STATE OF MICHIGAN

COURT OF APPEALS

PAUL A. HENDERSON,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellee.

FOR PUBLICATION
September 25, 2014
9:00 a.m.

No. 312859
Michigan Tax Tribunal
LC No. 431375

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

STEPHENS, J.

Petitioner, a resident of the state of Florida, appeals by right the Final Opinion and Judgment of the Michigan Tax Tribunal (MTT) granting respondent summary disposition and holding petitioner responsible for taxes under Michigan's former Single Business Tax Act. MCL 208.1 et seq.[1] For the reasons set forth below, we affirm.

I. BACKGROUND

A Bill for Taxes due, or Notice of Intent to Assess, (the Notice) was issued by respondent to petitioner on October 18, 2011. The Notice alleged that petitioner was liable for a Single Business Tax in the amount of $72,286.39[2] pursuant to MCL 205.27a(5) as a corporate officer of Jefferson Beach Properties, LLC. Liability was for the tax period ending December 2007. Petitioner filed a petition with the MTT challenging the Notice on November 17, 2011.

The petition alleged respondent did not make a preliminary determination that petitioner was the individual responsible for paying the taxes. Further, that the tax liability was subject to a bankruptcy plan and ultimately discharged by the United States Bankruptcy Court, Southern District of Florida on August 3, 2011.[3] Respondent moved for summary disposition before the MTT on the basis of its authority to assess tax liability against corporate officers under MCL 205.27a(5) and the bankruptcy's decree which excluded the tax liability from discharge.

[1] All references to MCL 208.1 et seq. are to sections that were in effect for the 2007 tax year unless otherwise noted.

[2] $61,080.00 tax due, and $11,206.39 interest.

[3] Petitioner had filed for Chapter 11 bankruptcy in Florida the previous year, November 3, 2010.

Summary disposition was granted in a proposed opinion at a referee hearing and affirmed in a final opinion of the Tribunal. Before the proposed opinion had been affirmed however, petitioner served respondent with discovery. Respondent in turn, filed a motion for immediate consideration to hold discovery in abeyance until the final order was issued. Immediate consideration was denied but abeyance was granted, and the Tribunal judge closed all discovery until the final opinion was issued.

The Tribunal issued its Final Opinion and Judgment on August 24, 2012. It affirmed the proposed opinion holding that the referee properly analyzed state and federal law to determine that Michigan's Single Business Tax was a non-dischargeable excise tax under 11 USC 507(a)(8)(E). Petitioner motioned for reconsideration of the Tribunal's opinion on two occasions and was denied both times. At no point did petitioner file a Motion to Amend his petition. In none of the papers filed with the Tax Tribunal after his initial petition did petitioner contend there was a material question of fact as to whether he was a responsible corporate officer and that regardless of the characterization of the SBT summary disposition was, therefore, inappropriate.

II. PETITIONER'S RIGHT TO AMEND HIS PLEADINGS

Petitioner argues the Tribunal denied him the right to amend his pleadings and in interpreting MCR 2.116(I)(5). We find no support for this argument in the record. Our standard of review is clear. "Where fraud is not claimed, this Court reviews the tribunal's decision for misapplication of the law or adoption of a wrong principle." *Wexford Med Group v Cadillac,* 474 Mich 192, 201; 713 NW2d 734 (2006). Our decision is equally clear because petitioner never moved to amend his petition. Petitioner cites the following portion of the Tribunal's Order in its grant of respondent's Motion for Abeyance as support:

> Petitioner has had an opportunity to amend his pleadings and Petitioner has currently failed to timely exercise that "right" or demonstrate why he should be entitled to an extended opportunity to exercise that right.

Respondent's motion for abeyance came after the referee's proposed opinion. That opinion granted summary disposition to respondent and rejected petitioner's claim that his tax liability was discharged by a Florida bankruptcy court. The proposed opinion stated the viability of an amendment to petitioner's pleading at that point was poor because as a matter of law, petitioner had stated no other claim and no amendment could change the fact that the SBT was non-dischargeable by law. The referee was expressing the futility of the amendment at that point. *Tierney v Univ of Mich Regents*, 257 Mich App 681, 687-688; 669 NW2d 575 (2003).[4] Still, the proposed opinion advised petitioner of his right to amend under MCR 2.116(I)(5) where a party against whom judgment is entered under MCR 2.116(C)(8) "shall [be] give[n] . . . an opportunity to amend [his] pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." The referee did not preclude the filing of a Motion to Amend. After the proposed opinion respondent moved to hold in abeyance

[4] "Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile." *Tierney*, 257 Mich App at 687-688.

petitioner's first set of interrogatories and requests for production of documents. The motion did not mention amendments to pleadings. Petitioner added "the right to amend the petition" issue in its response to respondent's motion for abeyance.[5] The Tribunal addressed this issue in its Order Granting Respondent's Motion for Abeyance:

> 3. Although MCR 2.116(I)(5) does require the Tribunal to provide the parties with an opportunity to amend their pleadings, Petitioner has not filed any motion to amend or amended pleading since the filing of Respondent's January 11, 2012, Motion for Summary Disposition, the Tribunal's April 17, 2012, Proposed Order granting that Motion and the filing of Petitioner's May 7, 2012, exceptions to that Order. In that regard, Petitioner has had an opportunity to amend his pleadings and Petitioner has currently failed to timely exercise that "right" or demonstrate why he should be entitled to an extended opportunity to exercise that "right."

