STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Earl's Spray Service, Inc.,
Petitioner,

v

MTT Docket No. 308804

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Patricia L. Halm

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

The issue in this case is whether a business engaged in the service of crop dusting is entitled to a refund for taxes paid under the Motor Fuel Tax Act, being MCL 207.1001 *et seq*, if the fuel used in its crop dusting aircraft was labeled as diesel fuel in violation of MCL 207.1094(4).

Petitioner, Earl's Spray Service, Inc., is a Michigan corporation whose purpose is to provide crop dusting services. Petitioner provides this service from a rural landing strip it owns in Porter Township in Midland County. During the period January 18, 2002 through September 17, 2002, Petitioner paid $7,176.75 in motor fuel tax on K-1 kerosene and diesel fuel it purchased and used in its crop dusting aircraft. Petitioner's position is that it is entitled to a refund of this tax pursuant to MCL 207.1039 because its crop dusting aircraft are implements of husbandry or, in the alternative, because the fuel was used for a non-highway purpose. Respondent's position is that Petitioner used fuel identified on a shipping paper or invoice as diesel fuel for aviation purposes and that this was a violation of MCL 207.1094. Respondent asserts that because Petitioner violated the statute, it is not entitled to a refund of the tax paid.

Both parties filed motions for summary disposition. Petitioner, represented by attorney Charles M. Fortino, based its motion on MCR 2.116(C)(10). Respondent, represented by Assistant Attorney General David R. Ishbia, based its motion on MCR 2.116(C)(8) and (C)(10).

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that Petitioner is entitled to a refund of tax paid under the motor fuel tax act. As such, Petitioner's Motion for Summary Disposition is granted and Respondent's Motion is denied.

PETITIONER'S POSITION

Petitioner's business is a crop dusting service that is based at a rural landing strip it owns in Porter Township in Midland County. During the time under appeal, January 18, 2002 through September 17, 2002, Petitioner owned two Turbine Thrush aircraft manufactured by Ayers Corporation. According to Petitioner,

> …Turbine Thrush aircraft are a single seat, low wing, crop dusting aircraft. They are equipped with integral holding tanks for the purpose of carrying and spraying herbicides, insecticides, and fertilizer and are equipped with integral spray nozzles which dispense the materials carried in the holding tanks…The aircraft are labeled by their manufacturer as "restricted to agricultural use only" and are not susceptible to any other use…The aircraft's manufacturer specified the types of fuel which could be used in the aircraft, one of which was K-1 kerosene. (Petitioner's Affidavit, p2)

Petitioner only used its aircraft for crop dusting. (Petitioner's Brief, p2) "Because aviation fuel was not available to the Petitioner at its rural landing strip, it purchased K-1 kerosene and its equivalent, diesel fuel, from a petroleum supplier who transported it to Petitioner's facility." (Petitioner's Brief, p2) Petitioner paid tax to the State of Michigan at the rate of fifteen cents per gallon. "This same practice had been followed by Petitioner for a number of years prior to the 2001 and 2002 crop dusting seasons…." (Petitioner's Brief, p2)

During the period at issue, Petitioner purchased 35,103.7 gallons of diesel fuel and 11,699.4 gallons of K-1 kerosene. (Petitioner's Brief, p3) Pursuant to MCL 207.1008(1)(b),

Petitioner paid the tax at the rate of fifteen cents per gallon. The total amount paid was $7,176.75. Petitioner then claimed a refund.

Petitioner asserts this claim for a refund pursuant to MCL 207.1039, stating that its crop dusting aircraft are implements of husbandry as defined in MCL 207.1003(i). Petitioner argues that had the legislature intended to exclude aircraft from the definition of an implement of husbandry, it could clearly have done so, as it did with motor vehicles licensed for use on public roads. Petitioner argues that it is common knowledge that aircraft are used in Michigan for agricultural purposes and that the legislature made an informed decision not to exclude aircraft from the definition of an implement of husbandry. Petitioner further asserts that the Turbine Thrush aircraft is a vehicle.

In the alternative, Petitioner contends that it is entitled to a refund under MCL 207.1039 because the fuel was used for a nonhighway purpose not expressly exempted under the Act.

Finally, Petitioner states that it did not know that it was illegal to use fuel identified as diesel fuel for aviation purposes.

