B Transfer Date, one or more amendments to the Internal Revenue Code of 1986, as amended (the "Code"), are enacted that reduce the percentage of the dividends-received deduction below seventy percent (70%) as specified in section 243(a)(1) of the Code or any successor provision (the "Dividends Received Percentage"), certain adjustments may be made in respect of the dividends payable by the Bank, and Series B Post Declaration Date Dividends (defined below) and Series B Retroactive Dividends (defined below) may become payable, as described in Articles Fourth(b)(3)(E)(ii), (iii), (iv) and (v) below.

RECEIVED by MSC 8/30/2021 2:05:19 PM

(ii) The amount of each dividend payable (if declared) per share of Series B Preferred Stock for dividend payments made on or after the effective date of such change in the Code will be adjusted by multiplying the amount of the dividend payable pursuant to Article Fourth(b)(3) (before adjustment) by the following fraction (the "DRD Formula"), and rounding the result to the nearest cent (with one-half cent rounded up):

$$\frac{1-.35(1-.70)}{1-.35\,(1\text{-DRP})}$$

For the purpose of the DRD formula, "DRP" means the Dividends-Received Percentage (expressed as a decimal) applicable to the dividend in question; provided, however, that if the Dividends-Received Percentage applicable to the dividend in question shall be less than fifty percent (50%), then the DRP shall equal .50. No amendment to the Code, other than a change in the percentage of the dividends-received deduction set forth in section 243(a)(1) of the Code or any successor provision thereto, will give rise to an adjustment. Notwithstanding the foregoing provisions, if, with respect to any such amendment, the Bank receives either an unqualified opinion of nationally recognized independent tax counsel selected by the Bank or a private letter ruling or similar form of authorization from the Internal Revenue Service ("IRS") to the effect that such amendment does not apply to a dividend payable on the Series B Preferred Stock, then such amendment will not result in the adjustment provided for pursuant to the DRD Formula with respect to such dividend. The opinion referenced in the previous sentence shall be based upon the legislation amending or establishing the DRP or upon a published pronouncement of the IRS addressing such legislation.

(iii) If any such amendment to the Code is enacted after the dividend payable on a Series B Dividend Payment Date has been declared, the amount of the dividend payable on such Series B Dividend Payment Date will not be increased; instead, additional dividends (the "Series B Post Declaration Date Dividends") equal to the excess, if any, of (a) the product of the dividend paid by the Bank on such Series B Dividend Payment Date and the DRD Formula (where the DRD used in the DRD Formula would be equal to the greater of Dividends-Received Percentage applicable to the dividend in question and .50), over (b) the dividend paid by the Bank on such Series B Dividend Payment Date, will be payable (if declared) to holders of Series B Preferred Stock on the record date applicable to the next succeeding Series B Dividend Payment Date in addition to any other amounts payable on such date.

RECEIVED by MSC 8/30/2021 2:05:19 PM

(iv) If any such amendment to the Code is enacted and the reduction in the Dividends-Received Percentage retroactively applies to a Series B Dividend Payment Date as to which the Bank previously paid dividends on the Series B Preferred Stock (each, a "Series B Affected Dividend Payment Date"), the Bank will pay (if declared) additional dividends (the "Series B Retroactive Dividends") to holders of Series B Preferred Stock on the Series B Record Date applicable to the next succeeding Series B Dividend Payment Date (or, if such amendment is enacted after the dividend payable on such Series B Dividend Payment Date has been declared, to holders of Series B Preferred Stock on the Record Date following the date of enactment) in an amount equal to the excess of (a) the product of the dividend paid by the Bank on each Series B Affected Dividend Payment Date and the DRD Formula (where the DRP used in the DRD Formula would be equal to the greater of the Dividends-Received Percentage and .50 applied to each Series B Affected Dividend Payment Date), over (b) the sum of the dividends paid by the Bank on each Series B Affected Dividend Payment Date. The Bank only will make one payment of Series B Retroactive Dividends for any such amendment. Notwithstanding the foregoing provisions, if, with respect to any such amendment, the Bank receives either an unqualified opinion of nationally recognized independent tax counsel selected by the Bank or a private letter ruling or similar form of authorization from the IRS to the effect that such amendment does not apply to a dividend payable on a Series B Affected Dividend Payment Date for the Series B Preferred Stock, then such amendment will not result in the payment of Series B Retroactive Dividends with respect to such Series B Affected Dividend Payment Date. The opinion referenced in the previous sentence shall be based upon the legislation amending or establishing the DRP or upon a published pronouncement of the IRS addressing such legislation.

(v) No adjustment in the dividends payable by the Bank shall be made, and no Series B Post Declaration Date Dividends or Series B Retroactive Dividends shall be payable by the Bank, in respect of the enactment of any amendment to the Code eighteen (18) months or more after the CFI Series B Transfer Date that reduces the Dividends-Received Percentage. In the event that the amount of dividends payable per share of the Series B Preferred Stock is adjusted pursuant to the DRD Formula and/or Series B Post Declaration Date Dividends or Series B Retroactive Dividends are to be paid, the Bank will give notice of each such adjustment and, if applicable, any Series B Post Declaration Date Dividends and Series B Retroactive Dividends to the holders of Series B Preferred Stock. Unless the context otherwise requires, references to dividends

RECEIVED by MSC 8/30/2021 2:05:19 PM

in this sub-Article (b) as to the Series B Preferred Stock include dividends as adjusted by the DRD Formula, Series B Post Declaration Date Dividends and Series B Retroactive Dividends. The Bank's calculation of the dividends payable, as so adjusted and as certified accurate as to calculation and reasonable as to method by the independent certified public accountants then regularly engaged by the Bank, shall be final and not subject to review absent manifest error.

(4) Liquidation Preference.

(A) In the event of any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Bank, the holders of shares of Series B Preferred Stock then outstanding shall be entitled to be paid out of the assets of the Bank available for distribution to its shareholders an amount in cash equal to the Series B Liquidation Value for each share outstanding, plus an amount in cash equal to all unpaid dividends thereon for the then current Series B Dividend Period, whether or not earned or declared, before any payment shall be made or any assets distributed to the holders of Series B Junior Securities. If the assets of the Bank are not sufficient to pay in full the liquidation payments payable to the holders of outstanding shares of the Series B Preferred Stock and any Series B Parity Securities, then the holders of all such shares shall share ratably in such distribution of assets in accordance with the amount which would be payable on such distribution if the amounts to which the holders of outstanding shares of Series B Preferred Stock and the holders of outstanding shares of such Series B Parity Securities are entitled were paid in full.

(B) For the purpose of this Article Fourth(b)(4), neither the voluntary sale, conveyance, exchange or transfer (for cash, shares of stock, securities or other consideration) of all or substantially all of the property or assets of the Bank, nor the merger, consolidation, reclassification or conversion of the Bank with or into any one or more other Persons shall be deemed to be a voluntary or involuntary liquidation, dissolution or winding up of the Bank, unless such voluntary sale, conveyance, exchange or transfer shall be in connection with a plan of liquidation, dissolution or winding up of the Bank.

(5) Redemption. Prior to September 30, 2020, the Series B Preferred Stock is not redeemable. On or after September 30, 2020, the Series B Preferred Stock shall be redeemable in whole or in part, at the option of the Bank, but with the consent of the Federal Reserve and any other appropriate regulatory authorities, if then required, for cash out of any source of funds legally available at a redemption price equal to 100% of the Series B Liquidation Value per share plus unpaid dividends thereon accumulated since the immediately preceding Series B Dividend Payment Date and any unpaid Series B Additional Amounts thereon (the "Series B

RECEIVED by MSC 8/30/2021 2:05:19 PM

Redemption Price"). If fewer than all the outstanding shares of Series B Preferred Stock are to be redeemed, the Bank will select those to be redeemed by lot or pro rata or by any other method as may be determined by the Board of Directors to be equitable.

The Series B Preferred Stock is not subject to any mandatory redemption, sinking fund or other similar provisions.

(6) Procedure for Redemption.

(A) Upon redemption of the Series B Preferred Stock pursuant to Article Fourth(b)(5) hereof, notice of such redemption (a "Series B Notice of Redemption") shall be mailed by first-class mail, postage prepaid, not less than thirty (30) days nor more than sixty (60) days prior to the Series B Redemption Date to the holders of record of the shares to be redeemed at their respective addresses as they shall appear in the records of the Bank; provided, however, that failure to give such notice or any defect therein or in the mailing thereof shall not affect the validity of the proceeding for the redemption of any shares so to be redeemed except as to the holder to whom the Bank has failed to give such notice or except as to the holder to whom notice was defective. Each such notice shall state: (i) the Series B Redemption Date; (ii) the Series B Redemption Price; (iii) the place or places where certificates for such shares are to be surrendered for payment of the Series B Redemption Price; and (iv) the CUSIP number, if any, of the shares being redeemed.

(B) If a Series B Notice of Redemption shall have been given as aforesaid and the Bank shall have deposited on or before the Series B Redemption Date a sum sufficient to redeem the shares of Series B Preferred Stock as to which a Series B Notice of Redemption has been given in trust with the Series B Transfer Agent with irrevocable instructions and authority to pay the Series B Redemption Price to the holders thereof, or if no such deposit is made, then on the Series B Redemption Date (unless the Bank shall default in making payment of the Series B Redemption Price), all rights of the holders thereof as shareholders of the Bank by reason of the ownership of such shares (except their right to receive the Series B Redemption Price thereof without interest) shall cease and terminate, and such shares shall no longer be deemed outstanding for any purpose. The Bank shall be entitled to receive, from time to time, from the Series B Transfer Agent the interest, if any, earned on such monies deposited with it, and the holders of any shares so redeemed shall have no claim to any such interest or any other interest payment. In case the holder of any shares of Series B Preferred Stock so called for redemption shall not claim the Series B Redemption Price for its shares within three (3) months after the date of redemption, the Series B Transfer Agent shall, upon demand, pay over to the Bank such amount remaining on deposit, and the Series B Transfer Agent shall thereupon be

RECEIVED by MSC 8/30/2021 2:05:19 PM

relieved of all responsibility to the holder of such shares, and such holder shall look only to the Bank for payment thereof.

(C) On the Business Day immediately preceding the Series B Redemption Date, the Bank shall irrevocably deposit with the Series B Transfer Agent sufficient funds for the payment of the Series B Redemption Price for the shares to be redeemed on the Series B Redemption Date and shall give the Series B Transfer Agent irrevocable instructions to apply such funds, and, if applicable and so specified in the instructions, the income and proceeds therefrom, to the payment of such Series B Redemption Price. The Bank may direct the Series B Transfer Agent to invest any such available funds, provided that the proceeds of any such investment will be available to the Series B Transfer Agent at the opening of business on such Series B Redemption Date.

(D) Except as otherwise expressly set forth in this Article Fourth(b)(6), nothing contained in this Article shall limit any legal right of the Bank to purchase or otherwise acquire any shares of Series B Preferred Stock at any price, whether higher or lower than the Series B Redemption Price, in private negotiated transactions, the over-the-counter market or otherwise.

(7) Reacquired Shares. Shares of the Series B Preferred Stock that have been redeemed, purchased or otherwise acquired by the Bank are not subject to reissuance or resale as shares of Series B Preferred Stock and shall be cancelled.

(8) Voting Rights. Except as expressly set forth in this Article Fourth(a)(8), the Series B Preferred Stock shall be nonvoting and the holders of Series B Preferred Stock shall not have any right to vote as to any matter submitted to a vote or consent of the shareholders of the Bank.

(A) If at any time dividends on the Series B Preferred Stock or any other Series B Parity Securities shall not have been declared and paid in an amount equal to six (6) quarterly dividends, whether consecutive or not, the number of directors constituting the Board of Directors of the Bank shall be increased by two (2) and the holders of the Series B Preferred Stock and any other Series B Parity Securities with similar voting rights, voting together as a single class, shall be entitled to elect two (2) additional persons to fill such newly created directorships. The directors so elected shall meet the qualifications then set forth in the Bank's bylaws and any applicable statutory or regulatory qualifications. At such time as dividends for at least four (4) consecutive Series B Dividend Periods have been fully paid or set apart for full payment on the outstanding Series B Preferred Stock and any other Series B Parity Securities with similar voting rights, the rights of such holders to vote as provided in this Article Fourth(b)(8)(A) shall cease, subject to renewal from time to time upon the same terms and conditions. For

RECEIVED by MSC 8/30/2021 2:05:19 PM

clarification, the foregoing provisions of this Article Fourth(b)(8)(A) and any comparable provisions of any other Series B Parity Securities are not intended to require the number of directors constituting the Board of Directors of the Bank to be increased by more than two (2) nor to permit the holders of the Series B Preferred Stock and Series B Parity Securities to elect more than two (2) additional persons to serve as directors of the Bank under any circumstances.

During any period when the holders of the Series B Preferred Stock and any other Series B Parity Securities have the right to vote as a class for directors as provided above, the directors so elected by the holders of the Series B Preferred Stock and any other Series B Parity Securities with similar voting rights shall continue in office until their successors shall have been elected or until termination of the right of the holders of the Series B Preferred Stock and any other Series B Parity Securities to vote as a class for directors. For purposes of the foregoing, the holders of the Series B Preferred Stock and any other Series B Parity Securities shall vote in proportion to their respective liquidation preference of the shares of such stock held by them.

(B) With respect to any right of the holders of shares Series B Preferred Stock to vote on any matter, whether such right is created by this Article Fourth(b)(8), by applicable law or otherwise, no holder of any share of Series B Preferred Stock shall be entitled to vote, and no share of Series B Preferred Stock shall be deemed to be outstanding for the purpose of voting or determining the number of shares required to constitute a quorum, if prior to or concurrently with a determination of shares entitled to vote or of shares deemed outstanding for quorum purposes, as the case may be, funds sufficient for the redemption of such shares are irrevocably deposited with the Series B Transfer Agent and a Series B Notice of Redemption has been given by the Bank or an Affiliate thereof to the holders of the Series B Preferred Stock.

(9) Series B Additional Amounts.

(A) If any distributions on the Series B Preferred Stock with respect to any fiscal year are not eligible for the dividends received deduction under section 243 of the Code because of insufficient current or accumulated earnings and profits, as determined for federal income tax purposes ("Qualifying Distribution"), the Bank shall, within 120 days after the end of such fiscal year, provide notice thereof to the Series B Transfer Agent. The Series B Transfer Agent will mail a copy of such notice to each Qualified Investor at the address specified in the records of the Series B Transfer Agent as promptly as practicable after its receipt of such notice from the Bank. The Bank shall, within fifteen (15) days after such notice is given to the Series B Transfer Agent, pay to the Series B Transfer Agent out of funds legally available therefor an amount equal to the aggregate Series B Additional

RECEIVED by MSC 8/30/2021 2:05:19 PM

Amount. The Series B Transfer Agent shall distribute to each Qualified Investor the Series B Additional Amount to which such Qualified Investor is entitled with respect to each Qualifying Distribution received by such Qualified Investor during such fiscal year. A "Qualified Investor" for purposes of this Article Fourth(b) is a holder of record of shares of Series B Preferred Stock during such fiscal year who was entitled to receive a Qualifying Distribution during any fiscal year.

(B) "Series B Additional Amount" shall mean payment with respect to a Qualifying Distribution of an amount which, when taken together with such Qualifying Distribution, would cause the net yield in dollars (after federal income tax consequences and treating, for purposes of calculating net yield in dollars, that portion of the Qualifying Distribution otherwise treated as a return of capital as capital gain received upon the taxable sale or exchange of Series B Preferred Stock) from the aggregate of both the Qualifying Distribution and the Series B Additional Amount to be equal to the net yield in dollars (after federal income tax consequences) that would have been realized if the amount of the aggregate Qualifying Distribution treated as a return of capital had instead been treated as a dividend for federal income tax purposes. Such Series B Additional Amount shall be calculated without consideration being given to the time value of money, assuming the Series B Additional Amount is subject to tax as ordinary income, and using the maximum marginal corporate federal tax rate applicable to ordinary income and capital gains, as the case may be.