While that order might have inferred to petitioner that he was precluded from subsequently filing a Motion to Amend, the Tribunal clarified the Order later when it addressed petitioner's motion for reconsideration:

> Furthermore, the Tribunal finds that the August 3, 2012 Order does not stand for the proposition that Petitioner *cannot* amend his pleadings, but rather, that Petitioner has failed to demonstrate that an amendment would be justified. (Emphasis added in original).

The Tribunal correctly applied MCR 2.116(I)(5). MCR 2.116(I)(5) only states that the court shall provide the *opportunity* for amendments without a limitations period. However, MCR 2.116(I)(5) refers to the amendment procedure in MCR 2.118 which provides that "[a] party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading." MCR 2.118(A)(1). Here, respondent filed its answer to petitioner's petition on December 8, 2012. Approximately nine months later, when the Tribunal issued its Order granting abeyance, petitioner had still not filed an amendment. While MCR 2.116(I)(5) mandates "the court shall provide the parties with an opportunity to amend," according to MCR 2.118(A)(2), after fourteen days the right becomes discretionary:

> (2) Except as provided in subrule (A)(1), a party *may* amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.[6]

There was no error in the Tribunal's application of MCR 2.116(I)(5) to the facts of this case.

III. PETITIONER'S RIGHT TO DISCOVERY

---

[5] Petitioner's Answer to respondent's motion for abeyance, July 10, 2012, response, paragraph 3.

[6] See also MCL 205.735(4) in relevant part: "The petition or answer *may* be amended at any time *by leave* of the tribunal and in compliance with its rules." (Emphasis added); TTR 221(1) "A petition or answer may be amended or supplemented by leave of the tribunal only."

Petitioner next argues he was promised a later opportunity to conduct discovery by the Tribunal and did not receive it. We find no merit in this argument. In order to properly preserve an issue for appeal, it must have been "raised before, and addressed and decided by, the trial court." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 444; 695 NW2d 84 (2005) (citation omitted). Petitioner's motion for reconsideration after the Tribunal ordered discovery closed only addressed the issue of petitioner's right to amend the pleadings. The discovery issue was abandoned. It was not addressed by the Tribunal and is therefore, not preserved for appellate review. However, this Court "may review an unpreserved issue if it presents a question of law and all the facts necessary for its resolution are before the Court." *Macatawa Bank v Wipperfurth*, 294 Mich App 617, 619; 822 NW2d 237 (2011). Sufficient facts are present here to discuss and decide the issues.

"We review a trial court's decision to grant or deny discovery for abuse of discretion."*Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000). "An abuse of discretion standard is equally applicable with respect to discovery rulings by the MTT." *County of Wayne v Mich State Tax Com'n*, 261 Mich App 174, 195; 682 NW2d 100, 114 (2004) (citation omitted). Petitioner relies on the following language from the Tribunal's August 3, 2012, Order Granting Respondent's Motion for Abeyance in support of his position:

> . . . the Tribunal assigned the case to the above-noted Tribunal member for review and entry of a final order adopting or modifying the Proposed Order *or* an order vacating the Proposed Order and scheduling the case for hearing, which would include an opportunity for conducting discovery.[7] (Emphasis added).

However, petitioner's reliance on the above language is misplaced. It is clear that the Tribunal did not indicate that an opportunity for conducting discovery would be afforded in the situation where the Tribunal decided to adopt or modify the proposed order. To adopt or modify the proposed order would substantially mean to affirm it, while vacating the order would be the opposite. The word "or" separates the two possibilities. See *People v Nicholson*, 297 Mich App 191, 199-200; 822 NW2d 284, 288 (2012) (citation omitted) ("The word "or" is disjunctive and, accordingly, it indicates a choice between alternatives.") The Tribunal's Order did not promise petitioner an opportunity for discovery in the event that it adopted or modified the proposed order. The opportunity to conduct discovery was only if the Tribunal vacated the proposed order and scheduled the case for a hearing. Here, the Tribunal chose to adopt the proposed order hence, no discovery was needed.

Petitioner also contends he was denied procedural due process by not being afforded the opportunity to conduct discovery. We disagree. Because this issue was also not preserved before the Tribunal, plain-error analysis is appropriate. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). To establish plain error, petitioner must show "(1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected defendant's substantial rights." *Peoplv Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011). The third factor requires petitioner to show he was prejudiced by the error such that it affected the outcome of the proceedings before the Tribunal. *Carines*, 460 Mich at 763.

---

[7] Order Granting Respondent's Motion for Abeyance, August 3, 2012, p. 2.

The Tribunal did not err when it granted respondent's motion for abeyance and ordered discovery closed until a final opinion was issued. First, there is no constitutional right to discovery in any judicial or quasi-judicial proceeding, including an administrative proceeding. *In the Matter of De Rio*, 400 Mich 665, 687 n 7; 256 NW2d 727 (1977). Second, the Tax Tribunal has authority to generate its own rules that "govern practice and procedure in all proceedings before the tribunal." TTR 201; MCL 205.732.

Petitioner cites no court rule or tax tribunal rule with which the Tribunal failed to comply. Petitioner argues that a scheduling conference was required to take place and cites TTR 270. However, TTR 270 involves prehearing conferences and provides that discovery is not permitted after a prehearing conference. TTR 270(10).[8]

Second, petitioner fails to tell this Court how the outcome of his Tribunal proceeding would have been different with discovery and how discovery would have changed the fact that as a matter of law, petitioner's tax liability to respondent was not dischargeable by bankruptcy.

The Tribunal did not commit plain error or deny petitioner procedural due process. Even if a prehearing conference did not take place, petitioner had his opportunity to be heard on issues involving discovery by way of his answer to respondent's motion for abeyance and by his motions for reconsideration to the Tribunal.