> On April 1, 2001, unbeknownst to the Petitioner, MCL 207.1094 was enacted which appears to have criminalized the business practice which Petitioner had followed for years by making it a crime to use diesel fuel in an aircraft. As a practical matter, Petitioner could not use aviation fuel, because it was not based at a commercial airport where aviation fuel was readily available, and because aviation fuel could not be purchased for transport to Petitioner's facility in the relatively small quantity needed by Petitioner. Had Petitioner been able to purchase aviation fuel, it would only have paid three cents per gallon in tax, instead of the fifteen cents it, in fact, paid. See MCL 259.203. (Petitioner's Brief, p2)

RESPONDENT'S POSITION

Petitioner's appeal involves Assessment No. L825141. This Assessment was levied to recoup a tax refund mistakenly granted to Petitioner for motor fuel tax paid for the period January 18, 2002 through September 17, 2002. Respondent received Petitioner's refund request

of $7,176.75 on April 5, 2003. On April 18, 2003, Respondent sent Petitioner a letter denying the request. Thereafter, the refund was issued in error.

Respondent argues that Petitioner is unable to make a valid claim for a refund of this tax because it purchased diesel fuel and used it for aviation purposes in violation of MCL 207.1094(4). Respondent argues that tax refunds are not available in the event that fuel is purchased and used in a way that violates the statute. Thus, it is irrelevant whether Petitioner's aircraft was an implement of husbandry. "To establish that [Petitioner] was entitled to an exemption of taxes, [Petitioner] must prove that it purchased and used the motor fuel in a way that is consistent with specific statutes with which it was required to comply." (Respondent's Brief, p5)

FINDINGS OF FACT

The Tribunal's factual findings must be supported by competent, material and substantial evidence. *Antisdale* v *Galesburg*, 420 Mich 265; 362 NW2d (1984). In that regard, the Tribunal finds that during the period at issue, January 18, 2002 through September 17, 2002, Petitioner was engaged in the business of crop dusting. Petitioner owned and used two Turbine Thrush aircraft in its business. Turbine Thrush aircraft are single seat, low wing, crop dusting aircraft, equipped with integral holding tanks for the purpose of carrying and spraying herbicides, insecticides and fertilizer and integral spray nozzles which dispense the materials carried in the holding tanks. These aircraft are labeled by their manufacturer as "restricted to agricultural use only" and are not susceptible to any other use. Petitioner historically purchased K-1 kerosene, and diesel fuel for use in this aircraft. This fuel was delivered to Petitioner's landing strip in Porter Township in Midland County and to other areas at which the aircraft was operating.

Petitioner paid motor fuel tax to the State of Michigan at the rate of fifteen cents per gallon for each gallon of fuel it purchased during the period at issue. The total amount paid was $7,176.75. Petitioner then claimed a refund of this tax, asserting that fuel was used in an implement of husbandry. Petitioner's claim for a refund of this tax was received by Respondent on April 5, 2003. On April 18, 2003, Respondent sent a letter to Petitioner denying the request. Thereafter, Respondent issued Petitioner the refund. On May 19, 2003, Respondent issued a second letter to Petitioner denying the request and informing Petitioner that an "Intent to Assess" would be issued to recover the refund.

MCL 207.1094(4) provides that motor fuel identified on a shipping paper or invoice as diesel fuel shall not be used for aviation purposes. Petitioner violated this statute. However, Petitioner had no knowledge of the statute and therefore did not violate it knowingly. Respondent denied Petitioner's request for a refund because of this violation.

MOTIONS FOR SUMMARY DISPOSITION

In the instant case, both parties have filed Motions for Summary Disposition pursuant to MCR 2.116(C)(10), which provides the following ground upon which a summary disposition motion may be based: "Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." There is no specific tribunal rule governing motions for summary disposition. As such, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such a motion. TTR 111(4).

The Michigan Supreme Court, in *Quinto* v *Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), provided the following explanation of MCR 2.116(C)(10).

> MCR 2.116 is modeled in part on Rule 56(e) of the Federal Rules of Civil Procedure…[T]he initial burden of production is on the moving party, and the

> moving party may satisfy the burden in one of two ways.
>
> First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.
>
> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*. at 361-363. (Citations omitted.)

In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius* v *Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

Respondent also filed a motion for summary disposition under MCR 2.116(C)(8), which provides the following ground upon which a summary disposition motion may be based: "The opposing party has failed to state a valid defense to the claim asserted against him or her." A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. *Beaudrie* v *Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A C(8) motion should be granted if no factual development could

possibly justify recovery. *Id*. at 130. In a motion under subsection C(8), all factual allegations in support of the claim are accepted as true and construed in a light most favorable to the nonmoving party. *Maiden* v *Rozwood,* 461 Mich 109; 597 NW2d 817.

