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

Great Lakes Home Health Services, Inc.,
Petitioner,

MTT Docket No. 410962

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

FINAL OPINION AND JUDGMENT

A Proposed Opinion and Judgment ("POJ") was issued on August 30, 2012. The POJ provided, in pertinent part, "[t]he parties shall have 20 days from the date of entry of this Proposed Opinion and Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281)," and "exceptions and written arguments shall be limited to the matters addressed in the motions." In addition, "[t]his Proposed Opinion and Judgment, together with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Michigan Tax Tribunal Act (MCL 205.726)."

Petitioner filed exceptions to the POJ on September 19, 2012.

Respondent filed exceptions to the POJ on September 19, 2012.

PETITIONER'S EXCEPTIONS

Petitioner takes exception to certain portions of the Findings of Fact contained in the POJ. Specifically, Petitioner objects to the inclusion of Sara Clark Pierson's testimony on pages 8 and 9, as she was not the auditor in this case and

her statements are "misplaced as a 'findings of fact.'" Further, Petitioner argues that the statements made are Ms. Pierson's views and opinions and should not be stated under the Findings of Fact. Petitioner further objects to the inclusion of Ms. Pierson's testimony on page 12 of the POJ relating to Great Lakes Hospice of Jackson. Petitioner contends that Hospice did not provide a "grant" to Petitioner, but reimbursed expenses. Petitioner argues that it was acting as an agent for Hospice and was reimbursed for the purchases made. Petitioner further argues that the items were purchased for the use of Hospice patients.

Petitioner further takes exceptions to the Conclusions of Law. Petitioner states that the determination in regard to OCS refers to "a generic boilerplate agreement" and many of the provisions did not apply during the audit period. Petitioner argues that the POJ "appears to use the parol-evidence rule" as found in *Mid America Management Corp v Dep't of Treasury*, 153 Mich App 446; 395 NW2d 702 (1986). Petitioner contends that this rule does not prohibit the Tribunal from admitting and considering sworn testimony regarding the use of OCS software. Petitioner further argues that the SHP agreement is also broad and not all the provisions apply. Petitioner contends that Barbara Rosenblum's testimony regarding SHP was completely ignored in the POJ, although she is the one most qualified to comment on transactions between Petitioner and SHP. Petitioner contends that it does not use the OCS or SHP software to input data or retrieve specific reports.

Petitioner further argues that it has no access to the software and no right to the software. Petitioner contends that this is an "unsettled area of law" regarding software located on a seller's server and Petitioner's "right or power over tangible personal property incident to the ownership of that property" under MCL 205.92(b). It is Petitioner's continued argument that "where a purchaser has no

access or right to use the seller's software, there is no 'use' and therefore there is no taxable incident."

In regard to the IDS palm devices, Petitioner contends that it was not renting a device, but purchasing a service. Petitioner asserts it would not pay $300 per month for a device worth a fraction of that amount. Petitioner contends that it purchased a subscription service and did not have access to or a right to use IDS software.

Petitioner contends that the only issue in regard to CAU is the support fees charged. Petitioner states that the incidental to service test applies to the transactions and that the essence of the transaction under application of this test is the purchase of services.

Petitioner further contends that the POJ is in conflict with the Tribunal's decision in *Garcia Clinical Laboratory, Inc v Dep't of Treasury*, MTT Docket No. 413912. Petitioner states that this case was based on identical facts to the OCS, SHP, and IDS agreements at issue.

Petitioner argues that the Tribunal's July 26, 2012, Order stated that the incidental to service test should be applied to the OCS, SHP, IDS and CAU agreements. Petitioner contends that the POJ applied the test to the CAU agreement only, which is inconsistent with the Order.

RESPONDENT'S EXCEPTIONS

Respondent states it is in agreement with the majority of the POJ. Respondent contends that the present case is factually distinguishable from *Andrie v Dep't of Treasury*, __ Mich App __; __ NW2d __ (No. 301615, April 26, 2012). Respondent states Petitioner has admitted that it did not pay sales tax to the Michigan vendors at the time of purchase. Respondent argues that in *Andrie* a

dispute existed as to whether Andrie paid sales tax at the time of purchase. Respondent argues that the POJ "overlooked the significant factual difference between this case and *Andrie* . . . ." Respondent contends that Petitioner's admission that sales tax was not paid is supported by the invoices that show $0.00 sales tax charged. Respondent further asserts that the purchases from J. McEldowney and NETech were made by Petitioner to be shipped to Great Lakes Home Health & Hospice. Respondent argues this is consistent with Petitioner's theory that it was exempt from tax based on Petitioner and Hospice acting as "one unit." Respondent argues that it is likely that Petitioner "held itself out as an agent acting on behalf of Hospice whose purchases are not subject to sales tax" when making purchases from J. McEldowney and NETech.