IV. PETITIONER'S TAX LIABILITY

The heart of petitioner's claim is found in the question of whether the SBT liability was discharged in Bankruptcy as a "non-excise tax". As before, our standard of review is limited and clear. "This Court's review of Tax Tribunal decisions in nonproperty tax cases is limited to determining whether the decision is authorized by law and whether any factual findings are supported by competent, material, and substantial evidence on the whole record." *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008) (quotation omitted). "Issues involving the interpretation and application of statutes are reviewed de novo as questions of law." *Id.*

Both parties to this appeal agree that the issue presented is whether Michigan's Single Business Tax is an excise tax. This is an issue of first impression for this Court. According to chapter 11 of the United States Bankruptcy Code, certain excise taxes cannot be discharged in bankruptcy. 11 USC § 523(a)(1)(A). This Court's determination of whether the SBT is an excise tax will answer the ultimate question of whether petitioner's liability for the SBT was discharged in his Florida bankruptcy case. If the SBT is not an excise tax, it was dischargeable in bankruptcy and the Tribunal erred in its grant of summary disposition in favor of respondent. On the other hand, if the SBT is an excise tax, it was not dischargeable in bankruptcy and the Tribunal's grant of summary disposition was proper.

[8] "Discovery shall not be conducted after completion of the prehearing conference, unless otherwise ordered by the tribunal." TTR 270(10).

A. PETITIONER'S BANKRUPTCY

On November 3, 2010, petitioner, as an individual debtor, filed for Chapter 11 Bankruptcy in the United States Bankruptcy Court Southern District of Florida. Petitioner checked under "Types of Priority Claims" the "[t]axes and certain other debts owed to governmental units" box on his Bankruptcy Petition and listed Michigan Business Taxes and Michigan Department of Treasury as creditors holding unsecured priority claims.[9] Petitioner was ordered discharged from bankruptcy in the Southern District of Florida on August 3, 2011. The Order of Discharge and Final Decree declared: "The discharge does not discharge a debtor from any debt under 11 U.S.C. § 523."

11 USC § 523 states:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> (1) for a tax or a customs duty--
>
> (A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

There was no protest in the Tribunal by any party whether petitioner was discharged under one of the sections listed in 11 USC § 523(a). A review of the sections included in 11 USC § 523(a), the Order of Discharge and Final Decree, and the Order Confirming Debtor's Plan of Reorganization confirms petitioner's discharge was under section 1141.

Still, a discharge under section 1141 only excludes taxes in sections 507(a)(3) or 507(a)(8). Section 507(a)(3) subsequently refers its reader to section 502(f). Section 502(f) applies to involuntary cases of bankruptcy whereas petitioner's petition for bankruptcy was filed voluntarily. Section 507(a)(8) refers to unsecured claims of governmental units and lists five types of claims for taxes: (A) a tax on income or gross receipts, (B) a property tax, (C) "a tax required to be collected or withheld and for which the debtor is liable in whatever capacity; (D) an employment tax on a wage, salary, or commission", and (E) an excise tax. 11 USC § 507(a)(8)(A)-(E).

Respondent asserts its claim for single business taxes against petitioner fits the description of an excise tax under 11 USC § 507(a)(8)(E)(i).[10] Section 507(a)(8)(E)(i) provides:

> **(8)** Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--
>
> **(E)** an excise tax on--

[9] Bankruptcy Petition Schedule E, pp. 28-30.

[10] Although there are five types of taxes listed under 11 USC § 507(a)(8), neither party argues that subsections (8)(A)-(D) are applicable.

> **(i)** a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

In this case, petitioner filed for bankruptcy on November 3, 2010, and the return for the 2007 tax year, which respondent claims petitioner is liable for, would have been due in 2008. Petitioner does not dispute that the year 2008 is within the three years of his 2010 bankruptcy filing. There is still however, the remaining question of whether the single business taxes that petitioner was liable for were excise taxes.

B. EXCISE TAXES

Petitioner and respondent disagree over the characterization of an excise tax. Petitioner urges this Court to find an excise tax is a specific indirect tax, imposed on a transaction from general business taxes and consequently that the Single Business Tax is not an excise tax. Respondent requests this Court adopt the definition of an excise tax as a privilege tax imposed on a corporation for engaging in business activity in the state and that the Single Business Tax be found an excise tax. The Tribunal determined the SBT, was "a tax upon the privilege of doing business that is measured by the 'adjusted tax base' of persons with business activity in this state."

Petitioner argues that the Tribunal incorrectly conferred with federal law to answer the question of whether the SBT is an excise tax. He claims the tax nature of the SBT is a question of state law because there is no "federal or state statutory definition" for excise tax. This argument is meritless given that petitioner's request for relief is cloaked in federal law. In order for this Court to determine whether the SBT is an excise tax dischargeable in a *federal* bankruptcy, it must first analyze what an excise tax is and second, determine whether the SBT meets those characteristics. "Whether an obligation is a tax within the meaning of the Bankruptcy Code is determined by federal law." *In re Fagan*, 465 BR 472, 476 (Bkrtcy ED Mich, 2012) (citations and quotations omitted). "[T]he Supreme Court [has] held that when the language of the Bankruptcy Code is clear, the sole function of the courts is to enforce it according to its terms." *In re National Steel Corp*, 321 BR 901, 908 (Bkrtcy ND Ill 2005) (citation and internal quotation marks omitted). It is true however, that "[t]he term "excise tax" is not defined in the Bankruptcy Code." *Fagan*, 465 BR at 477.

