

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

DHG Associates LP,  
Petitioner,

MTT Docket No. 449632

v

Michigan Department of Treasury,  
Respondent.

Tribunal Judge Presiding  
Steven H. Lasher

ORDER DENYING PETITIONER’S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

On November 13, 2013, Administrative Law Judge (“ALJ”) Thomas A. Halick issued a Proposed Order denying Petitioner’s Motion for Summary Disposition and granting Respondent’s Motion for Summary Disposition. The Proposed Order provided, in pertinent part, “[t]he parties have 20 days from date of entry of this Proposed Order to notify the Tribunal **in writing and by mail** if they do not agree with the Proposed Order and to state in writing why they do not agree with the Proposed Order (i.e., exceptions).” Petitioner filed exceptions to the Proposed Opinion and Judgment on December 3, 2013. Respondent filed a response to Petitioner’s Exceptions on December 16, 2013.

PETITIONER’S EXCEPTIONS

In the exceptions, Petitioner contends that *Ford Credit Int’l v Dep’t of Treasury*, 270 Mich App 530; 716 NW2d 593 (2006), interpreted the definition of “gross receipts” under Michigan’s Single Business Tax (“SBT”) and that this definition is applicable to the case at hand. More specifically, Petitioner contends that the legislature decided “to again select the term ‘gross receipts,’ and to define this term using the words ‘amounts received’” in the Michigan

Business Tax (“MBT”) which “reflects a clear choice by the Legislature to adopt the same term.” Exceptions at 2. Petitioner states that this choice also reflects the intent to adopt the term’s meaning as interpreted by the Court of Appeals. Petitioner contends that there is no evidence that the Legislature intended to expand the terms “‘receipts’ and ‘received’ into terms that include amounts that will never in fact be received.” *Id.* Petitioner also contends that the ALJ erred in finding that the definition of gross receipts was expanded following the ruling in *Ford Credit Int’l, supra*, and that there is “no textual or other support for [this] assertion.” Exceptions at 8.

Petitioner also contends that the ALJ erroneously deferred to federal tax law to interpret terms unnecessarily and without authority. In support of this contention, Petitioner states:

MCL 208.1103 only allows reference to the federal income tax definitions in cases in which: (1) a Michigan statutory term is not defined under Michigan law such that is necessary to look outside for guidance; and (2) the state law terms at issue are used in a “comparable context” to federal law that contains a definition of the term at issue. Exceptions at 3.

Here, Petitioner contends that the term is fully defined by Michigan law and that there is no comparable context because there is no comparable federal law. Petitioner also contends that the ALJ erroneously uses the terms resulting in erroneous conclusions that are contrary to law. See Exceptions at 6-7. In doing so, the ALJ erroneously fails to “acknowledge, much less cite, the expert affidavit of Randall C. Paschke . . . .” Exceptions at 9. More specifically, Petitioner contends that the ALJ conflates “receipt” with “income” by use of the definition of “amount,” which is addressed in Mr. Paschke’s affidavit. See Exceptions at 6.

Petitioner further states that the ALJ erred in concluding that “‘There is no legal or economic difference whether the lender sent a cash amount to the debtor or merely discharged the debt.’” Exceptions at 4. Petitioner contends that this is simply not true as “[i]f the lender were to send a cash amount to a debtor, the debtor could use the cash as it sees fit . . . .” *Id.* at 5.

Petitioner contends that these two scenarios are explicitly different as a cash payment is an amount received by the taxpayer because it may do what it pleases with the cash. On the other hand, the cancellation of debt “results only in an amount of indirect economic benefit being ‘realized’ by the taxpayer.” *Id.*

Finally, Petitioner contends that the ALJ failed to address the imposition of penalties in the Proposed Order. “In this case, [Petitioner] has established that its amended return was filed in good faith, based on its interpretation of the statute and relevant case law, and was not due to any willful neglect.” Exceptions at 10. Thus, Petitioner contends RAB 2005-3 supports the finding that the penalties shall be waived.

#### RESPONDENT’S RESPONSE TO PETITIONER’S EXCEPTIONS

Respondent contends that *Ford Credit, supra* is not controlling as the facts are “significantly different from the facts in this case and it analyzes a different, and much narrower, definition of gross receipts than the one currently at issue.” Response at 2. Respondent further contends that even if *Ford Credit* is applied to this case, “Petitioner ‘received’ and ‘amount’ when its creditor no longer required [] Petitioner to return the . . . loan.” Exceptions at 3.

Respondent contends that the ALJ did “not rely heavily on federal law” and “the POJ’s discussion of federal law per MCL 208.103 is not in error.” Response at 3. In addition, Respondent contends that Petitioner misunderstands the hypothetical set forth in the Proposed Order regarding the cash equivalence. “The Tribunal reasoned that from the Petitioner’s perspective, the Petitioner would be in the same economic position as it is now if someone had given the Petitioner \$19,918,188 in cash that Petitioner then used to pay off the \$19,918,188 debt.” Response at 4. Respondent also indicates that Petitioner further misunderstands the

discussion regarding the amount realized. Rather than saying that the amount realized is the same as “received” the ALJ indicates that it is a related concept of tax law.