CONCLUSION

The Tribunal has reviewed the exceptions and the case file, and finds that the ALJ did not err in the Findings of Fact. That portion of the POJ included a summarization of the evidence and testimony provided by all witnesses, including Sara Clark Pierson. The ALJ never made a finding or conclusion that Ms. Pierson was an auditor or that she was involved in the preparation of the audit for this appeal. Ms. Pierson's testimony was addressed along with the testimony of Petitioner's witnesses. The ALJ then determined what weight was to be given to each witness's testimony in preparing his Conclusions of Law.

In regard to Petitioner's exceptions regarding the determination made by the ALJ, the Tribunal finds that the ALJ did admit and consider the testimony of Petitioner's witnesses in regard to the OCS and SHP transactions. The ALJ also reviewed and analyzed the underlying agreements between Petitioner and these sellers in order to determination the nature of the transactions that occurred. Given

that the testimony of witnesses, as well as the argument contained in the Post-Trial Brief were considered, there appears to be no application of the parol evidence rule in the POJ, and the Tribunal rejects Petitioner's argument in relation to this contention. In further regard to OCS and SHP, the Tribunal finds that the ALJ correctly determined that Petitioner purchased a license for both the OCS and SHP software. While this software did not reside on Petitioner's computers or server, Petitioner did have access to the reports generated by the software through the use of an online user id and password. The data used to generate both the OCS and SHP reports came from Petitioner. Petitioner would input the data into another software program it used on its computers and the OCS and SHP programs would collect that data and generate reports that Petitioner would then access. The fact that Petitioner did not directly access or input data into the OCS or SHP software does not negate a finding that Petitioner's actions constitute a "use" of prewritten computer software, under the applicable statutes. Petitioner's exceptions relating to its "right or power over tangible personal property incident to the ownership of that property" under MCL 205.92(b), is the exact same argument stated in its Post-Trial Brief. This argument was reviewed by the ALJ in preparing his decision, and was addressed on pages 15 – 16 of the POJ. The Tribunal finds that the ALJ's conclusion that Petitioner was subject to use tax based on its purchase and use of prewritten computer software in relation to OCS and SHP is supported. Petitioner used both OCS and SHP in the course of its business activities. The OCS and SHP software is software *that is delivered by any means* to Petitioner within the meaning of MCL 205.92b(o). Petitioner's activities constitute a "use" of the software within the meaning of MCL 205.92(b), as Petitioner is exercising a "right or power over" the software when it accesses specific reports online.

In regard to the IDS agreement, the evidence and testimony clearly establishes that Petitioner purchased or rented tangible personal property, the palm device, which was used in obtaining oxygen readings for patients. Petitioner's argument in the exceptions is that it purchased a subscription service and not software that it could access. The amount of use tax attributable to the IDS agreement is $53.67. The Tribunal agrees with the ALJ's determination that there is no separately stated charge on the invoice for the rental of the palm device and the subscription service. Accordingly, Petitioner was required to pay use tax on the purchase.

Petitioner also argues in its exceptions that the POJ is in conflict with the Tribunal's decision in *Garcia Clinical Laboratory, Inc v Dep't of Treasury*, MTT Docket No. 413912. Petitioner states that this case was based on identical facts to the OCS, SHP, and IDS agreements at issue. The Tribunal finds that this was a proceeding held in the Small Claims Division. Decisions issued in the Small Claims Division are not precedential unless so designated by the Tribunal. No such precedent had been designated in that case. Petitioner may not rely on a prior Small Claims decision to support its contentions in the present case.

Petitioner disagrees with the ALJ's determination that under the incidental to service test in *Catalina Marketing Services, Inc v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004), Petitioner is liable for use tax on the CAU agreement. While Petitioner asserts that application of the test should result in a different outcome, Petitioner fails to apply the six factors of the test to support its contention that the issue should be decided in its favor. The Tribunal finds that the ALJ properly analyzed the agreement and found that "the transaction is essentially a license of software." The licensing of software is subject to use tax and Petitioner

has failed to establish in its exceptions that the determination of the ALJ was in error.