As a beginning then, it would be helpful to review how other panels of this Court and our Supreme Court have interpreted excise taxes. The case of *Dooley v City of Detroit*, 370 Mich 194; 121 NW2d 724 (1963), although it concerned the validity of Detroit's income tax ordinance, provided an extensive discussion on excise taxes. *Dooley* was also before the 1975 enactment of the Single Business Act. "It is presumed that the Legislature knows of and intends to legislate in harmony with existing law." *State Bar of Mich v Galloway*, 124 Mich App 271, 277; 335 NW2d 475 (1983). Further, "[t]he Legislature is presumed to know of the existence of the common law when it acts." *Wold Architects and Engineers v Strat*, 474 Mich 223, 234; 713 NW2d 750 (2006).

In *Dooley* the Supreme Court concluded that Detroit's tax on income was a proper excise tax. *Dooley*, 370 Mich at 201. At the time of *Dooley* an excise tax was known to be "variously

defined, sometimes in very general language and sometimes in language more specific." *Id*. at 205. The Supreme Court turned to treatises for elaboration

> Taxes fall naturally into three classes, namely, capitation or poll taxes, taxes on property, and excises. In general, it may be said that all taxes fall into one or the other of the foregoing classes, any exaction which is clearly not a poll tax or a property tax being an excise. *Dooley*, 370 Mich at 205 citing 51 Am Jur Taxation, § 24.
>
> In its modern sense an excise tax is any tax which does not fall within the classification of a poll tax or a property tax, and embraces every form of burden not laid directly upon persons or property. The affirmative definitions of excise or excise tax found in the later decisions exhibit some variety in phraseology. *Dooley*, 370 Mich at 205 citing 51 Am Jur Taxation, § 33 and 16 McQuillin, Municipal Corporations (3rd ed), § 44.190.

The *Dooley* Court also noted other taxes it found to be excises up to that point. In a line of decisions, the Supreme Court had held Michigan's Corporate Franchise Tax "was an excise tax on the franchise to do business as a corporation within the state." *Dooley*, 370 Mich at 205 (internal footnote and citations omitted).[11] In making that determination the Supreme Court relied on what it described as the "broad definition of an excise" which was "a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege." *Id*. at 206 (citations omitted). The *Dooley* Court also concluded the Detroit tax on income was an excise tax because it was not a capitation tax[12] or poll tax. *Id*. The characteristics of the Detroit tax were that it imposed a tax "upon net income from the performance of labor or the rendition of services" and on the "use of capital". *Id*.

Later, in *Continental Motors Corp v Muskegon Twp*, 376 Mich 170, 178; 135 NW2d 908 (1965), the Supreme Court explained the distinction between the ad valorem tax and the excise tax. At issue in *Continental Motors Corp* was the recovery of corporation taxes paid on the assessed value of personal property in possession of the plaintiff pursuant to PA 1959, No 266. *Continental Motors Corp*, 376 Mich at 174-175. In *Continental Motors Corp* an excise tax was referred to as a specific tax or privilege tax and was imposed "upon the privilege of possession and use" whereas an ad valorem tax was imposed on the property itself. *Id*. at 177, 181. The Supreme Court also named Michigan's corporate franchise tax, sales tax, use tax, and tax on possessory rights to use another's tax exempt property as examples of excise taxes. *Id*. at 180. Ultimately, the Court in *Continental Motors Corp* found PA 1959, No 266, unconstitutional reasoning that the public act amended section 14 of the general property tax law so to be under

---

[11] While not dispositive, it is worth knowing that when enacted the SBT replaced multiple other tax acts including the corporate income tax and corporate franchise tax act. Background and History: Michigan's Single Business Tax, House Fiscal Agency, November 2003, p. 7. See *Gillette Co v Department of Treasury*, 198 Mich App 303, 311; 497 NW2d 595 (1993).

[12] A capitation tax is a direct tax on income. "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." Const 1963, art 1, § 9. See also *Wikman v City of Novi*, 413 Mich 617, 680; 322 NW2d 103 (1982).

the guise of an ad valorem tax, when in actuality it operated as an excise tax. *Id*. at 177-178, 181. Continental Motors Corporation's possession and use of the corporation's property was a privilege, and a tax on the property in its possession would be a tax on the privilege, therefore, an excise tax. By contrast, a tax on the property itself would have been an ad valorem tax.

The federal courts have also had an opportunity to define and explain the nature of excise taxes. Petitioner in the instant case chose to appeal to the Tribunal and subsequently to this Court. Other litigants took the route of appealing to the bankruptcy court and subsequently to the federal circuit courts. The Tribunal Judge here did identify the bankruptcy court as an alternative form of relief for petitioner and recognized that it was "better suited to interpret its own orders and controlling case law." Respondent and the Tribunal cite *Quiroz v Michigan Dept of Treasury (In re Quiroz)*, 450 BR 699 (Bkrtcy ED Mich 2011), as an illustration of how the federal courts dealt with similar issues. *Quiroz* did have similar facts, but in that case the parties' focus was on whether the SBT was an excise tax "on a transaction" as required for discharge under 11 USC § 507(a)(8)(E)(i). *Quiroz*, 450 BR at 700. The nature of the SBT as an excise tax was apparently conceded and the *Quiroz* court concentrated on the meaning of the term "transaction". *Id*. at 701-702. The *Quiroz* court turned to the case of *In re Nat'l Steel Corp*, 321 BR 901 (Bkrtcy ND Ill 2005), and its interpretation of the apportionment character of the Texas Franchise Act to explain "transaction" in the context of an excise tax. *Id*. The *Quiroz* court concluded the SBT was an "excise tax on a transaction" because it taxed "the transaction consisting of the act of doing business in the State of Michigan" which was similar to the type of transaction taxed by the Texas Franchise Act. *Id*. The Tribunal followed the logic presented in *Quiroz* regarding the similarities in the apportionment provisions between the Texas Franchise Act and the SBT and concluded the SBT was an excise tax as well. The *Quiroz* case, while factually identical to the instant one, misses the analytical mark of the instant case's significance. The question here is preliminary to that of *Quiroz*, namely is the SBT an excise tax. To that end, *In re Fagan*, 465 BR 472 (Bkrtcy ED Mich 2012), is more instructive.