CONCLUSIONS OF LAW

The issue in the instant case is whether Petitioner is entitled to a refund of tax it paid pursuant to the MFTA. Under the MFTA, motor fuel is exempt from the tax if the fuel meets certain requirements. In those situations, the tax need not be paid. However, if the motor fuel doesn't meet one of the requirements and the tax is paid, a person may seek a refund if the motor fuel is used for a nontaxable purpose. Because of the manner in which the MFTA is worded, the Tribunal finds that a tax "refund" under the MFTA is the equivalent of a tax exemption. For that reason, the Tribunal finds that the refund provisions of the MFTA are subject to a rule of strict construction in favor of the taxing authority. *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc* v *Sylvan Twp*, 416 Mich 340, 348; 330 NW2d 682 (1982). Moreover, Petitioner bears the burden of proving that it is entitled to the refund.

In *ProMed Healthcare* v *City of Kalamazoo*, 249 Mich App 490; 644 NW2d 47 (2002), the Michigan Court of Appeals discussed Justice Cooley's treatise on taxation and held that:

> [T]he **beyond a reasonable doubt** standard applies when the petitioner attempts to establish that an entire class of exemptions was intended by Legislature. However, the **preponderance of the evidence** standard applies when a petitioner attempts to establish membership in an already exempt class. (Emphasis added.) *Id.* at 494, 495.

Because Petitioner is attempting to establish that aircraft used in crop dusting is an instrument of husbandry, the Tribunal finds that the preponderance of the evidence standard applies.

There are two Michigan statutes that impose a tax on the sale or use of aircraft fuel. The first is the aircraft fuel privilege tax, which, as its name suggests, is a tax imposed on the

privilege of "…using the aeronautical facilities on the lands and waters of this state." See MCL 259.203. The second is the motor fuel tax act (MFTA), which is a tax imposed on all motor fuel, not otherwise exempt, "…sold, delivered, or used in this state…." See MCL 207.211 *et seq*.

In the instant case, it appears that Petitioner did not use the state's aeronautical facilities since Petitioner has its own rural landing strip and Petitioner had fuel delivered to this landing strip and "…to such rural location from which the aircraft might be operating." (Petitioner's Affidavit, p2) Moreover, "Petitioner had no access to the purchase of bulk aviation fuel during the time periods applicable to this appeal." (Petitioner's Affidavit, p2)

MCL 207.1022(2) provides that "[t]he tax imposed on diesel fuel shall be imposed in lieu of all other taxes imposed or to be imposed upon the sale or use of diesel fuel by the state or a political subdivision of the state…." The statute then goes on to specify several taxes that may be imposed in addition to the motor fuel tax; however, the aircraft fuel privilege tax is not one of them. Thus, diesel fuel may only be taxed under the MFTA, regardless of its use. For these reasons, the Tribunal finds that the fuel purchased by Petitioner was not subject to the aircraft fuel privilege tax.

On the other hand, it is undisputed that the fuel purchased by Petitioner was subject to the MFTA. It is also undisputed that Petitioner paid the correct amount of tax on the fuel that it purchased. Section 8 of the Act provides: "Subject to the exemptions provided in this act, tax is imposed on <u>motor fuel</u> imported into or sold, delivered, or used in this state. . . ." (Emphasis added.) (MCL 207.1008(1)) Section 4 defines motor fuel as "…gasoline, <u>diesel fuel, kerosene</u>, a mixture of gasoline, diesel fuel, or kerosene, or a mixture of gasoline, diesel fuel, or kerosene and any other substance." (Emphasis added.) (MCL 207.1004(d)) Section 2 defines "diesel fuel" as:

> …any liquid other than gasoline that is capable of use as a fuel or a component of a fuel in a motor vehicle that is propelled by a diesel-powered engine or in a diesel-powered train. Diesel fuel includes number 1 and number 2 fuel oils, kerosene, dyed diesel fuel, and mineral spirits. Diesel fuel also includes any blendstock or additive that is sold for blending with diesel fuel, any liquid prepared, advertised, offered for sale, sold for use as, or **used in the generation of power for the propulsion of a** diesel-powered engine, **airplane**, or marine vessel. An additive or blendstock is presumed to be sold for blending unless a certification is obtained for federal purposes that the substance is for a use other than blending for diesel fuel. Diesel fuel does not include an excluded liquid. (Emphasis added.)