Petitioner further argues that the Tribunal's July 26, 2012, Order stated that the incidental to service test set forth in *Catalina Marketing* should also be applied to the OCS, SHP, and IDS transactions. Petitioner had stated in its Post-Trial Brief that the incidental to service test would apply to CAU, but may not apply to OCS, SHP and IDS. Petitioner made no argument in its Brief regarding application of the test to anything but CAU. Rather, Petitioner stated that the test was not "applicable to all the transactions that are the subject of this appeal." Petitioner's Brief, p 17. Further, Petitioner has never applied the six factors of the test to the transactions under appeal in this matter to prove that application of the test would result in a finding in Petitioner's favor. The Tribunal finds that the ALJ's determination regarding OCS, SHP, and IDS was correct. The Tribunal further finds that the ALJ was not required to apply the incidental to service test to every transaction at issue. Further, even if the test was applied to OCS, SHP, and IDS, it would not result in a different disposition. The ALJ determined that OCS and SHP involved a license for prewritten computer software. IDS involved the rental of tangible personal property (the palm device) and related subscription services. The Tribunal finds that the overall character of the transactions was predominantly a sale of goods (either pre-written computer software or the palm device). Petitioner has failed to reliably or persuasively establish that the test set forth in *Catalina Marketing*, if applied, would result in a finding that the transactions involved primarily the provision of services. Accordingly, the ALJ properly upheld the assessment of use tax against Petitioner for these transactions.

Respondent argues that the ALJ's determination regarding application of the ruling *Andrie v Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___ (2012), was incorrect. Respondent contends that Petitioner has admitted that sales tax was not collected on the purchases from Michigan vendors. The Tribunal finds that sales tax was required to be collected by the majority of these vendors, as there is no indication that Petitioner had ever provided an exemption certificate or claimed the purchases were exempt. The Court of Appeals in *Andrie* determined that:

> Our Supreme Court and this Court have held on multiple occasions that the mere fact that a transaction is subject to sales tax necessarily means that the transaction is not subject to use tax. See, e.g., *Elias Bros Restaurants v Dep't of Treasury*, 452 Mich 144, 146 n 1; 549 NW2d 837 (1996) ("The Use Tax Act, as amended, is an 'excise' or 'privilege' tax that covers transactions not subject to the general sales tax."); *Fisher & Co v Dep't of Treasury*, 282 Mich App 207, 209; 769 NW2d 740 (2009) ("The Use Tax Act is complementary to the Michigan General Sales Tax Act . . . and is designed to cover those transactions not subject to the sales tax.").

Id at 9. As the transactions with the Michigan vendors in this case were subject to sales tax, the decisions issued in *Andrie, Elias Bros Restaurants*, and *Fisher & Co*, support the ALJ's determination that Petitioner was not subject to use tax for those purchases.

However, Respondent has raised an additional exception to the POJ in regard to the purchases from NETech and J. McEldowney. Respondent states that the invoices from these vendors "make clear" that the purchases were made by Petitioner but were to be shipped to Great Lakes Home Health & Hospice, a charitable organization exempt from tax. Petitioner's argument that it was acting as one unit with Hospice and is therefore exempt was rejected by the ALJ and that determination is upheld in this Opinion. As such, Petitioner was not entitled to

hold itself out as exempt from taxation for the purchases made by Petitioner and later reimbursed by Hospice. The Tribunal agrees with Respondent's contention on this issue. Based on the testimony and evidence submitted by Petitioner, it held itself out as an agent of Hospice for these transactions. While Hospice is a charitable organization exempt from taxation, Petitioner is not. Accordingly, J. McEldowney and NETech would not have collected or remitted sales tax on these purchases, as they were purported by Petitioner to be made on behalf of Hospice (an exempt organization). The amounts attributable to the purchases from these two vendors should not have been included in the recalculation of tax provided by the ALJ. Removal of both the J. McEldowney and NETech purchases results in a revised total reduction in the assessment related to purchases from Michigan vendors of $10,399.94. Combined with the ALJ's determination for a reduction of $20,359.22 for the McKesson agreements, the calculation of final tax liability is as follows:

> $150,361.00 (original assessment) minus $30,759.27 ($10,399.94 + $20,359.22) = $119,601.73 total tax due. Applying Petitioner's interim payment of $117,749.76 results in a total tax due of $1,851.97, plus the applicable statutory interest.

Given the above, the Tribunal modifies the Proposed Opinion and Judgment, as indicated herein,and adopts the modified Proposed Opinion and Judgment as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgment, as modified herein, in this Final Opinion and Judgment.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that assessment No. Q861780 shall be modified as follows:

Assessment No.	Tax	Penalty	Interest
Q861780	$119,601.73	$0	*

*Interest accrues as provided by law.

The interim payment of $117,749.76 shall be credited against the above amount ($119,601.73). Petitioner's remaining tax liability under the assessment is $1,851.97, with statutory interest.

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

MICHIGAN TAX TRIBUNAL

By: Kimbal R. Smith III

Entered: 10/23/12