In *Fagan*, the debtor, a corporate officer, claimed that the Michigan Department of Treasury continued to collect fuel taxes on the corporation when the tax liability was discharged in the debtor's Chapter 7 bankruptcy. *Fagan*, 465 BR at 473. The Department, in a motion to dismiss, argued that the fuel tax was excepted from discharge under 11 USC § 523(a)(1)(A) of the bankruptcy code because it was an excise tax under 11 USC § 507(a)(8)(E). *Fagan*, 465 BR at 474. On an issue of first impression, the Bankruptcy Court for the Eastern District of Michigan analyzed the fuel taxes to determine first, whether they were a tax under federal bankruptcy law, second, whether they were excise taxes, and third, whether they were excise taxes on a transaction. *Id*. at 474. While the federal district court's conclusions are not binding on this Court, the analysis of that court is helpful.

The first analytical step in *Fagan* was determining whether an obligation was a tax or not.[13] However, neither party in the present case questions whether the SBT is a tax under

[13] There are "requirements that must be met in order for an obligation to the government to qualify for priority as a tax under federal bankruptcy law." *In re National Steel Corp*, 321 BR 901, 907 (Bkrtcy ND Ill 2005). The requirements have been formulated into a four-part test where the obligation must be: "(1) an involuntary pecuniary burden; (2) imposed by the state

federal bankruptcy law, nor does either party argue that the SBT is something other than a tax. The second and third steps analyze whether the tax is an excise or not.

In re Fagan recognized there are "two generally accepted definitions of 'excise tax'". *Fagan*, 465 BR at 477. Not surprisingly, petitioner has adopted one and respondent the other. The first, adopted by respondent is from Black's Dictionary:

> [a] tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege. A tax on the manufacture, sale, or use of goods or on the carrying on of an occupation or activity, or a tax on the transfer or property. In current usage the term has been extended to include various license fees and practically every internal revenue tax except the income tax (*e.g.*, federal alcohol and tobacco excise taxes)[.] [*Fagan*, 465 BR at 477 quoting Black's Law Dictionary (6th ed) (citations omitted)].

The second, adopted by petitioner is from the general dictionary definition:

> an internal tax, duty or impost levied upon the manufacture, sale, or consumption of a commodity within a country and [usually] forming an indirect tax that falls on the ultimate consumer[;] c: any of various duties or fees levied on producers of excisable commodities[;] d: any of various taxes upon privileges (as of engaging in a particular trade or sport, transferring property, or engaging in business in a corporate capacity) that are often assessed in the form of a license or other fee[.] [*Fagan*, 465 BR at 477 quoting Webster's Third New International Dictionary (citations omitted)].

Because both definitions have been employed to describe an excise tax, neither should be counted as "wrong". Instead, the SBT should be analyzed to determine whether it possesses the characteristics commonly attributed to excise taxes.

C. THE MICHIGAN SINGLE BUSINESS TAX ACT

When the *Fagan* court analyzed whether fuel taxes were excise taxes under 11 USC § 507(a)(8)(E), it first looked to the preface of the act from which the taxes came to ascertain the act's purpose. In the present case, the SBT, enacted as 1975 PA 228, provided that it was

> 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 proscribe 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.

---

legislature; (3) for a public purpose; (4) under the police or taxing power of the state." *Fagan*, 465 BR 472, 476 (Bkrtcy ED Mich 2012); (citations omitted).

"[T]he Single Business Tax Act, 1975 P.A. 228, M.C.L. § 208.1 *et seq. ;* M.S.A. § 7.558(1) *et seq.,* was enacted to provide for a tax on financial activities beginning January 1, 1976." *Comerica Bank-Detroit v Dep't of Treas,* 194 Mich App 77, 91; 486 NW2d 338 (1992). Decisions of the United States Supreme Court "agree that the purpose of the particular enactment is the controlling factor." *In re Mansfield Tire & Rubber Co,* 942 F2d 1055, 1060; (CA 6, 1991).[14]

> In Michigan, the rationale for adopting the SBT (a modified VAT) stemmed from three main points. The first is the benefits received principle: because all businesses benefit from government services, all businesses should remit a business tax. The second is that whereas corporate income taxes are levied only on corporations, VATs are levied on all types of businesses (including sole proprietorships, partnerships, and limited liability companies) regardless of organizational structure. The third point is revenue stability: the base of VATs, which consists mainly of compensation, is broad and fairly stable.[15]

Other panels of this Court have analyzed the purpose and process of the SBT. Soon after the SBT was enacted its' constitutionality was challenged in *Stockler v Dep't of Treas*, 75 Mich App 640; 255 NW2d 718 (1977). In addition to upholding the constitutionality of the act, the *Stackler* Court determined that the SBT was not an income tax.[16] *Id*. at 652. Section 31 of the Single Business Tax Act provides that the tax levied and imposed under the act is imposed upon "the privilege of doing business and not upon income." *Id*. at 651; M.C.L. § 208.31(3). The Court explained that "[t]he SBT taxes what one has added to the economy in contrast to an income tax which taxes what one has derived from the economy."[17] *Id*. at 643. The *Stockler* Court also determined that the SBT was a specific tax. *Id*. at 652. Indeed, by its own terms the SBT provides that it "imposed a specific tax upon the adjusted tax base of every person with business activity in this state[.]" MCL 208.31(1).