During the period in question, Petitioner "…used K-1 kerosene and its equivalent, diesel fuel, in the aircraft…." (Petitioner's Affidavit, p2) Therefore, Petitioner's fuel purchases were subject to the MFTA.

Petitioner asserts that its use of the fuel in its crop dusting aircraft was for a "nontaxable purpose" and, as such, it is entitled to a refund of the tax paid. "Nontaxable purposes" are defined in Sections 33 to 47 of the MFTA. (MCL 207.1033 to 207.1047) In support of its refund claim, Petitioner relies upon the nontaxable purpose set forth in MCL 207.1039, which states:

> An end user may seek a refund for tax paid under this act on motor fuel used in an implement of husbandry or otherwise used for a nonhighway purpose not otherwise expressly exempted under this act. However, a person shall not seek and is not eligible for a refund for tax paid on gasoline used in a snowmobile, off-road vehicle, or vessel as defined in the natural resources and environmental protection act. (Emphasis added.)

"Instrument of husbandry" is defined as "…a farm tractor, a vehicle designed to be drawn or pulled by a farm tractor or animal, a vehicle that directly harvests farm products, and a vehicle that directly applies fertilizer, spray, or seeds to a farm field. Implement of husbandry does not include a motor vehicle licensed for use on the public roads or highways of this state." (MCL 207.1003(i)) The statute does not define the term "vehicle." Courts may consult dictionary definitions to determine the ordinary meaning of undefined statutory terms. *Koontz* v *Ameritech*

Services, Inc, 466 Mich 304, 312; 645 NW2d 34 (2002) Pursuant to *The American Heritage College Dictionary,* Third Edition, "vehicle" is defined as "a device or structure for transporting persons or things…a space vehicle…." Thus, it is clear that the term "vehicle" includes aircrafts. Because Petitioner's aircraft was specifically designed to apply herbicides, insecticides and fertilizer to crops, the Tribunal finds Petitioner's aircrafts to be instruments of husbandry.

Respondent does not address the issue of whether Petitioner's crop dusting planes are implements of husbandry, or whether the planes were used for a nonhighway purpose. Instead, Respondent asserts that it is irrelevant whether Petitioner's aircraft was an implement of husbandry. (Respondent's Brief, p3) Respondent's sole argument is that "[t]here are no exemptions available in the event that fuel is purchased and used in a way that violates an applicable statute." (Respondent's Brief, p3) Respondent argues that Petitioner violated MCL 207.1094(4), which states: "A person shall not sell, use, or label for aviation purposes motor fuel identified on a shipping paper or invoice as diesel fuel." However, Respondent cites no authority for this position.

> 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. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. Failure to brief a question on appeal is tantamount to abandoning it. (Citations omitted.) *Mitcham* v *City of Detroit*, 355 Mich 182; 94 NW2d 388 (1959)

The Tribunal has reviewed MCL 207.1094 to determine the purpose of this statute. "[O]ur primary task in construing a statute, is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co* v *Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) "The words of a statute provide 'the most reliable evidence of its intent ····' " *Id.*, quoting *United States* v *Turkette*, 452 US 576, 593; 101 S CT 2524; 69 L Ed 2d 246 (1981). In that regard, the

Tribunal finds that the intent of the Legislature in enacting MCL 207.1094 was to insure that either the aircraft fuel privilege tax or the motor fuel tax was paid on motor fuel imported, sold, delivered or used in this state. It was not the Legislature's intent to forbid the use of diesel fuel or kerosene for aviation purposes. In the instant case, Petitioner paid the motor fuel tax. But for the fact that the fuel was not labeled for aviation use, Respondent has not denied that Petitioner would be granted the refund it seeks.

In conclusion, the Tribunal finds that Petitioner has proven by a preponderance of the evidence that it is the end user of the diesel fuel it purchased and that its aircraft are instruments of husbandry. Respondent's argument that the refund cannot be granted because Petitioner violated MCL 207.1094(4) fails because Respondent has not cited any authority for this premise. Based upon the above analysis of the statutory language, case law and affidavits, and there being no genuine issue in respect to any material fact, the Tribunal rules that Petitioner is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(10).

JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that Assessment No. L825141 is CANCELLED.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is DENIED.

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: July 31, 2006 By: Patricia L. Halm