(10) Definitions. For the purposes of sub-Article Fourth(b) of the Restated Articles, the following terms shall have the meanings indicated:

"Affiliate" has the meaning set forth in Rule 501(b) of the Securities Act of 1933, as amended.

"Bank" means Comerica Bank, a Texas banking association.

"Business Day" means a day on which the New York Stock Exchange is open for trading and which is not a day on which banking institutions in the State of Texas are authorized or required by law or executive order to close.

"CFI Series B Transfer Date" means the first date on which shares of CFI Series B Preferred are beneficially owned by any Person other than the Bank or any of its Affiliates.

"CFI Series B Preferred" means the Series B Non-Cumulative Perpetual NC-20 Preferred Stock, no par value per share, of Comerica Financial Incorporated, a Michigan corporation.

"Code" has the meaning set forth in Article Fourth(b)(3)(E)(i).

RECEIVED by MSC 8/30/2021 2:05:19 PM

"Dividends Received Percentage" has the meaning set forth in Article Fourth(b)(3)(E)(i) hereof.

"DRD Formula" has the meaning set forth in Article Fourth(b)(3)(E)(ii) hereof.

"DRP" has the meaning set forth in Article Fourth(b)(3)(E)(ii) hereof.

"Federal Reserve" means the Board of Governors of the Federal Reserve, or its successors.

"IRS" has the meaning set forth in Article Fourth(b)(3)(E)(ii) hereof.

"Person" means any individual, firm, Bank or other entity and shall include any successor (by merger or otherwise) of such entity.

"Qualifying Distribution" has the meaning set forth in Article Fourth(b)(9)(A) hereof.

"Qualified Investor" has the meaning set forth in Article Fourth(b)(9)(A) hereof.

"Series B Additional Amount" has the meaning set forth in Article Fourth(b)(9)(B) hereof.

"Series B Affected Dividend Payment Date" has the meaning set forth in Article Fourth(b)(3)(E)(iv) hereof.

"Series B Dividend Payment Date" means the first day of each January, April, July and October of each year.

"Series B Dividend Period" is the period from a Series B Dividend Payment Date to, but excluding, the next succeeding Series B Dividend Payment Date.

"Series B Issue Date" means the first date on which shares of Series B Preferred Stock are issued.

"Series B Junior Securities" has the meaning set forth in Article Fourth(b)(2) hereof.

"Series B Liquidation Value" has the meaning set forth in Article Fourth(b)(1) hereof.

"Series B Notice of Redemption" has the meaning set forth in Article Fourth(b)(6) hereof.

"Series B Parity Securities" has the meaning set forth in Article Fourth(b)(2) hereof.

RECEIVED by MSC 8/30/2021 2:05:19 PM

"Series B Post Declaration Date Dividends" has the meaning set forth in Article Fourth(b)(3)(E)(iii) hereof.

"Series B Record Date" means the fifteenth day of the month immediately preceding the month in which the applicable Series B Dividend Payment Date occurs.

"Series B Redemption Date" means the applicable date for redemption as specified in the Series B Notice of Redemption.

"Series B Redemption Price" has the meaning set forth in Article Fourth(b)(5) hereof.

"Series B Retroactive Dividends" has the meaning set forth in Article Fourth(b)(3)(E)(iv) hereof.

"Series B Senior Securities" has the meaning set forth in Article Fourth(b)(2) hereof.

"Series B Transfer Agent" means a bank or trust company as may be appointed from time to time by the Board of Directors of the Bank, or a committee thereof, to act as transfer agent, paying agent and registrar of the Series B Preferred Stock.

"Treasury" means the U.S. Department of the Treasury.

The Series B Preferred Stock is reserved exclusively for issuance by the Bank in exchange for shares of CFI Series B Preferred of Comerica Financial Incorporated to effect a Series B Exchange pursuant to the terms of Article III(b)(7) of the Restated Articles of Incorporation of Comerica Financial Incorporated and the Series B Preferred Stock may not be otherwise issued by the Bank.

(12) No Preemptive Rights. Holders of Series B Preferred Stock shall not have any preemptive rights as to Series B Preferred Stock or any other class or series of capital stock of the Bank.

c. Common Stock

Each holder of Common Stock shall be entitled to one vote for each share of Common Stock held of record on all matters on which shareholders generally are entitled to vote. Subject to the provisions of law and the rights of the Series A Preferred Stock and the Series B Preferred Stock and any other class or series of stock having a preference as to dividends over the Common Stock then outstanding, dividends may be paid on the Common Stock at such times and in such amounts as the Board of Directors shall determine. Upon the dissolution, liquidation or winding up of the Bank, after any preferential amounts to be distributed to the holders of the Series A Preferred Stock and the Series B Preferred Stock and any other class or series of stock having a preference over the Common Stock then outstanding have been paid or declared and set apart for payment, the holders of the Common

RECEIVED by MSC 8/30/2021 2:05:19 PM

Stock shall be entitled to receive all the remaining assets of the Bank available for distribution to its shareholders ratably in proportion to the number of shares held by them, respectively.

ARTICLE FIFTH
PREEMPTIVE RIGHTS

No shareholder shall have preemptive rights to purchase additional shares of the capital stock of the bank.

ARTICLE SIXTH
VOTING

Directors shall be elected by majority vote. No shareholder of the bank shall have the right to cumulate his votes in the election of directors.

ARTICLE SEVENTH
ACTION BY LESS THAN UNANIMOUS WRITTEN CONSENT

Any action required or permitted to be taken at a meeting of the shareholders of the bank may be taken without a meeting without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holder or holders of shares having not less than the minimum number of votes that would be necessary to take such action at a meeting at which the holders of all shares entitled to vote on the action were present and voted.

ARTICLE EIGHTH
CONSIDERATION RECEIVED FOR SHARES

The total consideration received by the bank for the initial issuance of shares is $5,000. All authorized shares have been subscribed and all subscriptions have been irrevocably paid in cash.

ARTICLE NINTH
POWER TO AMEND BYLAWS

Without limiting the power of the shareholders of the bank to amend or repeal the bank's bylaws or to adopt new bylaws, the Board of Directors shall have the power to amend or repeal the bank's bylaws and to adopt new bylaws.

ARTICLE TENTH
INITIAL HOME OFFICE

The street address of the initial home office of the bank shall be 1717 Main St., Dallas, Texas 75201. The Board of Directors may establish and maintain a branch office at any location on prior written approval of the banking commissioner.

RECEIVED by MSC 8/30/2021 2:05:19 PM

ARTICLE ELEVENTH
INITIAL DIRECTORS

The number of directors constituting the initial Board of Directors is five (5) and the names and addresses of the persons who are to serve as directors until the first annual meeting of the shareholders, or until their successors are elected and qualified are:

Elizabeth S. Acton	1601 Elm Street, 4th Floor, Dallas, Texas 75201
Ralph W. Babb, Jr.	1601 Elm Street, 4th Floor, Dallas, Texas 75201
John R. Beran	500 Woodward Avenue, Detroit, Michigan 48226
Joseph J. Buttigieg, III	500 Woodward Avenue, Detroit, Michigan 48226
Dale E. Greene	2560 Dallas Parkway, Plano, TX 75093

The number of directors may hereafter be increased or decreased as provided in the bank's bylaws.

ARTICLE TWELFTH
LIMITATION OF LIABILITY

To the fullest extent permitted by applicable law, a director of the bank shall not be personally liable to the bank or its shareholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for a breach of the director's duty of loyalty to the bank or its shareholders; (ii) for acts or omissions not in good faith that (a) constitute a breach of duty of the director to the bank, or (b) involve gross negligence, intentional or willful misconduct or a knowing violation of the law; (iii) a transaction from which the director received an improper benefit, regardless of whether the benefit resulted from an action taken within the scope of the person's duties; or (iv) an act or omission for which the liability of the director is provided by an applicable statute. If applicable laws or regulations are hereafter amended to authorize corporate action further limiting or eliminating the personal liability of directors, then the liability of each director of the bank shall be limited or eliminated to the full extent permitted by law as so amended from time to time.

IRS Publication

EMPLOYER IDENTIFICATION NUMBER

Understanding Your EIN

RECEIVED by MSC 8/30/2021 2:05:19 PM

RECEIVED by MSC 8/30/2021 2:05:19 PM

This publication provides general information on Employer Identification Numbers (EINs). The topics included are:

- *What is an EIN*
- *Information by type of business entity*
- *When you need a new EIN*
- *How to apply for an EIN*
- *How to complete Form SS-4*
- *Where to apply for an EIN*
- *How to avoid common problems*

Table of Contents

What is an EIN? 2
Special Rules Regarding Entity Classification Elections 2
Information by Type of Business Entity....2
Sole Proprietorship 3
Corporation 4
Partnership 5
Estate 7
Trust 7
Employee Plans 9
Exempt Organizations 10
Limited Liability Company (LLC) 12
Employment and Excise Taxes 13
Employment Taxes 13
Excise Taxes 14
How to Apply for an EIN 14
Apply Online 14
Apply by Fax 15
Apply by Mail....15
How to Complete Form SS-4, Application for an EIN 15
Sole Proprietor/Individual....16
Corporation....17
Partnership 19
Trust 20
GNMA POOLS (Governmental National Mortgage Association) 21
Estate....22
Plan Administrators 23
Employee Plans 24
Exempt Organizations 25
Bankruptcy (Individual) 27
Bankruptcy (Corporation or Partnership) 28
EFTPS (Electronic Federal Tax Payment System) 28
Where to Apply for an EIN (Mail or Fax):....29
Avoiding Common EIN Problems....30

RECEIVED by MSC 8/30/2021 2:05:19 PM

What is an EIN?

An Employer Identification Number (EIN) is a nine-digit number that IRS assigns in the following format: XX-XXXXXXX. It is used to identify the tax accounts of employers and certain others who have no employees. However, for employee plans, an alpha (for example, P) or the plan number (e.g., 003) may follow the EIN. The IRS uses the number to identify taxpayers that are required to file various business tax returns. EINs are used by employers, sole proprietors, corporations, partnerships, non-profit associations, trusts, estates of decedents, government agencies, certain individuals, and other business entities. Use your EIN on all of the items that you send to the IRS and the Social Security Administration (SSA).

Caution: An EIN is for use in connection with your business activities only. Do not use your EIN in place of your social security number (SSN).

Effective May 21, 2012, to ensure fair and equitable treatment for all taxpayers, the Internal Revenue Service will limit Employer Identification Number (EIN) issuance to one per responsible party per day. This limitation is applicable to all requests for EINs whether online or by fax or mail. We apologize for any inconvenience this may cause.

You should have only one EIN for the same business entity. If you have more than one EIN and are not sure which one to use, call the Business and Specialty Tax Line at 1-800-829-4933 (TTY/TDD users can call 1-800-829-4059). Provide the numbers that you have, the name and address to which each was assigned, and the address of your main place of business. The IRS will tell you which number to use.

If you do not have your EIN by the time your return is due, write "Applied For" and the date that you applied for it in the space shown for the number.

Special Rules Regarding Entity Classification Elections

There are special rules and procedures for classification elections made on Form 8832, Entity Classification Election. Those rules and procedures are not reflected in this publication. The results explained in this publication may be different when an entity classification election is involved. See the instructions for Form 8832 for further information regarding entity classification elections.

Information by Type of Business Entity

This section contains the following information:

- Definitions of various entity types
- Which forms each entity type may file
- When you need a new EIN
- When you don't need a new EIN

RECEIVED by MSC 8/30/2021 2:05:19 PM

Sole Proprietorship

Definition

A sole proprietorship is an unincorporated business that is owned by one individual. It is the simplest form of business organization to start and maintain. The business has no existence apart from you, the owner. Its liabilities are your personal liabilities and you undertake the risks of the business for all assets owned, whether or not used in the business. Include the income and expenses of the business on your own tax return. For more information on sole proprietorships, see Publication 334, Tax Guide for Small Businesses. If you are a farmer, see Publication 225, Farmer's Tax Guide.

Form(s):

Business profits or losses of a sole proprietorship are reported on Schedule C, Schedule C-EZ, or Schedule F of Form 1040, U.S. Individual Income Tax Return. A sole proprietor may also be required to file other returns (such as employment or excise tax returns).

You will need a new EIN if any of the following are true:

- You file bankruptcy under Chapter 7 (liquidation) or Chapter 11 (reorganization) of the Bankruptcy Code
- You incorporate
- You are a sole proprietor and take in partners and operate as a partnership
- You are establishing a pension, profit sharing, or retirement plan

You do not need a new EIN if any of the following are true:

- You change the name of your business
- You change your location or add locations (stores, plants, enterprises or branches of the entity)
- You operate multiple businesses (including stores, plants, enterprises or branches of the entity)

Note: If you are a sole proprietor who conducts business as a limited liability company (LLC), you do not need a separate EIN for the LLC, unless you are required to file employment or excise tax returns. A limited liability company is an entity formed under state law by filing articles of organization as an LLC. An LLC owned by one individual is automatically treated as a sole proprietorship for federal income tax purposes (referred to as an entity to be disregarded as separate from its owner). Report the business activities of the LLC on your Form 1040 using a Schedule C, Schedule C-EZ or Schedule F.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Corporation

Definition:

A corporation is defined as a legal entity or structure created under the authority of the laws of a state consisting of a person, or group of persons, who become shareholders. The entity's existence is considered separate and distinct from that of its members. Since a corporation is an entity in its own right, it is liable for its own debts and obligations. In forming a corporation, prospective shareholders transfer money, property, or both, for the corporation's capital stock.

The following businesses formed after 1996 are taxed as corporations:

- A business formed under a federal or state law that refers to it as a corporation, body corporate, or body politic
- A business formed under a state law that refers to it as a joint-stock company or joint-stock association
- An insurance company
- Certain banks
- A business wholly owned by a state or local government
- A business specifically required to be taxed as a corporation by the Internal Revenue Code
- Certain foreign businesses
- Any other business that elects to be taxed as a corporation. For example, a limited liability company (LLC) by filing Form 8832, Entity Classification Election. For more information, see the instructions for Form 8832.

Form(s):

Corporations usually file a Form 1120 series return, plus other returns that apply (such as employment or excise tax returns).

The Form 1120 series returns are as follows:

- Form 1118, Foreign Tax Credit-Corporation
- Form 1120, U.S. Corporation Income Tax Return
- Form 1120-C, U.S. Income Tax Return for Cooperative Associations
- Form 1120-F, U.S. Income Tax Return of a Foreign Corporation
- Form 1120-FSC, U.S. Income Tax Return of a Foreign Sales Corporation
- Form 1120-H, U.S. Income Tax Return for Homeowners Associations
- Form 1120-L, U.S. Life Insurance Company Income Tax Return
- Form 1120-ND, Return for Nuclear Decommissioning Funds and Certain Related Persons
- Form 1120-PC, U.S. Property and Casualty Insurance Company Income Tax Return
- Form 1120-POL, U.S. Income Tax Return for Certain Political Organizations
- Form 1120-REIT, U.S. Income Tax Return for Real Estate Investment Trusts

RECEIVED by MSC 8/30/2021 2:05:19 PM

- Form 1120-RIC, U.S. Income Tax Return for Regulated Investment Companies
- Form 1120S, U.S. Income Tax Return for an S Corporation
- Form 1120-SF, U.S. Income Tax Return for Designated Settlement Funds (Under section 468B)
- Form 1120-W, Estimated Tax for Corporations
- Form 1120-X, Amended U.S. Corporation Income Tax Return

You will need a new EIN if any of the following are true:

- You are a subsidiary of a corporation and currently use the parent's corporate EIN
- You become a subsidiary of a corporation
- The corporation becomes a partnership or a sole proprietorship
- You create a new corporation after a statutory merger
- You receive a new corporate charter

You will not need a new EIN if any of the following are true:

- You are a division of a corporation
- After a corporate merger, the surviving corporation uses its existing EIN
- A corporation declares bankruptcy. However, if a liquidating trust is established for a corporation that is in bankruptcy, an EIN for that trust is required. See Treasury Reg. § 301.7701-4(d).
- Your business name changes
- You change your location or add locations (stores, plants, enterprises or branches)
- You elect to be taxed as an S Corporation by filing Form 2553
- After a corporate reorganization, you only change identity, form, or place of organization
- The corporation is sold and the assets, liabilities and charters are obtained by the buyer

Partnership

Definition:

A partnership is the relationship existing between two or more persons who join together to carry on a trade or business. Each partner contributes money, property, labor or skill, and expects to share in the profits and losses of the business.