---

[14] See *United States v New York,* 315 US 510, 516-517; 62 S Ct 712; 86 L Ed 998 (1942); *Meilink v Unemployment Commission*, 314 US 564; 62 S Ct 389; 86 L Ed 458 (1942); *United States v Childs*, 266 US 304; 45 S Ct 110; 69 L Ed 299 (1924); *New York v Jersawit* 263 US 493; 496; 44 S Ct 167; 68 L Ed 405 (1924).

[15] Background and History: Michigan's Single Business Tax, House Fiscal Agency, November 2003, p. 37. VAT is the acronym for "value added tax." "Value added taxes are based on the economic activity or the value that businesses add to the production of goods and services. The tax base is final sales less the cost of goods sold or the cost of materials used as inputs."

[16] "The appellate courts of this state have rejected the theory that the single business tax is a tax upon income." *Gillette Co v Dep't of Treas*, 198 Mich App 303, 309; 497 NW2d 595 (1993) citing *Trinova Corp v Dep't of Treas,* 433 Mich 141, 149; 445 NW2d 428 (1989), aff'd 498 US 358; 111 S Ct 818; 112 L Ed 2d 884 (1991); *Mobil Oil Corp v Dep't of Treas*, 422 Mich 473, 493-495; 373 NW2d 730 (1985); *Town & Country Dodge, Inc v Dep't of Treas,* 152 Mich App 748, 755; 394 NW2d 472 (1986); *Wismer & Becker Contracting Engineers v Dep't of Treas,* 146 Mich App 690, 696; 382 NW2d 505 (1985).

[17] See also *Columbia Assoc, LP v Dep't of Treas*, 250 Mich App 656, 666-667; 649 NW2d 760 (2002).

Later in *Fluor Enterprises, Inc v Dep't of Treasury*, 265 Mich App 711, 715; 697 NW2d 539 (2005) aff'd in part and rev'd in part on other grounds 477 Mich 170 (2007) (citation omitted), the SBT was determined to be a value-added tax, which is a tax imposed on "economic activity itself and can be described in two ways: as a tax on the economic actor's use of the scarce resources of society, or as a tax on the value the economic actor adds to the economy." That analysis was affirmed in *Ammex, Inc v Dep't of Treas*, 273 Mich App 623, 629; 732 NW2d 116 (2007). "This Court has recognized the nature of the SBT as a value-added tax that measures 'the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale.'" *Cowen v Dep't of Treasury*, 204 Mich App 428, 432, 516 N.W.2d 511 (1994), quoting Haughey, *The Economic Logic of the Single Business Tax*, 22 Wayne L R 1017, 1018 (1976).

Petitioner argues, although not specifically, that value-added is synonymous with ad valorem and concludes that an excise tax is "practically any tax which is not an ad valorem tax." First, petitioner's authority for the statement that an excise tax is any tax but an ad valorem tax is taken from *Callaway v City of Overland Park*, 211 Kan 646, 651; 508 P2d 902 (1973), and therefore, not binding precedent on this Court. Further, the *Callaway* case did not hold the SBT was an ad valorem tax. In fact, there is no case cited by petitioner finding the SBT is an ad valorem tax. Second, petitioner has not shown how the very specific meaning of ad valorem, which is almost always in relation to the taxation of personal property, is related to the SBT outside of his incorrect understanding of the term as the equivalent of value-added.[18]

The SBT has the characteristics of an excise tax as defined under the federal bankruptcy law. That definition of an excise tax is an assessment that taxes the "enjoyment of a privilege" or "the carrying on of an occupation or activity" both of which describe the purposes of the SBT. *Fagan*, 465 BR at 477 (quotation omitted). The SBT is a tax upon "the privilege of doing business" in the state, *Stockler, supra* at 651, and focuses "on taxing the economic activity itself rather than the goods." *Ammex, Inc*, 273 Mich App at 631; M.C.L. § 208.31(3). The United States Supreme Court did add the caveat that the SBT was not a tax on "business activity" per se, but rather, as the statute reads, a tax "*upon the adjusted tax base* of every person *with business activity in this state* which is allocated or apportioned to this state." *Trinova Corp v Mich Dep't of Treas*, 498 US 358, 374; 111 S Ct 818; 112 L Ed 2d 884 (1991) (*Trinova II*), quoting MCL 208.31(1) (emphasis in original). The Tribunal likened the apportioned nature of the SBT to the Texas Franchise Tax which was found to be an excise tax and cited *In re National Steel Corp*,

[18] Most notably, ad valorem is used in our state's constitution: "The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law. * * * The legislature may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation. Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates." Const 1963, art 9, § 3. See *Consumers Power Co v City of Muskegon*, 13 Mich App 334, 343; 164 NW2d 398 (1968) (citations omitted) ("[A]d valorem taxes are to be levied upon the State equalized value of property.") See also *Shivel v Vidro*, 295 Mich 10, 18; 294 NW 78 (1940) (citation omitted) ("Property taxes may be either specific or ad valorem, although they are almost invariably ad valorem and in some states the constitution forbids property taxes other than ad valorem.")

supra, in support of the SBT also being an excise tax. Petitioner takes issue with that analogy and asserts that "[t]he fact that the SBT is an apportioned tax further distinguishes it from an excise tax." However, petitioner's assertion is unsupported by detailed argument and cites no authority for its conclusion. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

The Tribunal's analogy of the SBT to the Texas Franchise Tax is sound. The Texas Franchise Tax was found to be an excise tax because it met accepted definitions and descriptions of an excise tax. *In re National Steel Corp*, 321 BR at 909. The Texas Franchise Tax was "a tax on the value of the privilege to transact business in the state" *Id*. at 910, and so is the SBT, MCL 208.31(3). Further, the SBT was to be calculated "in lieu of all other privilege of franchise fees". MCL 208.22.