Respondent further contends that the Tribunal “owes no deference to the Petitioner’s ‘expert’” and that there “is no use for an ‘expert’ in a case where the only dispute is legal, not factual.” Response at 6. Further, “[t]he Tribunal did not err by disregarding the Petitioner’s request for a penalty waiver because the Petitioner’s request did not comply with the rules governing such request.” *Id.*

### CONCLUSION

The Tribunal has reviewed Petitioner’s exceptions and finds that the ALJ properly considered each of the Motions in the November 13, 2013 Proposed Order. After reviewing the Proposed Order, however, the Tribunal finds that the ALJ erred in failing to address Petitioner’s request for a penalty waiver. This issue and Petitioner’s remaining exceptions are discussed fully below.

Petitioner contends that the ALJ erred in its failure to rely upon *Ford Credit, supra* which is binding precedent. However, the Tribunal finds that the ALJ properly found that this case is not precedential to this case as the law and facts in the above-captioned case are distinguishable from that in *Ford Credit*. First, the ALJ indicates that the definition of “gross receipts” was expanded from the former SBTA definition which was at issue in *Ford Credit*, thereby limiting that holding’s applicability to this case. Petitioner contends that the definition was not expanded; however, even the Court in *Ford Credit* specifically noted that: “A later amendment, 2000 PA 477, *expanded* the phrase ‘gross receipts’ to mean ‘the entire amount received by the taxpayer from any activity whether in intrastate, interstate, or foreign commerce.’” *Ford Credit*, at 535, FN 3. [Emphasis added.] The Court’s language makes it clear that the definition was expanded

and that the definition at issue in *Ford Credit* “was not a vague phrase, or an all-encompassing one. Rather, the phrase was explicitly defined as ‘the sum of sales . . . and rental or lease receipts.’” *Id.* The ALJ properly found the MBTA adopted the SBTA’s *expanded* definition which was not considered in *Ford Credit*. The ALJ also properly found that:

After casting a wide net with the [MBTA’s] general definition, the legislature excluded numerous items in the ensuing sections and subsections. This drafting style [evidences] an intent to create an all-encompassing definition that includes every conceivable *amount* that a taxpayer *receives* from any *activity* in commerce engaged in for a direct or indirect gain, benefit, or advantage. The extensive list of exclusions indicates that an amount is included in gross receipts, unless it is expressly excluded. Proposed Order at 10.

Thus, the statutory language also makes it clear that the definition at hand is clearly distinguishable from the narrow definition at issue in *Ford Credit*. Moreover, the precedential value of case law is not applicable where there has been an intervening change of law.<sup>1</sup>

In addition to the distinguishable statutory language, the ALJ properly found that the facts are also distinguishable. More specifically, the issue in *Ford Credit* was regarding deemed dividends which were not distributed and were not received as they remained under the control of the foreign subsidiary. Proposed Order at 18. In this case, there is no dispute that Petitioner received the proceeds from the loan and incurred a corresponding obligation to repay that amount. There is also no dispute that the obligation to repay was subsequently extinguished. Petitioner’s only contention is the cancellation of the debt should not be included in its “gross receipts” under MCL 208.1111(1). While Petitioner was not required to include the loan proceeds in its gross receipts in the year in which the proceeds were distributed under MCL 208.1111(h)(ii), the cancellation of the requirement to repay is not similarly excluded by the

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<sup>1</sup> See *Sumner v General Motors*, 245 Mich App 653, 662; 633 NW2d 1 (2001) (“the law of the case doctrine does not apply where there has been an intervening change of law.”).

statute. More specifically, there is no exclusion from the definition of gross receipts in the statute for the cancellation of debt. The ALJ properly found that “when the duty to repay the loan was extinguished, the taxpayer realized a ‘gain, benefit, or advantage’ from that amount.” Proposed Order at 12-13. The “gain, benefit, or advantage” was not in the form of cash but rather in the intangible form of debt cancellation. Petitioner did, in fact, receive an amount as it no longer has to repay the loan proceeds it originally received.

The ALJ’s indication that Petitioner would be in the same position if the lender sent Petitioner a cash amount equivalent to the debt relief was merely an attempt to illustrate that there is no limitation that the amounts received must be “cash or other assets” as contended by Petitioner. More specifically, the ALJ properly found that the “amount received” under MCL 208.1111(1) can be intangible and Petitioner would be in a similar financial situation after the receipt of either a hypothetical cash payment or debt relief actually received. While Petitioner is correct that the cash could be utilized for alternative purposes, this does not diminish the fact that the ALJ properly found that Petitioner’s attempt to narrow the definition of amount to “cash or other assets” was not supported. Similarly, the ALJ’s analysis of the definition of “amounts realized” was used as analogy to illustrate that, even given Petitioner’s restrictive and erroneous definition that “amount” must be “cash or other assets,” the cancellation of debt still was an amount received by Petitioner. See Proposed Order at 11-12.