The term 'partnership' includes a limited partnership, syndicate, group, pool, joint venture, or other unincorporated organization, through or by which any business, financial operation, or venture is carried on.

An unincorporated organization with two or more members is generally classified as a partnership for federal tax purposes if its members carry on a trade, business, financial operation, or venture and divide its profits. However, a joint undertaking merely to share expenses is not a partnership. For example, co-ownership of property maintained and rented or leased is not a partnership unless the co-owners provide services to the tenants.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Husband and Wife Businesses – Sole Proprietorship or Partnership?

Many small businesses are operated by husband and wife, without incorporating or creating a formal partnership agreement. A husband and wife business may be a partnership, whether or not a formal partnership agreement is made. However, see the information below regarding legislation designed to reduce taxpayer burden for husband and wife businesses.

The Small Business and Work Opportunity Tax Act of 2007 (Public Law 110-28) provides that for tax years beginning after December 31, 2006, a qualified joint venture conducted by a husband and wife who file a joint return is not rated as a partnership for federal tax purposes. A qualified joint venture, for purposes of this provision, includes only businesses that are owned and operated by spouses as co-owners, and not in the name of a state law entity (including a general or limited liability company).

If a husband and wife materially participate as the only members of a jointly owned and operated business, and file a joint federal income tax return (Form 1040), they can elect for the business to be taxed as a qualified joint venture instead of a partnership. To make the election, all items of income, gain, loss, deduction, and credit must be divided between the spouses, in accordance with each spouse's interests in the venture, and reported on separate Schedules C or F as sole proprietors.

Spouses who meet these qualifications and require EINs should submit separate Forms SS-4 as sole proprietors. Do not apply for a joint EIN as a "Qualified Joint Venture".

> *Note:* If your spouse is your employee, not your partner, you must pay Social Security and Medicare taxes for him or her.

Form(s):

A partnership files Form 1065, U.S. Partnership Return of Income, plus other returns that apply (such as employment or excise tax returns).

You will need a new EIN if any of the following are true:

- You incorporate
- One partner takes over and operates as a sole proprietorship
- The partnership is terminated (no part of any business, financial operation, or venture of the partnership continues to be carried on by any of its partners in a partnership) and a new partnership is begun

You do not need a new EIN if any of the following are true:

- The partnership declares bankruptcy. However, if a liquidating trust is established for a partnership that is in bankruptcy, an EIN for that trust is required. See Treasury Reg. § 301.7701-4(d)
- The partnership name changes
- The location of the partnership changes or new locations are added.
- The partnership terminates under IRC Section 708(b)(1)(B). A partnership shall be considered terminated if within a 12-month period there is a sale or exchange of at least 50% of the total interest in partnership capital and profits to another partner. If the purchaser and remaining partners immediately contribute the properties to a new partnership, they can retain the old partnership EIN.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Estate

Definitions:

Estate: An estate is a legal entity created as the result of a person's death. The decedent's estate is a separate legal entity for federal tax purposes. An estate consists of real and/or personal property of the deceased person. The estate pays any debts owed by the decedent and then distributes the balance of the estate's assets to the beneficiaries of the estate. The estate exists until the final distribution of the assets is made to the heirs and other beneficiaries.

Fiduciary: A fiduciary is any person acting in a fiduciary capacity for any other person. A fiduciary for a decedent's estate can be an executor, administrator, personal representative, or person in possession of property of a decedent's estate. The primary duties of the fiduciary are to collect all the decedent's assets, pay the creditors, and distribute the remaining assets to the heirs or other beneficiaries.

Form(s):

- Estates file either Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, or
- Form 1041, U.S. Fiduciary Return of Income, plus other returns that apply (such as employment or excise tax returns)

You will need a new EIN if any of the following are true:

- A trust is created with estate funds. Such a trust is not simply a continuation of the estate.
- You represent an estate that operates a business after the owner's death.

You will not need a new EIN if any of the following are true:

- The administrator, personal representative, or executor changes
- The beneficiaries of an estate change

Trust

Definitions

Trust: A trust is an arrangement through which trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts. A trust is a legal entity created under state law and taxed under federal law. A trust may be created during an individual's lifetime (inter vivos) or at the time of his or her death under a will (testamentary). Trusts include guardianships, custodianships, conservatorships, receiverships, escrow accounts, Ginnie Mae (GNMA) and Fannie Mae (FNMA) pools.

Fiduciary/Trustee: A fiduciary is an individual or organization charged with the duty to act for the benefit of another. A trustee is a fiduciary. The trustee obtains legal title to the trust assets and is required to administer the trust on behalf of the beneficiaries according to the express terms and provisions of the trust agreement.

Beneficiary: A beneficiary is a person designated as a recipient of funds or other property under a trust or an estate.

Grantor: The grantor (also known as trustor, settlor, or creator) is the creator of the

RECEIVED by MSC 8/30/2021 2:05:19 PM

trust relationship and is generally the owner of the assets initially contributed to the trust. The grantor generally establishes, in the trust instrument, the terms and provisions of the trust relationship between the grantor, the trustee, and the beneficiary. The grantor may retain control over all or a portion of the trust, which may result in the grantor being subject to tax on the income from that portion of the trust.

Revocable/Irrevocable Trust: An irrevocable trust is a trust, which, by its terms, cannot be modified, amended, or revoked. For tax purposes, an irrevocable trust can be treated as a simple, complex, or grantor trust, depending on the powers listed in the trust instrument. A revocable trust may be revoked and is considered a grantor trust (IRC § 676). State law and the trust instrument establish whether a trust is revocable or irrevocable. If the trust instrument is silent on revocability, then most states consider the trust revocable.

Living Trust: A living person creates an inter vivos trust during that person's lifetime. An inter vivos trust can be established as revocable or irrevocable. An inter vivos trust can be a simple, complex, or grantor trust depending on the trust instrument.

Testamentary Trust: A testamentary trust is created by a will, which begins its existence upon the death of the person making the will, when property is transferred from the decedent's estate. Testamentary trusts are generally simple or complex trusts. A testamentary trust is irrevocable by definition, as it comes into being at the death of the grantor. A "trust under the will' is the same as a testamentary trust.

Conservatorship: A trust, not an estate, which is usually set up for an incompetent person.

Guardianship/Custodianship: A trust usually set up for a minor.

Form(s):

Form 1041 U.S. Fiduciary Return of Income, plus other returns that apply (such as employment tax returns).

You will need a new EIN if any of the following are true:

- A trust changes to an estate
- A living (inter vivos) trust changes to a testamentary trust
- The revocable trust changes to an irrevocable trust

You will not need a new EIN if any of the following are true:

- The trustee changes
- The grantor or beneficiary changes his or her name or address.

Note: Separate EINs are needed if one person is the grantor/maker of multiple trusts. For example, if you have a trust for each of your grandchildren, each trust must have a separate EIN and file a separate tax return. However, a single trust with several beneficiaries requires only one EIN.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Employee Plans

Definitions:

Employee Benefit Plan: An employee benefit plan is a permanent arrangement under which an employer provides retirement or health benefits for employees. Some of these include: cafeteria plans, defined benefit plans, and defined contribution plans. The employer/sponsor and/or the plan administrator file the applicable returns.

Plan Sponsor: The plan sponsor is the entity that establishes and maintains a benefits plan. The plan sponsor is usually an employer, but may also be an employee organization created for the purpose of offering benefits. If the plan is a "multi-employer plan," the committee or other entity that established the plan is considered the plan sponsor.

Plan Administrator: The plan administrator is the person or company who handles day-to-day details of operating a health benefit or pension plan, such as processing claims for benefits, employer and employee contributions, record-keeping, and reports. The administrator is usually identified in the plan creation documents.

> *Note:* If you are reporting withholding on pension distributions, be sure to be consistent in using the same name and EIN for all reporting and depositing of taxes, i.e. Forms 945, 1099-R, and 8109/EFTPS. Filing Form 945 with an incorrect name or EIN or failure to use the same name and EIN in all reporting and depositing of taxes may result in penalties and delays in processing your return.

Form(s):

Employee plans usually file Form 5500 series returns plus other returns that apply (such as employment or excise taxes). The major employee plan forms are listed below.

> *Note:* If the employer/sponsor entity already has an EIN, use that number on all Form 5500 series returns.

- (electronic) Form 5500-SF, Short Form Annual Return/Report of Small Benefit Plan
- Form 5500-C/R, Return/Report of Employee Benefit Plan (with fewer than 100 participants)
- Form 5500-EZ, Annual Return of One-Participant (Owners and Their Spouses) Pension Benefit Plan
- Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.
- Form 5304-SIMPLE, Savings Incentive Match Plan for Employees of Small Employers (SIMPLE) (Not Subject to the Designated Financial Institution Rules)
- Form 5305-SEP, Simplified Employee Pension-Individual Retirement Accounts Contribution Agreement
- Form 5305A-SEP, Salary Reduction and Other Elective Simplified Employee Pension-Individual Retirement Accounts Contribution Agreement
- Form 5305-SIMPLE, Savings Incentive Match Plan for Employees of Small

RECEIVED by MSC 8/30/2021 2:05:19 PM

Employers (SIMPLE) (for Use With a Designated Financial Institution)

- Form 5329, Additional Taxes Attributable to IRAs, Other Qualified Retirement Plans, Annuities, Modified Endowment Contracts, and MSAs
- Form 5330, Return of Excise Taxes Related to Employee Benefit Plans

Note: For more information on employee plans, visit the Retirement Plans Community located on the IRS website at **www.irs.gov**, or call 1-800-TAX FORM, and ask for Package 5500.

Exempt Organizations

Definitions:

Tax Exempt Organization: A tax exempt organization is a non-profit organization that is exempt from certain taxes because it is described under Section 501 of the Internal Revenue Code. Certain organizations are required to apply to the Internal Revenue Service for a determination letter that grants them formal tax exemption, while other organizations are treated as tax exempt as long as they are organized and operated under an applicable section of the Code.

IRC Section 501(c)(3) Organization: This is an organization that is organized and operated exclusively for one or more of the following purposes: charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition (but only if none of its activities involve providing athletic facilities or equipment), or the prevention of cruelty to animals. To qualify, the organization must be a corporation, community chest, fund, unincorporated association, or foundation. A trust is a fund or foundation and will qualify. However, an individual or a partnership will not qualify.

Organizations not required to apply for formal tax exempt status: Some organizations are treated as tax exempt under IRC Section 501(c)(3) without being required to file Form 1023, provided they are organized and operated appropriately. These include:

- Churches, interchurch organizations of local units of a church, conventions or associations of churches, or integrated auxiliaries of a church, such as a men's or women's organization, religious school, mission society, or youth group.
- Any organization (other than a private foundation) normally having annual gross-receipts of not more than $5,000.

Contributions to domestic 501(c)(3) organizations, except organizations testing for public safety, are generally deductible as charitable contributions on the donor's federal income tax return.

Private Foundation vs. Public Charity: Most organizations that are exempt from income tax under IRC Section 501(c)(3) are presumed to be private foundations, unless they notify the Internal Revenue Service within a specified period of time that they are not. In effect, the definition divides organizations into two classes, namely private foundations and public charities. There is an excise tax on the net investment income of most domestic private foundations. In addition, there are several other rules that apply.

See Publication 557 for a chart listing many other categories of exempt organizations.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Organizations seeking formal recognition of their exempt status must generally file one of the applications listed below with the Internal Revenue Service and must pay the required user fee. Requests for exemption under subsections other than 501(c)(3) must include Form 8718, User Fee for Exempt Organization Determination Letter Request. Requests should be sent to the address shown on Form 1023 and on Form 8718. To decide which application form listed below is needed for your organization, refer to Publication 557, Tax-Exempt Status for Your Organization.

- Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code
- Form 1024, Application for Recognition of Exemption Under Section 501(a) for Determination Under Section 120 of the Internal Revenue Code

  Note: All non-profit organizations must apply for an EIN before filing for exempt status.

All publications and forms mentioned above are available for download from the IRS website, **www.irs.gov**, or by calling our toll-free number 1-800-TAX-FORM.

Group Exemption Letter: A group exemption letter is a ruling or determination letter issued to a central organization recognizing, on a group basis, the exemption of subordinate organizations on whose behalf the central organization has applied for recognition of exemption. A central organization is an organization that has one or more subordinates under its control. A subordinate organization is a chapter, local, post, or unit of a central organization.

Public Disclosure of Forms 990: Exempt organization Forms 990 are required to be made available to the public. Procedures for obtaining this information are found in Publication 557, Tax-Exempt Status for Your Organization, and Form 4506A, Request for Public Inspection or Copy of Exempt or Political Organization. In addition, submitted Forms 990-N are made available on the IRS website, www.irs.gov.

Unrelated Business Income: Even though an organization is recognized as tax-exempt, it still may be liable for tax on its unrelated business income. Unrelated business income is income from a trade or business, regularly carried on, that is not substantially related to the charitable, educational, or other purpose that is the basis for the organization's exemption.

Form(s)

Exempt organizations usually file a Form 990 series return plus other returns that apply (such as employment or excise tax returns). The exempt organization forms are listed below:

- Form 990-N, e-Postcard
- Form 990, Return of Organizations Exempt From Income Tax
- Form 990-EZ, Short Form Return of Organization Exempt From Income Tax
- Form 990-BL, Information and Initial Excise Tax Return for Black Lung Benefit Trusts and Certain Related Persons
- Form 990-PF, Return of Private Foundation or Section 4947(a)(1) Charitable Trusts Treated as a Private Foundation
- Form 990-T, Exempt Organization Business Income Tax Return

RECEIVED by MSC 8/30/2021 2:05:19 PM

- Form 4720, Return of Certain Excise Taxes on Charities and Other Persons under Chapters 41 and 42 of the Internal Revenue Code
- Form 5578, Annual Certification of Racial Nondiscrimination for a Private School Exempt from Federal Income Tax

Annual information returns: Except for private foundations, which must file Form 990-PF annually regardless of gross receipts, an exempt organization that normally has $25,000 or more in gross receipts must file an exempt organization information return Form 990, Return of Organization Exempt from Income Tax, whether or not the organization has formal tax exempt status. Most organizations not required to file a Form 990/Form 990-EZ or Form 990-PF are required to submit a Form 990-N, e-Postcard, for tax years that began after December 31, 2006. Organizations exempted from this requirement are listed in Publication 557, Tax Exempt Status for Your Organization. Special filing rules apply to supporting organizations described in IRC section 509(a)(3). These rules can also be found in Publication 557.

Limited Liability Company (LLC)

Definition: A limited liability company (LLC) is an entity formed under state or foreign law by filing articles of organization as an LLC. Unlike a partnership, none of the members of an LLC are personally liable for its debts.

LLC Tax Classification: Treas. Reg. Section 301.7701-3 provides guidance on classification for limited liability companies. Generally, if the business is an unincorporated business entity, and there are two or more owners, the entity can choose to be a partnership or a corporation. If an unincorporated business entity has only one owner, it can either elect to be a corporation or the entity can be disregarded. If an individual owns a disregarded entity, it is treated as a sole proprietorship. If a corporation owns a disregarded entity, it is treated as a division or branch of the corporation. See Form 8832, Entity Classification Election, for more details.