The next and last analytical step from *Fagan* is determining whether the SBT is "an excise tax on a transaction" as required by 11 USC § 507(a)(8)(E)(i). *Fagan*, 465 BR at 478. Petitioner's argument against the SBT being an excise tax is that the SBT is a general business tax and that excise taxes are specific and related to specific activities. This argument fails for a number of reasons. First, the SBT was enacted with a specific purpose, namely to impose "taxes on *certain* commercial, business, and financial activities[.]" 1975 PA 228 (emphasis added). Second, the same sentence illustrates that the SBT was limited to specific activities, those being "financial activities". Third, the reasoning in *In re Quiroz*, which is helpful on this point, explained that "transactions are not limited to separate and distinct acts or specific taxable events." *In re Quiroz*, 450 BR at 701. *In re National Steel Corp* elaborated this point, that an actual "series of transactions . . . are necessarily required in the carrying on of business." *In re National Steel Corp*, 321 BR at 913. The taxing of financial activities implies multiple transactions. The SBT is an excise tax on a transaction within the meaning of 11 USC § 507(a)(8)(E)(i).

Petitioner disagrees with the state and federal analyses employed by the Tribunal to determine how to interpret Michigan's Single Business Tax. Petitioner asserts the proposed order quoted statements in the case of *City of New York v Feiring*, 313 US 283; 61 S Ct 1028; 85 L Ed 1333 (1941), that did not exist and then erroneously relied on them. The first statement from *Feiring* was: "Whether a particular obligation is a 'tax is a federal question and is not dependent upon the particular nomenclature used in a state's law.'" Petitioner is correct that this quote does not exist in *Feiring*. The actual quote reads:

> Whether the present obligation is a 'tax' entitled to priority within the meaning of the statute is a federal question. Intended to be nationwide in its application, nothing in the language of s 64 or its legislative history suggests that its incidence is to be controlled or varied by the particular characterization by local law of the state's demand. Hence we look to the terms and purposes of the Bankruptcy Act as establishing the criteria upon the basis of which the priority is to be allowed. *City of New York v. Feiring*, 313 US 283, 285; 61 S Ct 1028 85 L Ed 1333 (1941) (internal citations and quotations omitted).

The Tribunal's statement and the actual quote from *Feiring* both communicate that federal law determines what is and is not a tax. Because the sentence quoted by the Tribunal was an accurate paraphrase of *Feiring*, petitioner's complaint is reduced to one of clerical error, a placement of quotations where there should be none.

The second statement in the proposed order purportedly from *Feiring* was:

> Some courts have held that an income tax and a property tax are *not* excise taxes. *Id*, [sic] 673, citing, *Jenson v Henneford*, 185 Wash 209; 53 P2d 607, 610 (1936). On the other hand, the United States Supreme Court has held that an "excise tax" is " . . . practically any tax which is not an ad valorem tax . . ., imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege . . ." *City of New York v Feiring*, 313 US 283, 285; 61 S Ct 1028, 1029; 85 L Ed 1333 (1941) (emphasis in original).

Petitioner is correct that this quotation is not from *Feiring*. The language is instead from *Callaway v City of Overland Park*, 211 Kan 646, 651; 508 P2d 902 (1973). This error does not, however, eviscerate the analytical soundness of the Tribunal's proposed order as a whole. Nor does it establish that the Tribunal ignored the common law. The eighteen-page proposed order cited a myriad of sources, the overwhelming majority of which were correctly cited and supportive of the order's conclusions. The Tribunal's decision to not accept a particular definition of an "excise tax," which consequently would have favored petitioner, is not evidence that the Tribunal completely ignored the common law on the subject of excise taxes.

D. DERIVATIVE LIABILITY UNDER MCL 205.27a(5)

MCL 205.27(a)(5) permits the Department of Treasury to collect revenue from officers of limited liability companies. Under MCL 205.27(a)(5), "[t]he sum due for a liability may be assessed and collected under the related sections of this act." Petitioner never contends that he is not a corporate officer of Jefferson Beach Properties, LLC.[19] He only challenges the type of liability due under the statute, arguing that since the liability did not arise from an excise tax, it was discharged in bankruptcy. Respondent and the Tribunal aver the officer liability is clearly for taxes due. Petitioner argues the liability is not a tax liability, but merely a derivative liability where petitioner is held responsible for the debt of another.

The plain language of MCL 205.27(a)(5) provides that the liability is for taxes:

> If a . . . limited liability company . . . liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers, . . . is personally liable for the failure. The dissolution of a . . . limited liability company . . . does not discharge an officer's . . . liability for a prior failure of the . . . limited liability company . . . to make a return or remit the tax due. The

[19] Respondent alleges petitioner "signed several tax filings, company statements, and checks in the payment of Jefferson Beach's tax liabilities." Brief of Appellee Michigan Department of Treasury, p. 2.

> sum due for a liability may be assessed and collected under the related sections of this act. [As in effect for the 2007 tax year].

"The words of a statute provide 'the most reliable evidence of [the Legislature's] intent....' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). The liability in MCL 205.27(a)(5) is born from a limited liability company's failure to have not either 1) filed returns or 2) paid taxes due. The failure in the instant case was for taxes due and not the filing of returns. By nature of the statute, the corporate officer became personally liable for the company's failure: to pay taxes. The language of the statute clearly identifies the liability "for taxes" and the failure "to pay taxes due" and does not use the ambiguous term "debt" that petitioner employs for his own manipulation. Petitioner's characterization of the liability as derivative did not change the nature of the liability for the payment of taxes.