The Tribunal further finds that the ALJ did not err in failing to rely upon the affidavits submitted by Petitioner. The affidavit submitted is offered in support of Petitioner’s legal argument that the debt cancellation should not be included in the definition of “gross receipts” under MCL 208.1111(1). MRE 703 indicates that “[i]f the court determines that scientific, technical, or other specialized knowledge *will assist the trier of fact to understand the evidence*

*or to determine a fact in issue*, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion.” Here, the expert opinion proffered was an opinion of legal definitions and conclusions. The Tribunal finds that this affidavit does not assist the Tribunal in understanding the legal issue at hand or otherwise assist the tribunal in understanding the evidence or determining a factual issue. See MRE 703.

Therefore, the ALJ did not err in specifically examining the affidavits in the Proposed Order.

Contrary to Petitioner’s contentions, the Proposed Order did not rely upon federal law in finding that the debt cancellation is included in the definition of “gross receipts” under MCL 208.1111(1). While federal law was referenced in the Proposed Order, the ALJ did not define the terms at issue utilizing federal law. More specifically, the ALJ stated that:

The word “received” is not defined in the MBTA and therefore, it is appropriate to consider whether the term is “used in comparable context in the laws of the United States relating to federal income taxes.” *Id.* If so, then a definition of the word “received” found in “laws relating to federal income taxes” would apply to the MBTA. The phrase “laws of the United states relating to federal income taxes” includes, statutes, regulations, and case law. Neither party has cited a definition of “received” from federal income tax law.

Thus, the ALJ merely indicated that a federal definition may be applicable. He did not, however, cite a federal definition and utilize that definition to decide the case at hand. Ironically, the case upon which Petitioner places heavy reliance, *Ford Credit*, does rely upon federal law including the Internal Revenue Code definition of “dividend.” See *Ford Credit, supra*.

With regard to the issue of penalties, the ALJ did err in failing to address Petitioner’s request for a waiver. In Petitioner’s exceptions, Petitioner contends that RAB 2005-3 indicates that the penalty shall be waived if the failure to file was not due to willful neglect but reasonable cause. Petitioner contends that no penalty should be imposed because any failure to pay would be based on reasonable cause. This was also raised in Petitioner’s Brief in Support of its Motion for

Summary Disposition and in the Petition. In its response to the exceptions, Respondent indicates that the Tribunal properly disregarded Petitioner's request because the request did not comply with 2013 AC, R 205.1013 ("Rule 13") and that Petitioner has not "attempted to demonstrate that its circumstances are comparable to those of any of the examples of reasonable cause listed in Rule 13(7)." Response at 6.

MCL 205.24(4) states that if "it is shown to the satisfaction of the department that the failure was due to reasonable cause and not to willful neglect, the state treasurer or an authorized representative of the state treasurer shall waive the penalty." The Tribunal finds that further guidance on the issue of penalty waiver is found in Rule 13 which is also outlined in RAB 2005-3 cited to by Petitioner. Petitioner has not demonstrated that it complied with Rule 13 requirement to file its waiver request, in writing, to the Department. More importantly, while Petitioner contends that its failure was reasonable cause because "its amended return was filed in good faith, based upon its interpretation of the statute and relevant case law, and was not due to any willful neglect," it has failed to demonstrate that its interpretation of the statute falls within the definition of reasonable cause. Exceptions at 10. As required by MCL 205.24(1), Rule 13 sets forth the definition of what constitutes reasonable cause and provides illustrative examples. Rule 13(4) also states that "[t]he taxpayer bears the burden of affirmatively establishing, by clear and convincing evidence, that the failure to file or failure to pay was due to reasonable cause." The Tribunal finds that the examples set forth in Rule 13 include delay due to circumstances beyond the taxpayer's control, fire or other casualty of the taxpayer's records, receipt of erroneous information from a department employee, and a bank error. Each of the illustrative examples indicates some circumstance that outside of the taxpayer's control. In this case Petitioner has not demonstrated that the filing was due to circumstances outside of its control.

Rule 13 also provides additional factors that may be considered in determining whether “reasonable cause” exists but Petitioner has failed to demonstrate that it has met any of these factors. Rather, Petitioner merely contends that the filing was based upon the erroneous interpretation of the law. Thus, the Tribunal finds that Petitioner has not met its burden under Rule 13 to establish that the failure was due to reasonable cause and the request for a waiver shall be denied.

The Tribunal modifies the November 13, 2013 Proposed Order, limited to the analysis of the issue of penalty wavier, as the Tribunal’s and adopts the modified Proposed Order as the Final Opinion and Judgment in this case, pursuant to MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law, as modified herein, in the Proposed Order in this Final Opinion and Judgment. Therefore,

IT IS ORDERED that the Administrative Law Judge’s Proposed Order is MODIFIED and adopted by the Tribunal as the Final Opinion and Judgment.

IT IS FURTHER ORDERED that Petitioner’s requests for relief are DENIED, Respondent’s denial of Petitioner’s amended return is AFFIRMED, and this appeal (Docket No. 449632 consolidated with Docket No. 449633) shall be DISMISSED without costs to either party.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

Entered: Mar 7, 2014  
krb

By: Steven H. Lasher