> *Note:* While a single member entity, that does not elect corporate status, will default to a disregarded status for some federal tax purposes, it will not be disregarded for all federal tax purposes. For federal employment taxes (after January 1, 2009) and certain excise taxes (after January 1, 2008) it will be treated as a separate entity.

Single Member LLC:

A single member LLC generally has the following choices:

(1) File Form 8832 to be taxed as a corporation

(2) If qualified, file Form 2553, Election by a Small Business Corporation (Under Section 1362 of the Internal Revenue Code), to be taxed as an S corporation

(3) Be taxed (by default) as a disregarded entity

- If the single member is an individual, the LLC will be taxed as a sole proprietorship
- If the single member is a business entity, the LLC will be taxed as a division of the corporation

Multiple Member LLC:

A multiple member LLC generally has the following choices:

RECEIVED by MSC 8/30/2021 2:05:19 PM

(1) File Form 8832 to be taxed as a corporation

(2) If qualified, file Form 2553 to be taxed as an S-Corporation

(3) Be taxed (by default) as a partnership

Note: A husband and wife, who are owners of an LLC, and share in the profits of such, can file as a single member if they reside in a Community Property State (Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, or Wisconsin). Publication 555, Community Property, contains additional information on Community Property laws.

If you are organized as a limited liability company and require an EIN, please refer to the instructions for Form SS-4 for information on completing the form or apply online using the Internet EIN application available at www.irs.gov and select "Limited Liability Company" as the type of entity you are establishing.

Employment and Excise Taxes

Employment Taxes

Definition:

If you have one or more employees, you will generally be required to withhold federal income tax from their wages. You also may be subject to social security and Medicare taxes under the Federal Insurance Contributions Act (FICA) and federal unemployment tax under the Federal Unemployment Tax Act (FUTA).

If you are required to report employment taxes or give tax statements to employees or annuitants, you need an employer identification number (EIN).

Form(s):

Social security, Medicare, and withheld income tax are usually reported on Form 941, Employer's QUARTERLY Federal Tax Return. The exceptions are:

- If your employees are agricultural workers, file Form 943, Employer's Annual Tax Return for Agricultural Employees.
- If your yearly employment taxes will be $1,000 or less (average annual wages of $4,000 or less) you may file Form 944, Employer's ANNUAL Federal Tax Return, rather than Form 941, Employer's QUARTERLY Federal Tax Return. Do not file Form 944 unless the IRS has notified you of this requirement.
- If your employee(s) does household work in your private, non-farm home (for example, child care, housekeeping, or gardening work) attach Schedule H, Household Employment Taxes, to your Form 1040.

  Note: Employers must report and pay required employment taxes for household domestic employees on Schedule H attached to Forms 1040 or 1040A. While withheld amounts no longer have to be deposited on a monthly basis, employers do need an employer identification number (EIN) to include on Form W-2 and Schedule H.

Non-payroll items, including backup withholding and withholding for pensions, annuities, IRAs, and gambling winnings are reported on Form 945, Annual Return of Withheld Federal Income Tax. The return is due January 31 of the following year.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Report Federal Unemployment Tax on Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return.

Excise Taxes

Definition:

Excise tax is a tax on the manufacture, sale, or consumption of a specific commodity. Examples are: fuel taxes, environmental taxes, and communications and air transportation taxes.

Form(s):

Most excise taxes are reported on Form 720, Quarterly Federal Excise Tax Return. Certain excise taxes are reported on different forms and to other organizations. Those excise taxes and forms are:

- Form 2290, Highway Use Tax
- Form 730, Tax on Wagering
- Form 11-C, Occupational Tax Return and Application for Registry-Wagering
- TTB Form 5300.26, Firearms and Ammunition Excise Tax Return, and Special Tax Registration and Return, TTB Form 5630.5

How to Apply for an EIN

You can apply for an EIN online, by fax, or mail depending on how soon you need to use the EIN

Apply Online

Note: This is a free service offered by the Internal Revenue Service at **www.irs.gov**. Beware of websites on the internet that charge for this free service.

The internet is the preferred method to use when applying for an EIN. Visit the IRS website at **www.irs.gov** (keyword "EIN") and check out the Interview-style online EIN application. The application includes embedded help topics and hyperlinked keywords and definitions so separate instructions aren't needed. The information you submit is validated during the online session. Once you've completed the application, you will receive your EIN immediately. You can then download, save, and print your confirmation notice. (This feature is not available to Third Party Designees.) The online application is fast, free, and user-friendly!

The application is available during the following hours:

Monday - Friday 7:00 a.m. to 10:00 p.m. Eastern time

The online application is available for all entities whose principal business, office or agency, or legal residence (in the case of an individual), is located in the United States or U.S. Territories. Additionally, the principal officer, general partner, grantor, owner, trustor etc. must have a valid Taxpayer Identification Number (Social Security Number, Employer Identification Number, or Individual Taxpayer Identification Number) in order to use the online application.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Apply by Fax

You can receive your EIN by fax within four (4) business days. Fax your completed Form SS-4 to the fax number listed for your state under "Where to Apply" in this publication. The fax number is available 24 hours a day, 7 days a week. Be sure to provide your fax number so that an IRS representative can fax the EIN back to you. Do not fax an application and also call the EIN toll-free number for the same entity because a duplicate EIN may be assigned. By using this method, you are authorizing IRS to fax your EIN without a cover sheet.

Apply by Mail

You can receive your EIN by mail within about four (4) weeks. Ensure that the Form SS-4 contains all of the required information and mail the application to the address listed under "Where to Apply" in this publication. An EIN will be assigned and mailed to you.

How to Complete Form SS-4, Application for an EIN

If you choose to apply online, you will not need a Form SS-4. Otherwise, you can download Form SS-4 and separate instructions by accessing the IRS website at **www.irs.gov** or call 1-800-TAX-FORM to request the form and instructions by mail. You can also visit your local IRS office.

Special Characters In Your Business Name:

The only special characters IRS systems can accept in a business name are: 1) alpha (A-Z), 2) numeric (0-9), 3) hyphen (-) and 4) ampersand (&). If the legal name of your business includes anything other than those listed above, you will need to decide how best to enter your business name into the online EIN application or on Form SS-4.

If your legal name contains a symbol or character such as a "plus" symbol (+) or a period (.) you could spell out the symbol and leave a space. Jones.com could be submitted as Jones Dot Com or Jones Com. The backward (\) or forward (/) slash can be substituted with a hyphen (-). If your business name contains an apostrophe ('), drop the apostrophe and do not leave a space.

Third Party Designee:

No matter what method you use to apply, if a third party is making the application for an EIN, the taxpayer must authorize the third party to apply for and receive the EIN.

- A Third Party Designee (TPD) must complete his/her identifying information at the bottom of the Form SS-4.
- The Form SS-4 must be signed by the taxpayer for the TPD authorization to be valid.
- The Form SS-4 must be mailed or faxed to the appropriate Internal Revenue Service campus. See "Where to Apply" in this publication.

The designee's authority terminates at the time the EIN is assigned and released to the designee.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Read the instructions for Form SS-4.

After reading the instructions, find your entity type (sole proprietor, corporation, partnership, etc.).

> *Note:* This is not an election for a tax classification. See Form 8832, Entity Classification Election, for tax classification information.

The Internal Revenue Service has become aware that nominee individuals are being listed as principal officers, general partners, grantors, owners, and trustors in the Employer Identification Number (EIN) application process. A nominee is not one of these people. Rather, nominees are temporarily authorized to act on behalf of entities during the formation process. The use of nominees in the EIN application process prevents the IRS from gathering appropriate information on entity ownership, and has been found to facilitate tax non-compliance by entities and their owners.

The IRS does not authorize the use of nominees to obtain EINs. All EIN applications (mail, fax, phone, electronic) must disclose the name and Taxpayer Identification Number (SSN, ITIN, or EIN) of the true principal officer, general partner, grantor, owner or trustor. This individual or entity, which the IRS will call the "responsible party," controls, manages, or directs the applicant entity and the disposition of its funds and assets.

Follow the line-by-line instructions below to complete Form SS-4 for your entity type.

Sole Proprietor/Individual

Line 1 Enter your first name, middle initial and last name exactly as it appears on your social security card. Do not use abbreviations or nicknames. Do not enter your business name on line 1.

Line 2 Enter your trade name or "doing business as" name, if any.

Line 3 If you have a person designated to receive all of your IRS correspondence, enter that person's name on this line. Otherwise, leave blank.

Line 4a-b Enter your mailing address. If Line 3 (Care-Of) is completed, enter the address for the designated person.

Lines 5a-b Enter the location address only if it is different from Lines 4a-b mailing address. Do not enter a PO Box here.

Line 6 Enter the county and state where your principal business is located.

Line 7a-b N/A

Line 8a N/A

Line 8b N/A

Line 8c N/A

Line 9a Check the "Sole Proprietor" box and enter your SSN (or ITIN) in the space provided.

Line 9b N/A

RECEIVED by MSC 8/30/2021 2:05:19 PM

Line 10 Check only one box. If your reason for applying is not specifically listed, check the "Other" box and enter the reason.

Line 11 Enter the date you first started or acquired your business.

Line 12 Enter the last month of your accounting year or tax year (generally December (12) calendar year for a sole proprietor).

Line 13 Enter the highest number of employees expected in the next 12 months (Agricultural, Household or Other). If none, enter 0 and skip to Line 16.

Line 14 If you expect your employment tax liability to be $1,000 or less in a full calendar year and want to file Form 944 annually instead of Forms 941 quarterly check "Yes". (To file Forms 941, check "No".)

Line 15 If your business has (or will have) employees enter the date the business began or will begin to pay wages (Month, Date, Year.) If you have no employees, leave blank. If the applicant is a withholding agent, enter date income will first be paid to nonresident alien.

Line 16 Check the one box that best describes the type of business you operate, i.e. construction, real estate, etc. If none of the boxes apply, check the "Other" box and specify type of business. Do not leave blank or enter "none", or "N/A".

Line 17 Describe the applicant's principal line of business in more detail than Line 16 such as, type of merchandise sold, specific construction product produced or service provided. Do not leave blank or enter "none" or "N/A".

Line 18 If the applicant shown on line one (1) ever applied for and received an EIN previously, check "yes". If "yes", enter previous EIN on the line.

Complete the Third Party Designee section only if you want to authorize the named individual to receive the EIN and answer questions about the completion of Form SS-4. You must also sign the application for the authorization to be valid.

Name and Title: Print your name and title.

Telephone Number: Enter the telephone number where we can reach you if we have questions about your application.

Signature: The sole proprietor must sign the application if the Third Party Designee section is completed.

Corporation

Line 1 Enter the corporate name as it appears on the corporate charter.

Line 2 Enter Doing Business as (DBA) name, only if different from Line 1.

Line 3 If you have a designated person to receive all of your IRS correspondence, enter that person's name on this line. If none, leave blank .

Line 4a-b Enter your mailing address. If Line 3 (Care-Of) is completed, enter the address for the designated person to receive the tax information.

Lines 5a-b Enter the business physical location, only if different from Lines 4a-b mailing address. Do not enter a PO Box here.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Line 6 Enter the county and state where principal business is located.

Line 7a Enter the first name, middle initial, and last name of responsible party. The responsible party will be a president, vice president or other principal officer of the corporation.

Line 7b Enter the SSN or ITIN of the responsible party shown on Line 7a.

Line 8a N/A

Line 8b N/A

Line 9 Check the "Corporation" box, then write on the line the form number that you intend to file (ex: 1120). If you entered "1120S" after the checkbox, you must file Form 2553. See the Instructions for Form 2553.

Line 9b Enter the state or foreign country where you were incorporated.

Line 10 If your reason for applying is not specifically listed, check the "Other" box and enter the reason.

Line 11 Enter the date you first started or acquired your business.

Line 12 Enter the last month of your accounting year or tax year.

Line 13 Enter the highest number of employees expected in the next 12 months (Agricultural, Household or Other). If none, enter 0 and skip to Line 16.

Line 14 If you expect your employment tax liability to be $1,000 or less in a full calendar year and want to file Form 944 annually instead of Forms 941 quarterly check "Yes". (To file Forms 941, check "No".)

Line 15 If your business has (or will have) employees enter the date the business began or will begin to pay wages (Month, Date, Year). If you have no employees, leave blank. If the applicant is a withholding agent, enter date income will first be paid to nonresident alien.

Line 16 Check one box that best describes the type of business you operate (i.e. construction, real estate, etc..) If none of the listed boxes applies, check the "Other" box and write your specific type of business. Do not leave blank or enter "none" or "N/A".

Line 17 Describe the applicant's principal line of business in more detail (such as, type of merchandise sold, specific construction work, product produced or service provided). Do not leave blank or enter "none" or "N/A".

Line 18 If the applicant shown on line one (1) ever previously applied for and received an EIN, check "yes". If "yes", enter previous EIN on the line.

Complete the Third Party Designee section only if you want to authorize the named individual to receive the EIN and answer questions about the completion of Form SS-4. You must also sign the application for the authorization to be valid.

Name and Title: Print your name and title.

Telephone Number: Enter the telephone number where we can reach you if we have questions about your application.

Signature: The president, vice president, or other principal officer must sign the application if the Third Party Designee section is completed.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Note: If you wish to elect S-corporation status, you must file Form 2553, Election by a Small Business Corporation.

Partnership

Line 1 Enter the name of the partnership as it appears in the partnership agreement.

Line 2 Enter trade name or "doing business as" name, if different from line 1.

Line 3 If you have a person designated to receive all of your IRS correspondence, enter that person's name on this line. If none, leave blank.

Lines 4a-b Enter your mailing address. If Line 3 (Care-Of) is completed, enter the address of the designated person.

Lines 5a-b Enter the business physical location only if different from Lines 4a-b. Do not enter PO Box here.

Line 6 Enter the county and state where principal business is located.

Line 7a Enter the first name, middle initial, last name of the responsible party. The responsible party is a general partner of the partnership.

Line 7b Enter the SSN, ITIN or EIN of the responsible party shown on Line 7a.

Line 8a N/A

Line 8b N/A

Line 8c N/A

Line 9a Check the "Partnership" box.

Line 9b N/A

Line 10 Check only one box. If your reason is not specifically listed, check the "Other" box and enter the reason.

Line 11 Enter the date you first started or acquired your business.

Line 12 Enter the last month of your accounting year or tax year.

Line 13 Enter the highest number of employees expected in the next 12 months (Agricultural, Household or Other). If none, enter 0 and skip to Line 16.

Line 14 If you expect your employment tax liability to be $1,000 or less in a full calendar year and want to file Form 944 annually instead of Forms 941 quarterly check "Yes". (To file Forms 941, check "No".)

Line 15 If your business has (or will have) employees enter the date the business began or will begin to pay wages (Month, Date, Year). If you have no employees leave blank. If the Applicant is a withholding agent, enter date income will first be paid to nonresident alien.

Line 16 Check one box that best describes the type of business you operate (i.e., construction, real estate, etc.). If none of the boxes apply, check the "Other" box and specify type of business. Do not leave blank or enter "none", or "N/A".

RECEIVED by MSC 8/30/2021 2:05:19 PM

Line 17 Describe the applicant's principal line of business in more detail (type of merchandise sold, specific construction work, product produced or service provided). Do not leave blank or enter "none" or "N/A".

Line 18 If the applicant shown on line one (1) ever applied for and received an EIN previously, check "yes". If "yes" enter previous EIN on the line.

Complete the Third Party Designee section only, if you want to authorize the named individual to receive the EIN and answer questions about the completion of Form SS-4. You must also sign the application for the authorization to be valid.

Name and Title: Print your name and title.

Telephone Number: Enter the telephone number where we can reach you if we have questions about your application.

Signature: A responsible and duly authorized member or officer having knowledge of the partnership's affairs must sign the application if the Third Party Designee section is completed.

Trust

Line 1 Enter the exact name of the trust as it appears on the trust instrument.

Line 2 N/A

Line 3 Enter the name of the trustee.

Line 4a-b Enter mailing address of the trustee, where all IRS correspondence will be mailed.