Petitioner erroneously asserts his case is similar to that of *Livingstone v Dep't of Treas*, 434 Mich 771; 456 NW2d 684 (1990). While petitioner attempts to analogize the derivative liability in *Livingstone* to the derivative liability he contends is present in his own case, the two cases are incomparable. The Supreme Court's discussion in *Livingstone* was isolated to derivative liability found in the Use Tax Act, MCL 205.91 *et seq.*, not the Single Business Tax Act. *Id*. at 776. *Livingstone* also concerned, MCL 205.96(3), which is different from the derivative liability statute, MCL 205.27(a)(5), involved in petitioner's case. *Id*. at 795-796. Also, one of the central points in *Livingstone* was how the derivative liability of corporate officer's was affected by the use tax's period of limitations. *Id*. *Livingstone* and the instant case are distinguishable to the point where comparison would be inappropriate and a misapplication of the Supreme Court's holdings in *Livingstone* would result.

E. SUMMARY DISPOSITION

The proposed opinion and order granted respondent's motion for summary disposition under MCR 2.116(C)(8). The Final Opinion and Judgment affirmed the proposed order. "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood* 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Id*. at 119. Only the pleadings are considered. MCR 2.116(G)(5).

A motion under MCR 2.116(C)(8) allows dismissal of a claim when "[t]he opposing party has failed to state a claim on which relief can be granted." Petitioner's pleadings only made one claim and it was that he was not liable for SBT taxes because those taxes were included in an earlier bankruptcy he filed in the Southern District of Florida and discharged by that bankruptcy. Respondent argued that SBT taxes were excise taxes non-dischargeable in bankruptcy proceedings. The Tribunal agreed with respondent. As a matter of law an excise tax on a transaction is not dischargeable in a bankruptcy proceeding. 11 USC § 507(a)(8)(E)(i). The Order of Discharge and Final Decree from the Southern District of Florida notified petitioner of this fact. The SBT is an excise tax on a transaction and therefore, not dischargeable. Petitioner points to no other support adequate to sustain his claim that he is not liable for SBT taxes. The Tribunal, and likewise this Court, has no ground to grant petitioner relief. Summary disposition was proper.

F. JURISDICTION

Lastly, petitioner argues that the Tribunal lacked jurisdiction to grant summary disposition to respondent as a matter of law. He contends that respondent had a burden to demonstrate it had jurisdiction to seek payment from petitioner after the liability was discharged from bankruptcy in Florida. This issue was not presented to the Tribunal and is therefore, new on appeal. Issues not addressed by the trial court are not preserved for this Court's review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Further, the issue of jurisdiction was not identified in the petitioner's statement of questions presented. Issues must be raised in petitioner's statement of questions presented in order to be properly presented for this Court's review. MCR 7.212(C)(5); see *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 553; 730 NW2d 481 (2007).

G. RETROACTIVE EFFECT OF 2014 PA 3

As part of the supplemental authority provided to this Court, petitioner has directed our attention to the case of *Shotwell v Dept of Treas*, ___ Mich App ___; ___ NW2d ___ (2014), and its holding that 2014 PA 3 be given retroactive effect.

2014 PA 3 amended the language of MCL 205.27(a)(5). MCL 205.27(a)(5), as amended, refers its reader to the new subsection (15) which sets forth the "elements of a responsible person" to be proven by the Department of Treasury in order to find the corporate officer liable for the taxes of the corporation.

In pertinent parts, MCL 205.27a(15) reads:

> (15) As used in subsections (5) and (6):
>
> (b) "Responsible person" means an officer, member, manager of a manager-managed limited liability company, or partner for the business *who controlled, supervised, or was responsible for the filing of returns or payment of any of the taxes* described in subsection (14) during the time period of default and who, during the time period of default, *willfully failed to file a return or pay the tax due* for any of the taxes described in subsection (14). (Emphasis added).
>
> (d) "Willful" or "willfully" means the person knew or had reason to know of the obligation to file a return or pay the tax, but intentionally or recklessly failed to file the return or pay the tax.

Arguably, petitioner knew of his obligation to pay the SBT because he listed the Department of Treasury and Michigan Business Taxes as creditors on his bankruptcy petition in the Southern District of Florida.

Petitioner argues that these new changes to MCL 205.27(a)(5) support remand to the Tribunal. Petitioner argues that on remand: 1) respondent should be required to prove petitioner is a responsible person by showing petitioner willfully failed to file a return or pay a tax due, and 2) petitioner should be allowed to conduct more discovery to defend against the assertion that he is a responsible person.

We concur with petitioner only on the points that *Shotwell, supra,* did determine 2014 PA 3 was retroactive and that 2014 PA 3 amended portions of MCL 205.27a, the corporate officer liability statute. We do not agree, however, that petitioner's issues, as they are framed before the Court, are affected by the amendments to MCL 205.27a. Petitioner does not argue to this Court that he is not a corporate officer or that he is not responsible for the debts of the corporation, Jefferson Beach Properties, LLC. Petitioner concedes his capacity. His request on appeal is for this Court to interpret the liability which he concedes he owes as a liability that was discharged in bankruptcy. His contention is that he *is* derivatively liable for a debt, which can be discharged by bankruptcy, and not for an excise tax of the corporation. The issues before this Court and the Tribunal focused on the nature of assessment.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Douglas B. Shapiro
/s/ Jane E. Markey