Lines 5a-b Enter the physical location of the trustee, only if different from Lines 4a-b mailing address.

Line 6 Enter the county and state where the trust is located.

Line 7a Enter the name of the responsible party. This will be the grantor, owner or trustor.

Line 7b Enter the SSN, ITIN or EIN of the person shown on Line 7a.

Line 8a N/A

Line 8b N/A

Line 8c N/A

Line 9a Check "Trust" and enter the SSN, ITIN, or EIN of the grantor.

Line 9b N/A

Line 10 Check the "Created a Trust" box.

Line 11 Enter the date the trust was funded.

Line 12 Enter the last month of your accounting year or tax year. Generally, a trust must adopt a calendar year, except for the following trusts: tax-exempt trusts, charitable trusts, and grantor-owned trusts.

Line 13 Enter the highest number of employees expected in the next 12 months (Agricultural, Household or Other). If none, enter 0 and skip to Line 16.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Line 14 If you expect your employment tax liability to be $1,000 or less in a full calendar year and want to file Form 944 annually instead of Forms 941 quarterly check "Yes". (To file Forms 941, check "No".)

Line 15 If your business has (or will have) employees enter the date the business began, or will begin, to pay wages (Month, Date, Year). If you have no employees leave blank. If the applicant is a withholding agent, enter date income will first be paid to nonresident alien.

Line 16 Check the "Finance & Insurance" box.

Line 17 Enter "Trust Administration".

Line 18 If the applicant shown on line one (1) ever applied for and received an EIN previously, check "yes". If "yes", enter previous EIN on the line.

Complete Third Party Designee section only if you want to authorize the named individual to receive the EIN and answer questions about the completion of Form SS-4. You must also sign the application for the authorization to be valid.

Name and Title: Print your name and title.

Telephone Number: Enter the telephone number where we can reach you if we have questions about your application.

Signature: The trustee or other authorized fiduciary must sign the application, if the Third Party Designee section is completed.

GNMA POOLS (Governmental National Mortgage Association)

Note: The EIN Stays with the "GNMA Pool" if it is traded from one financial institution to another.

Line 1 Enter the pool number. Do not enter leading zeros. For example, enter GNMA 00979 as GNMA 979

Line 2 N/A

Line 3 Enter the name of the trustee.

Line 4a-b Enter the mailing address. This is the address where all IRS correspondence will be sent.

Lines 5a-b Enter only if different from the mailing address.

Line 6 Enter the county and state where the GNMA Pool is located.

Line 7a-b N/A

Line 8a N/A

Line 8b N/A

Line 8c N/A

Line 9a Check "Trust" and enter the TIN of the grantor.

Line 9b N/A

Line 10 Check the "Other" box and enter "GNMA Pool".

RECEIVED by MSC 8/30/2021 2:05:19 PM

Line 11 Enter the date the "GNMA Pool" was created.

Line 12 Enter 12 for the last month of your accounting year.

Line 13 Enter the highest number of employees expected in the next 12 months (Agricultural, Household or Other). If none, enter 0 and skip to Line 16.

Line 14 If you expect your employment tax liability to be $1,000 or less in a full calendar year and want to file Form 944 annually instead of Forms 941 quarterly check "Yes". (To file Forms 941, check "No".) .

Line 15 If your business has (or will have) employees enter the date the business began or will begin to pay wages (Month, Date, Year). If you have no employees, leave blank.

Line 16 Check the "Finance & Insurance" box.

Line 17 Enter "GNMA".

Line 18 If the applicant entity shown on line one (1) ever applied for and received an EIN previously, check "yes". If "yes", enter previous EIN on the line.

Complete the Third Party Designee section only if you want to authorize the named individual to receive the EIN and answer questions about the completion of this form. You must also sign the application for the authorization to be valid.

Name and Title: Print your name and title of the fiduciary.

Telephone Number: Enter the telephone number where we can reach you if we have questions about your application.

Signature: The trustee or other authorized fiduciary must sign the application if the Third Party Designee Section is completed.

Estate

Line 1 Enter the first name, middle initial and last name of the decedent, followed by "Estate".

Line 2 N/A

Line 3 Enter the name of the executor, administrator, or other fiduciary.

Lines 4a-b Enter the mailing address. This is the address where all IRS correspondence will be sent.

Lines 5a-b Enter only if different from the mailing address on Lines 4a-b.

Line 6 Enter the county and state where the will is probated.

Line 7a-b N/A

Line 8a N/A

Line 8b N/A

Line 8c N/A

Line 9a Check "Estate" and enter the SSN of the decedent on the line provided.

Line 9b N/A

RECEIVED by MSC 8/30/2021 2:05:19 PM

Line 10 Check the "Other" box and enter "Estate Administration".

Line 11 Enter the date the estate was funded.

Line 12 Enter the last month of your accounting year or tax year.

Line 13 Enter the highest number of employees expected in the next 12 months (Agricultural, Household or Other). If none, enter 0 and skip to Line 16.

Line 14 If you expect your employment tax liability to be $1,000 or less in a full calendar year and want to file Form 944 annually instead of Forms 941 quarterly check "Yes". (To file Forms 941, check "No".)

Line 15 If the estate has (or will have) employees enter the date the estate will begin to pay wages (Month, Date, Year) If no employees, leave blank.

Line 16 Check the "Finance & Insurance" box.

Line 17 Enter "Estate Administration".

Line 18 If the applicant shown on line one (1) ever previously applied for and received an EIN, check "yes". If "yes" enter previous EIN on the line.

Complete the Third Party Designee section only if you want to authorize the named individual to receive the EIN and answer questions about the completion of this form. You must also sign the application for the authorization to be valid.

Name and Title: Print the name and title of the fiduciary.

Telephone Number: Enter the telephone number where we can reach you if we have questions about your application.

Signature: The fiduciary must sign the application if the Third Party Designee section is completed.

Note: If you use an estate to create a trust, the trust is considered a different entity type and a new EIN is needed.

Plan Administrators

Note: If the plan administrator already has an EIN, use that number. A new EIN is not needed.

Line 1 Enter the name of the plan administrator.

Line 2 N/A

Line 3 If you have a person designated to receive all of your IRS correspondence, enter that person's name on this line. If none, leave blank.

Line 4a-b Enter the mailing address. This is the address where all IRS correspondence will be sent.

Line 5a-b Enter only if different from Lines 4a-b mailing address.

Line 6 Enter the county and state where the employee plan is located.

Line 7a-b N/A

Line 8a N/A

Line 8b N/A.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Line 8c N/A.

Line 9a Check "Plan Administrator". If the plan administrator is an individual, enter the plan administrator's SSN or ITIN in the space provided. Otherwise enter the EIN.

Line 9b If you are a corporation, enter the state or foreign country where you were incorporated

Line 10 If your reason is not specifically listed, check the "Other" box and enter the reason.

Line 11 Enter the date you first started or acquired your business.

Line 12 Enter the last month of your accounting year or tax year. Enter the highest number of employees expected in the next 12 months.

Line 13 Enter the highest (Agricultural, Household or Other). If none, enter 0 and skip to Line 16.

Line 14 If you expect your employment tax liability to be $1,000 or less in a full calendar year and want to file Form 944 annually instead of Forms 941 quarterly check "Yes". (To file Forms 941, check "No".)

Line 15 If your business has (or will have) employees enter the date the business began or will begin to pay wages (Month, Date, Year.) If you have no employees leave blank. If the applicant is a withholding agent, enter date income will first be paid to nonresident alien.

Line 16 Check the "Finance & Insurance" box.

Line 17 Enter "Plan Administration".

Line 18 If the applicant shown on line one (1) ever previously applied for and received an EIN, check "yes:. If "yes", enter previous EIN on the line.

Complete the Third Party Designee section only if you want to authorize the named individual to receive the EIN and answer questions about the completion of this form. You must also sign the application for the authorization to be valid.

Name and Title: Print the plan administrator's name and title.

Telephone Number: Enter the telephone number where we can reach you if we have questions about your application.

Signature: A responsible and duly authorized member or officer with the knowledge of plan's affairs must sign if the Third Party Designee section is completed.

Employee Plans

Line 1 Enter the name of the plan.

Line 2 N/A

Line 3 Enter the name of the trustee.

Line 4a-b Enter the mailing address. This is the address where all IRS correspondence will be sent.

Lines 5a-b Enter only if different from the mailing address.

Line 6 Enter the county and state where the employee plan is located.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Line 7a-b Enter the name of responsible party for the plan and SSN, ITIN or EIN.

Line 8a N/A

Line 8b N/A

Line 8c N/A.

Line 9a Check "Other" and specify "Employee Plan".

Line 9b N/A

Line 10 Check "Created a Pension Plan".

Line 11 Enter the date you first started or acquired your Employee plan.

Line 12 Enter the last month of your accounting year or tax year.

Line 13 N/A

Line 14 N/A

Line 15 N/A

Line 16 Check the "Finance & Insurance" box.

Line 17 Enter "Employee Plan".

Line 18 If the applicant shown on line one (1) ever previously applied for and received an EIN, check "yes". If "yes", enter previous EIN on the line.

Complete the Third Party Designee section only if you want to authorize the named individual to receive the EIN and answer questions about the completion of this form. You must also sign the application for the authorization to be valid.

Name and Title: Print your name and title.

Telephone Number: Enter the telephone number where we can reach you if we have questions about your application.

Signature: A responsible and duly authorized member or officer with knowledge of the plan's affairs must sign if there is a Third Party Designee.

Exempt Organizations

Line 1 Enter the legal name of the exempt organization.

Line 2 N/A

Line 3 Enter the name of the responsible party for the organization.

Line 4a-b Enter the mailing address. This is the address where all IRS correspondence will be sent.

Lines 5a-b Enter only if different from the mailing address in 4a and 4b.

Line 6 Enter the county and state where the exempt organization is located.

Line 7a-b Enter the name and SSN or ITIN of a responsible and duly authorized member or officer of the exempt organization.

Line 8a N/A.

Line 8b N/A

RECEIVED by MSC 8/30/2021 2:05:19 PM

Line 8c N/A

Line 9a Check only one box. If you check "other", enter the specific reason for applying.

Line 9b If you are a corporation, enter the State or Foreign Country where you were incorporated.

Line 10 If your reason is not specifically listed, check the "Other" box and enter the reason.

Line 11 Enter the date you first started or acquired your organization.

Line 12 Enter the last month of your accounting year or tax year.

Line 13 Enter the highest number of employees expected in the next 12 months (Agricultural, Household or Other). If none, enter 0 and skip to Line 16.

Line 14 If you expect your employment tax liability to be $1,000 or less in a full calendar year and want to file Form 944 annually instead of Forms 941 quarterly check "Yes". (To file Forms 941, check "No".)

Line 15 If your business has (or will have) employees enter the date the business began or will begin to pay wages (Month, Date, Year.) If you have no employees, leave blank. If the applicant is a withholding agent, enter date income will first be paid to nonresident alien.

Line 16 Check one box that best describes the type of business you operate (construction, real estate, etc.). If none of the listed boxes apply, check the "Other" box and write your specific type of business. Do not leave blank or enter "none" or "N/A".

Line 17 Describe the applicant's principal line of business in more detail (type of merchandise sold, specific construction work, product produced or service provided). Do not leave blank or enter "none" or "N/A".

Line 18 If the applicant shown on line one (1) ever previously applied for and received an EIN, check "Yes". If "yes", enter previous EIN on the line.

Complete the Third Party Designee section only if you want to authorize the named individual to receive the EIN and answer questions about the completion of this form. You must also sign the application for the authorization to be valid.

Name and Title: Print your name and title.

Telephone Number: Enter the telephone number where we can reach you if we have questions about your application.

Signature: A responsible and duly authorized member or officer having knowledge of the exempt organization's affairs must sign the application if there is a Third Party Designee.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Bankruptcy (Individual)

Bankruptcy proceedings begin with the filing of a petition with the bankruptcy court. The filing of the petition creates a bankruptcy estate, which generally consists of all the assets of the person filing the bankruptcy petition. A separate taxable entity is created if the bankruptcy petition is filed by an individual under Chapter 7 or Chapter 11 of the Bankruptcy Code.

Note: A married couple who file a joint bankruptcy petition require separate EINs for federal tax purposes.

Line 1 Enter the first name, middle initial and last name of the individual who has filed the bankruptcy petition followed by "Bankruptcy Estate".

Line 2 N/A

Line 3 Enter the name of the receiver, debtor in possession, or bankruptcy trustee.

Line 4a-b Enter the trustee or receiver's mailing address.

Line 5a-b Enter only if different from the mailing address.

Line 6 Enter the county and state where the bankruptcy petition was filed.

Line 7a-b Enter the name and SSN (or ITIN) of the bankrupt individual.

Line 8a N/A.

Line 8b N/A.

Line 8c N/A.

Line 9a Check "Other" and write in "individual bankruptcy", "receivership", or "debtor in possession".

Line 9b N/A

Line 10 Check "Other" and write in "bankruptcy", "receivership", or "debtor in possession".

Line 11 Enter the date the bankruptcy estate was created.

Line 12 Enter the last month of your accounting year or tax year.

Line 13 N/A

Line 14 N/A

Line 15 N/A

Line 16 Check the "Other" box and write in "Bankruptcy".

Line 17 Enter "Bankruptcy".

Line 18 If the applicant shown on line one (1) ever previously applied for and received an EIN, check "yes". If "yes", enter previous EIN on the line.

Complete Third Party Designee section only if you want to authorize the named individual to receive the EIN and answer questions about the completion of this form. You must also sign the application for the authorization to be valid.

Name and Title: Print your name and title.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Telephone Number: Enter the telephone number where we can reach you if we have questions about your application.

Signature: The bankruptcy trustee, receiver, or debtor in possession must sign the application if there is a Third Party Designee.

Bankruptcy (Corporation or Partnership)

A separate taxable estate is not created when a partnership or corporation files a bankruptcy petition. The court appointed trustee is, however, responsible for filing the regular income tax returns on Form 1065 or Form 1120.

If you are a bankrupt/liquidated corporation or partnership, you do not need a new EIN. Send the name of the trustee/receiver of the bankruptcy to your IRS service center so we can add that information to your existing EIN account.

EFTPS (Electronic Federal Tax Payment System)

Start your business off right. A Secure Way to Pay All Your Federal Taxes

EFTPS is a tax payment system provided free by the U.S. Department of Treasury. Pay federal taxes electronically - on-line or by phone 24/7. Businesses and Individuals can pay all their federal taxes using EFTPS. Individuals can pay their quarterly 1040ES estimated taxes electronically using EFTPS, and they can make payments weekly, monthly, or quarterly as well as schedule payments for the entire year in advance.

To enroll or for more information online, visit the EFTPS website at **https://www.eftps.gov/eftps/**, or to receive an enrollment form, call EFTPS Customer Service:

- 1-800-555-4477 (for Business payments)
- 1-800-316-6541 (for Individual payments)
- 1-800-733-4829 (TDD Hearing-Impaired)
- 1-800-244-4829 (Español)
- 1-800-555-8778 (EFTPS Online)

RECEIVED by MSC 8/30/2021 2:05:19 PM

Where to Apply for an EIN (Mail or Fax):

If your principal business, office or agency, or legal residence in the case of an individual, is located in:	**File or fax with the "Internal Revenue Service Center" at:**
One of the 50 states or the District of Columbia	Attn: EIN Operation Cincinnati, OH 45999 Fax-TIN: 859-669-5760
If you have no legal residence, principal place of business, or principal office oragency in any state:	Attn: EIN International Operation Cincinnati, OH 45999 Fax-TIN: 859-669-5987

Applications submitted by mail will be processed within 4 to 6 weeks.

Applications submitted by fax will be processed within 4 business days.

If you have not been notified of your EIN assignment within the normal processing timeframe, please call the IRS Business and Specialty Tax Line at 1-800-829-4933 for assistance.

If you have not received your EIN by the time you need to file a return, write: "Applied For" in the space provided for the EIN.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Avoiding Common EIN Problems

- If you wish to elect to be taxed as an S corporation, you must file Form 2553, Election by a Small Business Corporation (Under Section 1362 of the Internal Revenue Code).
- An association, limited liability company (LLC) or other organization that elects to be taxed as a corporation must file Form 8832, Entity Classification Election.
- Remember to always include your SSN, EIN, or ITIN on Line 7b of Form SS-4.
- Always use the full legal name you entered on Form SS-4, line 1 and the EIN given to you, consistently on all business tax returns you file with the IRS.
- If you change your address and/or you change the responsible party for the entity after you receive your EIN, you must use Form Form 8822-B, Change of Address or Responsible Party - Business, to notify the IRS of the new address.
- If you change your business name after you receive your EIN, write to us at the address where you file your tax return. The request to change your business name must be signed by an authorized person. Additionally, partnerships and corporations must include a copy of the Articles of Amendment that were filed with the state that authorized the name change.
- If the U.S. Postal Service doesn't deliver mail to your street address and you have a P.O. Box, show the P.O. Box number as the entity's mailing address instead of the street address.

RECEIVED by MSC 8/30/2021 2:05:19 PM

Publication 1635 (Rev. 2-2014) Catalog Number 14332X
Department of the Treasury **Internal Revenue Service** www.irs.gov

RECEIVED by MSC 8/30/2021 2:05:19 PM

SINGLE BUSINESS TAX ACT
Act 228 of 1975

AN ACT to provide for the imposition, levy, computation, collection, assessment and enforcement, by lien or otherwise, of taxes on certain commercial, business, and financial activities; to prescribe the manner and times of making certain reports and paying taxes; to prescribe the powers and duties of public officers and state departments; to permit the inspection of records of taxpayers; to provide for interest and penalties on unpaid taxes; to provide exemptions, credits, and refunds; to provide penalties; to provide for the disposition of funds; to provide for the interrelation of this act with other acts; and to provide an appropriation.

History: 1975, Act 228, Eff. Jan. 1, 1976.

Compiler's note: Enacting section 3 of 1999 PA 115 provides:

"Enacting section 3. The single business tax act, 1975 PA 228, MCL 208.1 to 208.145, is repealed effective on the January 1 of the year in which the rate under section 31 is reduced to 0.0%, and is not effective for tax years that begin on or after that date."

The People of the State of Michigan enact:

CHAPTER 1

***** *208.1 THIS SECTION IS REPEALED BY ACT 325 OF 2006 EFFECTIVE DECEMBER 31, 2007* *****

208.1 Short title.

Sec. 1. This act shall be known and may be cited as the "single business tax act".

History: 1975, Act 228, Eff. Jan. 1, 1976.

Compiler's note: Enacting section 3 of 1999 PA 115 provides:

"Enacting section 3. The single business tax act, 1975 PA 228, MCL 208.1 to 208.145, is repealed effective on the January 1 of the year in which the rate under section 31 is reduced to 0.0%, and is not effective for tax years that begin on or after that date."

***** *208.2 THIS SECTION IS REPEALED BY ACT 325 OF 2006 EFFECTIVE DECEMBER 31, 2007* *****

208.2 Meanings of words, phrases, and terms; references to internal revenue code.

Sec. 2. (1) For the purposes of this act, the words and phrases defined in sections 3 to 10 shall have the meanings respectively ascribed to them in those sections.

(2) A term used in this act and not defined differently shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes in effect for the tax year unless a different meaning is clearly required. A reference in this act to the internal revenue code includes other provisions of the laws of the United States relating to federal income taxes.

History: 1975, Act 228, Eff. Jan. 1, 1976.

***** *208.3 THIS SECTION IS REPEALED BY ACT 325 OF 2006 EFFECTIVE DECEMBER 31, 2007* *****

208.3 Definitions; A, B.

Sec. 3. (1) "Affiliated group" means 2 or more United States corporations, 1 of which owns or controls, directly or indirectly, 80% or more of the capital stock with voting rights of the other United States corporation or United States corporations. As used in this subsection, "United States corporation" means a domestic corporation as those terms are defined in section 7701(a)(3) and (4) of the internal revenue code.

(2) "Business activity" means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an employee to his employer, services as a director of a corporation, or a casual transaction. Although an activity of a taxpayer may be incidental to another or other of his business activities, each activity shall be considered to be business engaged in within the meaning of this act.

(3) "Business income" means federal taxable income, except that for a person other than a corporation it means that part of federal taxable income derived from business activity. For a partnership, business income includes payments and items of income and expense which are attributable to business activity of the partnership and separately reported to the partners.

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*

RECEIVED by MSC 8/30/2021 2:05:19 PM

request no later than 30 days after the department receives the request.

(5) On or before July 1 of each year, the department shall report to the house of representatives committee on tax policy and the senate committee on finance the total amount of tax credits claimed under this section, section 38c, and section 261 of the income tax act of 1967, 1967 PA 281, MCL 206.261, for the immediately preceding tax year.

History: Add. 1997, Act 191, Imd. Eff. Dec. 30, 1997.

***** *208.38g THIS SECTION IS REPEALED BY ACT 325 OF 2006 EFFECTIVE DECEMBER 31, 2007* *****

208.38g Tax credit; conditions; application for project costing more than $2,000,000 but $10,000,000 or less; application to Michigan economic growth authority for project costing $10,000,000 or more; limitations; total credits; criteria; investment on more than 1 property; project completion; tax year credits claimed; leased machinery, equipment, or fixtures; calculation of credits; carryforward provisions; qualified or eligible taxpayer; investment related to sports stadium, casino, or landfill; report; amendment of project; project as multiphase; project $200,000 or less; repeal of act for tax years beginning after December 31, 2007; effect; definitions.

Sec. 38g. (1) Subject to the criteria under this section, an eligible taxpayer may claim a credit against the tax imposed by this act as determined under subsections (20) to (25); and subject to the criteria under this section, a qualified taxpayer that has a preapproval letter issued after December 31, 1999 and before January 1, 2008, provided that the project is completed not more than 5 years after the preapproval letter for the project is issued, or an assignee under subsection (17) or (18) or section 35e may claim a credit that has been approved under subsection (2), (3), or (33) against the tax imposed by this act equal to either of the following:

(a) If the total of all credits for a project is $1,000,000.00 or less, 10% of the cost of the qualified taxpayer's eligible investment paid or accrued by the qualified taxpayer on an eligible property provided that the project does not exceed the amount stated in the preapproval letter. If eligible investment exceeds the amount of eligible investment in the preapproval letter for that project, the total of all credits for the project shall not exceed the total of all credits on the certificate of completion.

(b) If the total of all credits for a project is more than $1,000,000.00 but $30,000,000.00 or less and, except as provided in subsection (5)(b), the project is located in a qualified local governmental unit, a percentage as determined by the Michigan economic growth authority not to exceed 10% of the cost of the qualified taxpayer's eligible investment as determined under subsection (8) paid or accrued by the qualified taxpayer on an eligible property. If eligible investment exceeds the amount of eligible investment in the preapproval letter for that project, the total of all credits for the project shall not exceed the total of all credits on the certificate of completion.

(2) If the cost of a project will be for more than $2,000,000.00 but $10,000,000.00 or less, a qualified taxpayer shall apply to the Michigan economic growth authority for approval of the project under this subsection. An application under this subsection shall state whether the project is a multiphase project. The chairperson of the Michigan economic growth authority or his or her designee is authorized to approve an application or project under this subsection. Only the chairperson of the Michigan economic growth authority is authorized to deny an application or project under this subsection. A project shall be approved or denied not more than 45 days after receipt of the application. If the chairperson of the Michigan economic growth authority or his or her designee does not approve or deny an application within 45 days after the application is received by the Michigan economic growth authority, the application is considered approved as written. The total of all credits for all projects approved under this subsection shall not exceed $30,000,000.00 in any calendar year. After the first full calendar year after the effective date of the amendatory act that added subsection (33), if the authority approves a total of all credits for all projects under this subsection of less than $30,000,000.00 in a calendar year, the authority may carry forward for 1 year only the difference between $30,000,000.00 and the total of all credits for all projects approved under this subsection in the immediately preceding calendar year. The criteria in subsection (6) shall be used when approving projects under this subsection. When approving projects under this subsection, priority shall be given to projects on a facility. The total of all credits for an approved project under this subsection shall not exceed $1,000,000.00. A taxpayer may apply under this subsection instead of subsection (3) for approval of a project that will be for more than $10,000,000.00 but the total of all credits for that project shall not exceed $1,000,000.00. If the chairperson of the Michigan economic growth authority or his or her designee approves a project under this subsection, the chairperson of the Michigan economic growth authority or his or her designee shall issue a preapproval letter that states that the taxpayer is a qualified taxpayer; the maximum total eligible investment

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*

RECEIVED by MSC 8/30/2021 2:05:19 PM

for the project on which credits may be claimed and the maximum total of all credits for the project when the project is completed and a certificate of completion is issued; and the project number assigned by the Michigan economic growth authority. If a project is denied under this subsection, a taxpayer is not prohibited from subsequently applying under this subsection or subsection (3) for the same project or for another project.

(3) If the cost of a project will be for more than $10,000,000.00 and, except as provided in subsection (5)(b), the project is located in a qualified local governmental unit, a qualified taxpayer shall apply to the Michigan economic growth authority for approval of the project. An application under this subsection shall state whether the project is a multiphase project. The Michigan economic growth authority shall approve or deny the project not more than 65 days after receipt of the application. A project under this subsection shall not be approved without the concurrence of the state treasurer. If the Michigan economic growth authority does not approve or deny the application within 65 days after it receives the application, the Michigan economic growth authority shall send the application to the state treasurer. The state treasurer shall approve or deny the application within 5 days after receipt of the application. If the state treasurer does not deny the application within the 5 days after receipt of the application, the application is considered approved. The Michigan economic growth authority shall approve a limited number of projects under this subsection during each calendar year as provided in subsection (5). The Michigan economic growth authority shall use the criteria in subsection (6) when approving projects under this subsection, when determining the total amount of eligible investment, and when determining the percentage of eligible investment for the project to be used to calculate a credit. The total of all credits for an approved project under this subsection shall not exceed the amount designated in the preapproval letter for that project. If the Michigan economic growth authority approves a project under this subsection, the Michigan economic growth authority shall issue a preapproval letter that states that the taxpayer is a qualified taxpayer; the percentage of eligible investment for the project determined by the Michigan economic growth authority for purposes of subsection (1)(b); the maximum total eligible investment for the project on which credits may be claimed and the maximum total of all credits for the project when the project is completed and a certificate of completion is issued; and the project number assigned by the Michigan economic growth authority. The Michigan economic growth authority shall send a copy of the preapproval letter to the department. If a project is denied under this subsection, a taxpayer is not prohibited from subsequently applying under this subsection or subsection (2) for the same project or for another project.

(4) If the project is on property that is functionally obsolete, the taxpayer shall include, with the application, an affidavit signed by a level 3 or level 4 assessor, that states that it is the assessor's expert opinion that the property is functionally obsolete and the underlying basis for that opinion.

(5) The Michigan economic growth authority may approve not more than 17 projects each calendar year under subsection (3), and the following limitations apply:

(a) Of the 17 projects allowed under this subsection, the total of all credits for each project may be more than $10,000,000.00 but $30,000,000.00 or less for up to 2 projects.

(b) Of the 17 projects allowed under this subsection, up to 3 projects may be approved for projects that are not in a qualified local governmental unit if the property is a facility for which eligible activities are identified in a brownfield plan or, for 1 of the 3 projects, if the property is not a facility but is functionally obsolete or blighted, property identified in a brownfield plan. For purposes of this subdivision, a facility includes a building or complex of buildings that was used by a state or federal agency and that is no longer being used for the purpose for which it was used by the state or federal agency.

(c) Of the 2 projects allowed under subdivision (a), 1 may be a project that also qualifies under subdivision (b).

(6) The Michigan economic growth authority shall review all applications for projects under subsection (3) and, if an application is approved, shall determine the maximum total of all credits for that project. Before approving a project for which the total of all credits will be more than $10,000,000.00 but $30,000,000.00 or less only, the Michigan economic growth authority shall determine that the project would not occur in this state without the tax credit offered under subsection (3), except that the Michigan economic growth authority may approve 1 project the construction of which began after January 1, 2000 and before January 1, 2001 without determining that the eligible investment would not occur in this state without the tax credit offered under this section. The Michigan economic growth authority shall consider the following criteria to the extent reasonably applicable to the type of project proposed when approving a project under subsection (3) and the chairperson of the Michigan economic growth authority or his or her designee shall consider the following criteria to the extent reasonably applicable to the type of project proposed when approving a project under subsection (2) or (33) or when considering an amendment to a project under subsection (31):

(a) The overall benefit to the public.

(b) The extent of reuse of vacant buildings and redevelopment of blighted property.

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*

RECEIVED by MSC 8/30/2021 2:05:19 PM

(c) Creation of jobs.
(d) Whether the eligible property is in an area of high unemployment.
(e) The level and extent of contamination alleviated by the qualified taxpayer's eligible activities to the extent known to the qualified taxpayer.
(f) The level of private sector contribution.
(g) The cost gap that exists between the site and a similar greenfield site as determined by the Michigan economic growth authority.
(h) If the qualified taxpayer is moving from another location in this state, whether the move will create a brownfield.
(i) Whether the financial statements of the qualified taxpayer indicate that it is financially sound and that the project is economically sound.
(j) Any other criteria that the Michigan economic growth authority or the chairperson of the Michigan economic growth authority, as applicable, considers appropriate for the determination of eligibility under subsection (2) or (3).

(7) A qualified taxpayer may apply for projects under subsection (2), (3), or (33) for eligible investment on more than 1 eligible property in a tax year. Each project approved and each project for which a certificate of completion is issued under this section shall be for eligible investment on 1 eligible property.

(8) When a project under subsection (2), (3), or (33) is completed, the taxpayer shall submit documentation that the project is completed, an accounting of the cost of the project, the eligible investment of each taxpayer if there is more than 1 taxpayer eligible for a credit for the project, and, if the taxpayer is not the owner or lessee of the eligible property on which the eligible investment was made at the time the project is completed, that the taxpayer was the owner or lessee of that eligible property when all eligible investment of the taxpayer was made. The chairperson of the Michigan economic growth authority or his or her designee, for projects approved under subsection (2) or (33), or the Michigan economic growth authority, for projects approved under subsection (3), shall verify that the project is completed. The Michigan economic growth authority shall conduct an on-site inspection as part of the verification process for projects approved under subsection (3). When the completion of the project is verified, a certificate of completion shall be issued to each qualified taxpayer that has made eligible investment on that eligible property. The certificate of completion shall state the total amount of all credits for the project and that total shall not exceed the maximum total of all credits listed in the preapproval letter for the project under subsection (2) or (3) or section 35c as applicable and shall state all of the following:
(a) That the taxpayer is a qualified taxpayer.
(b) The total cost of the project and the eligible investment of each qualified taxpayer.
(c) Each qualified taxpayer's credit amount.
(d) The qualified taxpayer's federal employer identification number or the Michigan treasury number assigned to the taxpayer.
(e) The project number.
(f) For a project approved under subsection (3) for which the total of all credits is more than $10,000,000.00 but $30,000,000.00 or less, the total of all credits and the schedule on which the annual credit amount shall be claimed by the qualified taxpayer.
(g) For a multiphase project under subsection (32), the amount of each credit assigned and the amount of all credits claimed in each tax year before the year in which the project is completed.

(9) Except as otherwise provided in this section, qualified taxpayers shall claim credits under subsections (2), (3), and (33) in the tax year in which the certificate of completion is issued. For a project approved under subsection (3) for which the total of all credits is more than $10,000,000.00 but $30,000,000.00 or less, the qualified taxpayer shall claim 10% of its approved credit each year for 10 years. A credit assigned based on a multiphase project shall be claimed in the year in which the credit is assigned.

(10) The cost of eligible investment for leased machinery, equipment, or fixtures is the cost of that property had the property been purchased minus the lessor's estimate, made at the time the lease is entered into, of the market value the property will have at the end of the lease. A credit for property described in this subsection is allowed only if the cost of that property had the property been purchased and the lessor's estimate of the market value at the end of the lease are provided to the Michigan economic growth authority.

(11) For credits under subsections (2) and (3), credits claimed by a lessee of eligible property are subject to the total of all credits limitation under this section.

(12) Each qualified taxpayer and assignee under subsection (17) or (18) or section 35e that claims a credit under subsection (1)(a) or (b) or (33) shall attach a copy of the certificate of completion and, if the credit was assigned, a copy of the assignment form provided for under this section to the annual return filed under this act on which the credit under subsection (2), (3), or (33) is claimed. An assignee of a credit based on a

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*

RECEIVED by MSC 8/30/2021 2:05:19 PM

multiphase project shall attach a copy of the assignment form provided for under this section and the component completion certificate provided for in subsection (32) to the annual return filed under this act on which the credit is claimed but is not required to file a copy of a certificate of completion.

(13) Except as otherwise provided in this subsection or subsection (15), (17), (18), or (32) or section 35e, a credit under subsection (2), (3), or (33) shall be claimed in the tax year in which the certificate of completion is issued to the qualified taxpayer. For a project described in subsection (8)(f) for which a schedule for claiming annual credit amounts is designated on the certificate of completion by the Michigan economic growth authority, the annual credit amount shall be claimed in the tax year specified on the certificate of completion.

(14) The credits approved under this section shall be calculated after application of all other credits allowed under this act. The credits under subsections (2), (3), and (33) shall be calculated before the calculation of credits under subsections (20) to (25) and before the credits under sections 37c and 37d.

(15) If the credit allowed under subsection (2), (3), or (33) for the tax year and any unused carryforward of the credit allowed under subsection (2), (3), or (33) exceed the qualified taxpayer's or assignee's tax liability for the tax year, that portion that exceeds the tax liability for the tax year shall not be refunded but may be carried forward to offset tax liability in subsequent tax years for 10 years or until used up, whichever occurs first. Except as otherwise provided in this subsection, the maximum time allowed under the carryforward provisions under this subsection begins with the tax year in which the certificate of completion is issued to the qualified taxpayer. If the qualified taxpayer assigns all or any portion of its credit approved under subsection (2), (3), or (33), the maximum time allowed under the carryforward provisions for an assignee begins to run with the tax year in which the assignment is made and the assignee first claims a credit, which shall be the same tax year. The maximum time allowed under the carryforward provisions for an annual credit amount for a credit allowed under subsection (3) begins to run in the tax year for which the annual credit amount is designated on the certificate of completion issued under this section.

(16) If a project or credit under subsection (2), (3), or (33) is for the addition of personal property, if the cost of that personal property is used to calculate a credit under subsection (2), (3), or (33), and if the personal property is sold or disposed of or transferred from eligible property to any other location, the qualified taxpayer that sold, disposed of, or transferred the personal property shall add the same percentage as determined pursuant to subsection (1) of the federal basis of the personal property used for determining gain or loss as of the date of the sale, disposition, or transfer to the qualified taxpayer's tax liability after application of all credits under this act for the tax year in which the sale, disposition, or transfer occurs. If a qualified taxpayer has an unused carryforward of a credit under subsection (2), (3), or (33), the amount otherwise added under this subsection to the qualified taxpayer's tax liability may instead be used to reduce the qualified taxpayer's carryforward under subsection (15).

(17) For credits under subsection (2), (3), or (33) for projects for which a certificate of completion is issued before January 1, 2006 and except as otherwise provided in this subsection, if a qualified taxpayer pays or accrues eligible investment on or to an eligible property that is leased for a minimum term of 10 years or sold to another taxpayer for use in a business activity, the qualified taxpayer may assign all or a portion of the credit based on that eligible investment to the lessee or purchaser of that eligible property. A credit assignment under this subsection shall only be made to a taxpayer that when the assignment is complete will be a qualified taxpayer. All credit assignments under this subsection are irrevocable and, except for a credit based on a multiphase project, shall be made in the tax year in which the certificate of completion is issued, unless the assignee is an unknown lessee. If a qualified taxpayer wishes to assign all or a portion of its credit to a lessee but the lessee is unknown in the tax year in which the certificate of completion is issued, the qualified taxpayer may delay claiming and assigning the credit until the first tax year in which the lessee is known. A qualified taxpayer may claim a portion of a credit and assign the remaining credit amount. Except as otherwise provided in this subsection, if the qualified taxpayer both claims and assigns portions of the credit, the qualified taxpayer shall claim the portion it claims in the tax year in which the certificate of completion is issued or for a credit assigned and claimed for a multiphase project before a certificate of completion is issued, the taxpayer shall claim the credit in the year in which the credit is assigned. If a qualified taxpayer assigns all or a portion of the credit and the eligible property is leased to more than 1 taxpayer, the qualified taxpayer shall determine the amount of credit assigned to each lessee. A lessee shall not subsequently assign a credit or any portion of a credit assigned under this subsection. A purchaser may subsequently assign a credit or any portion of a credit assigned to the purchaser under this subsection to a lessee of the eligible property. The credit assignment under this subsection shall be made on a form prescribed by the Michigan economic growth authority. The qualified taxpayer shall send a copy of the completed assignment form to the Michigan economic growth authority in the tax year in which the assignment is made. The assignee shall attach a copy of the completed assignment form to its annual return required to be filed

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*

RECEIVED by MSC 8/30/2021 2:05:19 PM

under this act, for the tax year in which the assignment is made and the assignee first claims a credit, which shall be the same tax year. In addition to all other procedures under this subsection, the following apply if the total of all credits for a project is more than $10,000,000.00 but $30,000,000.00 or less:

(a) The credit shall be assigned based on the schedule contained in the certificate of completion.

(b) If the qualified taxpayer assigns all or a portion of the credit amount, the qualified taxpayer shall assign the annual credit amount for each tax year separately.

(c) More than 1 annual credit amount may be assigned to any 1 assignee and the qualified taxpayer may assign all or a portion of each annual credit amount to any assignee.

(d) The qualified taxpayer shall not assign more than the annual credit amount for each tax year.

(18) Except as otherwise provided in this subsection, for projects for which a certificate of completion is issued before January 1, 2006, if a qualified taxpayer is a partnership, limited liability company, or subchapter S corporation, the qualified taxpayer may assign all or a portion of a credit allowed under subsection (2) or (3) to its partners, members, or shareholders, based on their proportionate share of ownership of the partnership, limited liability company, or subchapter S corporation or based on an alternative method approved by the Michigan economic growth authority. A credit assignment under this subsection is irrevocable and, except for a credit assignment based on a multiphase project, shall be made in the tax year in which a certificate of completion is issued. A qualified taxpayer may claim a portion of a credit and assign the remaining credit amount. If the qualified taxpayer both claims and assigns portions of the credit, the qualified taxpayer shall claim the portion it claims in the tax year in which a certificate of completion is issued. A partner, member, or shareholder that is an assignee shall not subsequently assign a credit or any portion of a credit assigned under this subsection. The credit assignment under this subsection shall be made on a form prescribed by the Michigan economic growth authority. The qualified taxpayer shall send a copy of the completed assignment form to the Michigan economic growth authority in the tax year in which the assignment is made. A partner, member, or shareholder who is an assignee shall attach a copy of the completed assignment form to its annual return required under this act, for the tax year in which the assignment is made and the assignee first claims a credit, which shall be the same tax year. A credit assignment based on a credit for a component of a multiphase project that is completed before January 1, 2006 shall be made under this subsection. A credit assignment based on a credit for a component of a multiphase project that is completed on or after January 1, 2006 may be made under this section or section 35e. In addition to all other procedures under this subsection, the following apply if the total of all credits for a project is more than $10,000,000.00 but $30,000,000.00 or less:

(a) The credit shall be assigned based on the schedule contained in the certificate of completion.

(b) If the qualified taxpayer assigns all or a portion of the credit amount, the qualified taxpayer shall assign the annual credit amount for each tax year separately.

(c) More than 1 annual credit amount may be assigned to any 1 assignee and the qualified taxpayer may assign all or a portion of each annual credit amount to any assignee.

(d) The qualified taxpayer shall not assign more than the annual credit amount for each tax year.

(19) A qualified taxpayer or assignee under subsection (17) or (18) shall not claim a credit under subsection (1)(a) or (b) based on eligible investment on which a credit claimed under section 38d was based.

(20) In addition to the other credits allowed under this section and sections 37c and 37d, for tax years that begin after December 31, 1999 and for a period of time not to exceed 20 years as determined by the Michigan economic growth authority, an eligible taxpayer may credit against the tax imposed by section 31 the amount certified each year by the Michigan economic growth authority that is 1 of the following:

(a) For an eligible business under section 8(5)(a) of the Michigan economic growth authority act, 1995 PA 24, MCL 207.808, an amount that is not more than 50% of 1 or both of the following as determined by the Michigan economic growth authority:

(*i*) An amount determined under the Michigan economic growth authority act, 1995 PA 24, MCL 207.801 to 207.810, that does not exceed the payroll of the eligible taxpayer attributable to employees who perform retained jobs multiplied by the tax rate for the tax year.

(*ii*) The tax liability attributable to the eligible taxpayer's business activity multiplied by a fraction the numerator of which is the ratio of the value of new capital investment to all of the taxpayer's property located in this state plus the ratio of the taxpayer's payroll attributable to retained jobs to all of the taxpayer's payroll in this state and the denominator of which is 2.

(b) For an eligible business under section 8(5)(b) of the Michigan economic growth authority act, 1995 PA 24, MCL 207.808, an amount that is not more than 1 or both of the following as determined by the Michigan economic growth authority:

(*i*) An amount determined under the Michigan economic growth authority act, 1995 PA 24, MCL 207.801 to 207.810, that does not exceed the payroll of the eligible taxpayer attributable to employees who perform

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*

RECEIVED by MSC 8/30/2021 2:05:19 PM

retained jobs multiplied by the tax rate for the tax year.

(*ii*) The tax liability attributable to eligible taxpayer's business activity multiplied by a fraction the numerator of which is the ratio of the value of capital investment to all of the taxpayer's property located in this state plus the ratio of the taxpayer's payroll attributable to retained jobs to all of the taxpayer's payroll in this state and the denominator of which is 2.

(21) An eligible taxpayer shall not claim a credit under subsection (20) unless the Michigan economic growth authority has issued a certificate under section 9 of the Michigan economic growth authority act, 1995 PA 24, MCL 207.809, to the taxpayer. The eligible taxpayer shall attach the certificate to the return filed under this act on which a credit under subsection (20) is claimed.

(22) An affiliated group as defined in this act, a controlled group of corporations as defined in section 1563 of the internal revenue code and further described in 26 CFR 1.414(b)-1 and 1.414(c)-1 to 1.414(c)-5, or an entity under common control as defined by the internal revenue code shall claim only 1 credit under subsection (20) for each tax year based on each written agreement whether or not a combined or consolidated return is filed.

(23) A credit shall not be claimed by a taxpayer under subsection (20) if the eligible taxpayer's initial certification under section 9 of the Michigan economic growth authority act, 1995 PA 24, MCL 207.809, is issued after December 31, 2009. If the Michigan economic growth authority or a designee of the Michigan economic growth authority requests that a taxpayer who claims the credit under subsection (20) get a statement prepared by a certified public accountant verifying that the actual number of new jobs created is the same number of new jobs used to calculate the credit under subsection (20), the taxpayer shall get the statement and attach that statement to its annual return under this act on which the credit under subsection (20) is claimed.

(24) If the credit allowed under subsection (20)(a)(*ii*) or (b)(*ii*) for the tax year and any unused carryforward of the credit allowed by subsection (20)(a)(*ii*) or (b)(*ii*) exceed the taxpayer's tax liability for the tax year, that portion that exceeds the tax liability for the tax year shall not be refunded but may be carried forward to offset tax liability in subsequent tax years for 10 years or until used up, whichever occurs first.

(25) If the credit allowed under subsection (20)(a)(*i*) or (b)(*i*) exceeds the tax liability of the eligible taxpayer for the tax year, the excess shall be refunded to the eligible taxpayer.

(26) An eligible taxpayer that claims a credit under subsection (1)(a), (1)(b), or (33) is not prohibited from claiming a credit under subsection (20). However, the eligible taxpayer shall not claim a credit under subsection (1)(a), (1)(b), or (33) and subsection (20) based on the same costs.

(27) Eligible investment attributable or related to the operation of a professional sports stadium, and eligible investment that is associated or affiliated with the operation of a professional sports stadium, including, but not limited to, the operation of a parking lot or retail store, shall not be used as a basis for a credit under subsection (2), (3), or (33). Professional sports stadium does not include a professional sports stadium that will no longer be used by a professional sports team on and after the date that an application related to that professional sports stadium is filed under subsection (2), (3), or (33).

(28) Eligible investment attributable or related to the operation of a casino, and eligible investment that is associated or affiliated with the operation of a casino, including, but not limited to, the operation of a parking lot, hotel, motel, or retail store, shall not be used as a basis for a credit under subsection (2), (3), or (33). As used in this subsection, "casino" means a casino regulated by this state pursuant to the Michigan gaming control and revenue act, the Initiated Law of 1996, MCL 432.201 to 432.226.

(29) Eligible investment attributable or related to the construction of a new landfill or the expansion of an existing landfill regulated under part 115 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.11501 to 324.11550, shall not be used as a basis for a credit under subsection (2), (3), or (33).

(30) The Michigan economic growth authority annually shall prepare and submit to the house of representatives and senate committees responsible for tax policy and economic development issues a report on the credits under subsection (2). The report shall include, but is not limited to, all of the following:

(a) A listing of the projects under subsection (2) that were approved in the calendar year.

(b) The total amount of eligible investment for projects approved under subsection (2) in the calendar year.

(31) If, after a taxpayer's project has been approved and the taxpayer has received a preapproval letter but before the project is completed, the taxpayer determines that the project cannot be completed as preapproved, the taxpayer may petition the Michigan economic growth authority to amend the project. The total of eligible investment for the project as amended shall not exceed the amount allowed in the preapproval letter for that project.

(32) A project under subsection (2), (3), or (33) may be a multiphase project but, for projects completed before January 1, 2006, only if the project is an industrial or manufacturing project. If a project is a multiphase project, when each component of the multiphase project is completed, the taxpayer shall submit

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

RECEIVED by MSC 8/30/2021 2:05:19 PM

documentation that the component is complete, an accounting of the cost of the component, and the eligible investment for the component of each taxpayer eligible for a credit for the project of which the component is a part to the Michigan economic growth authority or the designee of the Michigan economic growth authority, who shall verify that the component is complete. When the completion of the component is verified, a component completion certificate shall be issued to the qualified taxpayer which shall state that the taxpayer is a qualified taxpayer, the credit amount for the component, the qualified taxpayer's federal employer identification number or the Michigan treasury number assigned to the taxpayer, and the project number. The taxpayer may assign all or part of the credit for a multiphase project as provided in this section after a component completion certificate for a component is issued. The qualified taxpayer may transfer ownership of or lease the completed component and assign a proportionate share of the credit for the entire project to the qualified taxpayer that is the new owner or lessee. A multiphase project shall not be divided into more than 20 components. A component is considered to be completed when a certificate of occupancy has been issued by the local municipality in which the project is located for all of the buildings or facilities that comprise the completed component and a component completion certificate is issued. A credit assigned based on a multiphase project shall be claimed by the assignee in the tax year in which the assignment is made. The total of all credits for a multiphase project shall not exceed the amount stated in the preapproval letter for the project under subsection (1). If all components of a multiphase project are not completed by 10 years after the date on which the preapproval letter for the project was issued, the qualified taxpayer that received the preapproval letter for the project shall pay to the state treasurer, as a penalty, an amount equal to the sum of all credits claimed and assigned for all components of the multiphase project and no credits based on that multiphase project shall be claimed after that date by the qualified taxpayer or any assignee of the qualified taxpayer. The penalty under this subsection is subject to interest on the amount of the credit claimed or assigned determined individually for each component at the rate in section 23(2) of 1941 PA 122, MCL 205.23, beginning on the date that the credit for that component was claimed or assigned. As used in this subsection, "proportionate share" means the same percentage of the total of all credits for the project that the qualified investment for the completed component is of the total qualified investment stated in the preapproval letter for the entire project.

(33) If the total of all credits for a project is $200,000.00 or less, a qualified taxpayer shall apply to the Michigan economic growth authority for approval of the project under this subsection. An application under this subsection shall state whether the project is a multiphase project. Subject to section 35c, the chairperson of the Michigan economic growth authority or his or her designee is authorized to approve an application or project under this subsection. Only the chairperson of the Michigan economic growth authority is authorized to deny an application or project under this subsection. A project shall be approved or denied not more than 45 days after receipt of the application. If the chairperson of the Michigan economic growth authority or his or her designee does not approve or deny the application within 45 days after the application is received by the Michigan economic growth authority, the application is considered approved as written. If a project is denied under this subsection, a taxpayer is not prohibited from subsequently applying under this subsection for the same project or for another project. The total of all credits for all projects approved under this subsection shall not exceed $10,000,000.00 in any calendar year. After the first full calendar year after the effective date of the amendatory act that added this subsection, if the authority approves a total of all credits for all projects under this subsection of less than $10,000,000.00 in a calendar year, the authority may carry forward for 1 year only the difference between $10,000,000.00 and the total of all credits for all projects under this subsection approved in the immediately preceding calendar year. If the chairperson of the Michigan economic growth authority or his or her designee approves a project under this subsection, the chairperson of the Michigan economic growth authority or his or her designee shall issue a preapproval letter that states that the taxpayer is a qualified taxpayer; the maximum total eligible investment for the project on which credits may be claimed and the maximum total of all credits for the project when the project is completed and a certificate of completion is issued; and the project number assigned by the Michigan economic growth authority. The Michigan economic growth authority shall develop and implement the use of the application form to be used for projects under this subsection. Before the application form is first used and if the Michigan economic growth authority substantially changes the form, the Michigan economic growth authority shall adopt the form or changes by resolution. After 60 days after the effective date of the amendatory act that added this subsection and before the Michigan economic growth authority substantially changes the application form, the Michigan economic growth authority shall give notice of the proposed resolution to the secretary of the senate, to the clerk of the house of representatives, and to each person who requested from the Michigan economic growth authority in writing or electronically to be notified regarding proposed resolutions. The notice and proposed resolution and all attachments shall be published on the Michigan economic growth authority's internet website. The Michigan economic growth authority shall hold

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

RECEIVED by MSC 8/30/2021 2:05:19 PM

a public hearing not sooner than 14 days and not later than 30 days after the date notice of a proposed resolution is given and offer an opportunity for persons to present data, views, questions, and arguments. The Michigan economic growth authority board members or 1 or more persons designated by the Michigan economic growth authority who have knowledge of the subject matter of the proposed resolution shall be present at the public hearing and shall participate in the discussion of the proposed resolution. The Michigan economic growth authority may act on the proposed resolution no sooner than 14 days after the public hearing. The Michigan economic growth authority shall produce a final decision document that describes the basis for its decision. The final resolution and all attachments and the decision document shall be provided to the secretary of the senate and to the clerk of the house of representatives and shall be published on the Michigan economic growth authority's internet website. The notice shall include all of the following:

(a) A copy of the proposed resolution and all attachments.

(b) A statement that any person may express any data, views, or arguments regarding the proposed resolution.

(c) The address to which written comments may be sent and the date by which comments must be mailed or electronically transmitted, which date shall not be restricted to only before the date of the public hearing.

(d) The date, time, and place of the public hearing.

(34) If this act is repealed for tax years beginning after December 31, 2007, all of the following apply:

(a) Except as otherwise provided in this subsection, a qualified taxpayer that has a preapproval letter issued before January 1, 2007 for a brownfield credit for a project that is completed after the end of the taxpayer's last tax year but before January 1, 2010 or an assignee may claim the brownfield credit amount that could be claimed for the project for 2008 and 2009 against the taxpayer's or assignee's tax liability under this act on the taxpayer's or assignee's timely filed original or amended annual return filed under this act for the taxpayer's or assignee's last tax year.

(b) Except as otherwise provided in subdivision (e), a credit under this subsection shall be taken after all other credits the taxpayer claims for the tax year under this act and all of the following apply:

(*i*) The brownfield credit amount that the taxpayer or assignee would have been allowed to claim for projects completed in 2008 after the end of the taxpayer's or assignee's last tax year or for projects completed in 2009 is in addition to the brownfield credit amount that the taxpayer or assignee is allowed to claim for projects completed before the end of the taxpayer's or assignee's last tax year.

(*ii*) The brownfield credit amount that the taxpayer or assignee is allowed to claim for projects completed in 2008 after the end of the taxpayer's or assignee's last tax year or for projects completed in 2009 on the taxpayer's or assignee's annual return for the taxpayer's or assignee's last tax year or the sum of both brownfield credit amounts shall not exceed the taxpayer's or assignee's tax liability for the taxpayer's or assignee's last tax year after all other credits for that tax year except the taxpayer's or assignee's brownfield credit for the taxpayer's or assignee's last tax year have been taken.

(*iii*) The brownfield credit amount that the taxpayer or assignee is allowed to claim for its last tax year under this subsection shall not exceed the sum of the amount that the taxpayer or assignee would have been allowed to claim for projects completed in 2008 after the end of the taxpayer's or assignee's last tax year plus the amount that the taxpayer or assignee would have been allowed to claim for projects completed in 2009.

(c) If the amount of the total of all brownfield credit amounts that may be claimed by the taxpayer or assignee under this subsection exceeds the taxpayer's or assignee's tax liability for the taxpayer's or assignee's last tax year, the amount by which the total of all brownfield credit amounts exceeds the taxpayer's or assignee's tax liability for the taxpayer's or assignee's last tax year shall be refunded.

(d) A brownfield credit under this subsection shall not be claimed before a certificate of completion is issued for the project on which the brownfield credit is based.

(e) The credit allowed under this subsection shall be taken before the credit allowed under section 39c(16).

(f) This subsection does not apply to any amount the taxpayer or assignee may claim for the same project for a tax year that begins after December 31, 2007 under any other tax act.

(g) As used in this subsection:

(*i*) "Assignee" means an assignee under subsection (17) or (18) or under section 35e.

(*ii*) "Brownfield credit" means the credit allowed under subsections (2), (3), and (33).

(*iii*) "Last tax year" means the taxpayer's tax year under this act that begins after December 31, 2006 and before January 1, 2008.

(35) As used in this section:

(a) "Annual credit amount" means the maximum amount that a qualified taxpayer is eligible to claim each tax year for a project for which the total of all credits is more than $10,000,000.00 but $30,000,000.00 or less, which shall be 10% of the qualified taxpayer's credit amount approved under subsection (3).

(b) "Authority" means a brownfield redevelopment authority created under the brownfield redevelopment

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*

RECEIVED by MSC 8/30/2021 2:05:19 PM

financing act, 1996 PA 381, MCL 125.2651 to 125.2672.

(c) "Authorized business", "full-time job", "new capital investment", "qualified high-technology business", "retained jobs", and "written agreement" mean those terms as defined in the Michigan economic growth authority act, 1995 PA 24, MCL 207.801 to 207.810.

(d) "Blighted", "brownfield plan", "eligible activities", "eligible property", "facility", "functionally obsolete", "qualified local governmental unit", and "response activity" mean, except as otherwise provided in subdivision (f), those terms as defined in the brownfield redevelopment financing act, 1996 PA 381, MCL 125.2651 to 125.2672.

(e) "Eligible investment" means demolition, construction, restoration, alteration, renovation, or improvement of buildings or site improvements on eligible property and the addition of machinery, equipment, and fixtures to eligible property after the date that eligible activities on that eligible property have started pursuant to a brownfield plan under the brownfield redevelopment financing act, 1996 PA 381, MCL 125.2651 to 125.2672, and after the date that the preapproval letter is issued, except that the date that the preapproval letter is issued is not a limitation for 1 project the construction of which began after January 1, 2000 and before January 1, 2001 without the Michigan economic growth authority determining that the project would not occur in this state without the tax credit offered under this section as provided in subsection (7), if the costs of the eligible investment are not otherwise reimbursed to the taxpayer or paid for on behalf of the taxpayer from any source other than the taxpayer. The addition of leased machinery, equipment, or fixtures to eligible property by a lessee of the machinery, equipment, or fixtures is eligible investment if the lease of the machinery, equipment, or fixtures has a minimum term of 10 years or is for the expected useful life of the machinery, equipment, or fixtures, and if the owner of the machinery, equipment, or fixtures is not the qualified taxpayer with regard to that machinery, equipment, or fixtures.

(f) "Eligible property" means that term as defined in the brownfield redevelopment financing act, 1996 PA 381, MCL 125.2651 to 125.2672, except that, for purposes of subsection (33), all of the following apply:

(*i*) Eligible property means property identified under a brownfield plan that was used or is currently used for commercial, industrial, or residential purposes and that is 1 of the following:

(A) Property for which eligible activities are identified under the brownfield plan, is in a qualified local governmental unit, and is a facility, functionally obsolete, or blighted.

(B) Property that is not in a qualified local governmental unit but is within a downtown development district established under 1975 PA 197, MCL 125.1651 to 125.1681, and is functionally obsolete or blighted, and a component of the project on that eligible property is 1 or more of the following:

(I) Infrastructure improvements that directly benefit the eligible property.

(II) Demolition of structures that is not response activity under section 20101 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101.

(III) Lead or asbestos abatement.

(IV) Site preparation that is not response activity under section 20101 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101.

(C) Property for which eligible activities are identified under the brownfield plan, is not in a qualified local governmental unit, and is a facility.

(*ii*) Eligible property includes parcels that are adjacent or contiguous to the eligible property if the development of the adjacent or contiguous parcels is estimated to increase the captured taxable value of the property or tax reverted property owned or under the control of a land bank fast track authority pursuant to the land bank fast track authority act, 2003 PA 258, MCL 124.751 to 124.774.

(*iii*) Eligible property includes, to the extent included in the brownfield plan, personal property located on the eligible property.

(*iv*) Eligible property does not include qualified agricultural property exempt under section 7ee of the general property tax act, 1893 PA 206, MCL 211.7ee, from the tax levied by a local school district for school operating purposes to the extent provided under section 1211 of the revised school code, 1976 PA 451, MCL 380.1211.

(g) "Eligible taxpayer" means an eligible business that meets the criteria under section 8(5) of the Michigan economic growth authority act, 1995 PA 24, MCL 207.808.

(h) "Michigan economic growth authority" means the Michigan economic growth authority created in the Michigan economic growth authority act, 1995 PA 24, MCL 207.801 to 207.810.

(i) "Multiphase project" means a project approved under subsection (2), (3), or (33) that has more than 1 component, each of which can be completed separately.

(j) "Payroll" and "tax rate" mean those terms as defined in section 37c.

(k) "Personal property" means that term as defined in section 8 of the general property tax act, 1893 PA 206, MCL 211.8, except that personal property does not include either of the following:

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*

RECEIVED by MSC 8/30/2021 2:05:19 PM

(*i*) Personal property described in section 8(h), (i), or (j) of the general property tax act, 1893 PA 206, MCL 211.8.

(*ii*) Buildings described in section 14(6) of the general property tax act, 1893 PA 206, MCL 211.14.

(*l*) "Project" means the total of all eligible investment on an eligible property or, for purposes of subsection (5)(b), 1 of the following:

(*i*) All eligible investment on property not in a qualified local governmental unit that is a facility.

(*ii*) All eligible investment on property that is not a facility but is functionally obsolete or blighted.

(m) "Qualified local governmental unit" means that term as defined in the obsolete property rehabilitation act, 2000 PA 146, MCL 125.2781 to 125.2797.

(n) "Qualified taxpayer" means a taxpayer that meets both of the following criteria:

(*i*) Owns or leases eligible property.

(*ii*) Certifies that, except as otherwise provided in this subparagraph, the department of environmental quality has not sued or issued a unilateral order to the taxpayer pursuant to part 201 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101 to 324.20142, to compel response activity on or to the eligible property, or expended any state funds for response activity on or to the eligible property and demanded reimbursement for those expenditures from the qualified taxpayer. However, if the taxpayer has completed all response activity required by part 201 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101 to 324.20142, is in compliance with any deed restriction or administrative or judicial order related to the required response activity, and has reimbursed the state for all costs incurred by the state related to the required response activity, the taxpayer meets the criteria under this subparagraph.

(o) "Tax liability attributable to authorized business activity" means the tax liability imposed by this act after the calculation of credits provided in sections 36, 37, and 39.

History: Add. 2000, Act 143, Imd. Eff. June 6, 2000;—Am. 2002, Act 726, Imd. Eff. Dec. 30, 2002;—Am. 2003, Act 249, Imd. Eff. Dec. 29, 2003;—Am. 2006, Act 112, Imd. Eff. Apr. 10, 2006;—Am. 2006, Act 240, Imd. Eff. June 27, 2006.

Compiler's note: For transfer of certain powers and duties of the department of treasury or state treasurer related to brownfield redevelopment single business tax credits to the director of department of labor and economic growth by Type II transfer, see E.R.O. No. 2003-1, compiled at MCL 445.2011.

***** *208.39 THIS SECTION IS REPEALED BY ACT 325 OF 2006 EFFECTIVE DECEMBER 31, 2007* *****
***** *208.39 SUBSECTION (2) EXPIRES DECEMBER 31, 1982: See (2) of 208.39* *****

208.39 Credit for taxpayer subject to § 207.1 et seq.; credit for person eligible to file under § 208.57; expiration of subsection (2).

Sec. 39. (1) A taxpayer subject to Act No. 282 of the Public Acts of 1905, as amended, being sections 207.1 to 207.21 of the Michigan Compiled Laws, shall be allowed a credit against the tax imposed by this act for the taxable year, an amount equal to 5% of the tax imposed under Act No. 282 of the Public Acts of 1905, as amended. The credit allowed by this section shall not be in excess of the tax liability of the taxpayer under this act. Except as provided in subsection (2) this subsection shall not apply to a taxpayer who files pursuant to the provisions of section 57.

(2) A person eligible to file under section 57 who has a net operating loss for 2 or more years or has had a net operating loss for each year of operation immediately preceding the current tax year, shall be allowed a credit against the tax imposed by this act in an amount equal to the following percentage of the tax imposed under Act No. 282 of the Public Acts of 1905, as amended: 5% for the 1977 and 1978 tax year; 4% for the 1979 tax year; 3% for the 1980 tax year; 2% for the 1981 tax year; and 1% for the 1982 tax year. The credit allowed by this subsection shall not be in excess of the tax liability of the taxpayer under this act. This subsection shall expire December 31, 1982.

History: 1975, Act 228, Eff. Jan. 1, 1976;—Am. 1976, Act 389, Imd. Eff. Dec. 30, 1976;—Am. 1977, Act 273, Imd. Eff. Dec. 15, 1977.

208.39a Repealed. 1993, Act 329, Eff. Apr. 1, 1994.

Compiler's note: The repealed section pertained to employer payment of child care services for employees.

***** *208.39b THIS SECTION IS REPEALED BY ACT 325 OF 2006 EFFECTIVE DECEMBER 31, 2007* *****

208.39b Business located and conducted within renaissance zone; allowable tax credit; definitions.

Sec. 39b. (1) Except as provided in subsection (2) and for tax years that begin after December 31, 1996, a taxpayer that is a business located and conducting business activity within a renaissance zone may claim a

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*