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

Knight Facilities Management, Inc.,
Petitioner,

v

MTT Docket No. 319568

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Patricia L. Halm

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF RESPONDENT UNDER MCR 2.116(I)(2)

This matter involves a summary disposition motion filed by Petitioner, Knight Facilities Management, Inc., pursuant to MCR 2.116(C)(10). Petitioner is a Michigan corporation that provides facility maintenance services and supplies and equipment to other businesses. In this motion, Petitioner requests that the Tribunal determine that it is not liable for use tax and interest assessed by Respondent, Michigan Department of Treasury, for janitorial supplies and equipment it sold to the General Motors Corporation[1]. For the reasons set forth herein, the Tribunal finds that Petitioner is not liable for use tax and interest, but is liable for sales tax and interest. Therefore, Petitioner's Motion for Summary Disposition is denied and Respondent is granted summary disposition pursuant to MCR 2.116(I)(2).

PETITIONER'S MOTION FOR SUMMARY DISPOSITION

During the period at issue, November 1, 2000, through April 30, 2004, GM contracted with Petitioner to provide supervisors to oversee GM janitors. These supervisors were

[1] Hereinafter referred to as "GM."

employees of Petitioner, while the janitors were primarily union workers employed by GM.[2] The contract also required Petitioner to purchase supplies and equipment, mainly from a business known as "Supply Pro," which were then sold to GM for use by GM's janitors. The supplies and equipment were shipped from the supplier, e.g., Supply Pro, to the applicable GM facility. In some cases, to reduce the number of invoices and purchase orders processed by GM, GM ordered the supplies and equipment and Petitioner merely paid the invoice. The invoices Petitioner issued to GM listed the services provided, the unit price and the monthly charge by line item. The invoices also listed supplies and equipment provided and the monthly charge for each item.

> The supplies are provided on a 'flat rate' basis. GM specifies the amount it will pay for janitorial supplies for each facility. [Petitioner] charges only that specified amount, regardless of the quantity of supplies actually used. The monthly invoice amount is constant from month to month . . . The quantity of the supplies may fluctuate, but the monthly charge does not. (Petitioner's Brief, p4)

At issue in this case is the use tax and interest assessed against the sale of the supplies and equipment to 19 of GM's Michigan facilities. (Petitioner's Brief in Support of Motion for Summary Disposition[3], p2) Petitioner makes several arguments as to why it should not be held liable for the assessed use tax and interest.

First, Petitioner argues that it is GM and not Petitioner that is liable for payment of the tax. In support of this argument, Petitioner states that it "did not collect or remit tax on its sales of goods to GM because GM held a direct pay permit under which it was responsible for self-accruing and remitting the tax." (Petitioner's Brief, p2) "Although [Petitioner] resold the goods to GM under the purchase orders, GM had informed [Petitioner] that it held a "direct pay

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[2] "For one GM facility... [Petitioner] provided janitors in addition to supervisors." (Petitioner's Brief, FN 3, p3)
[3] Hereinafter referred to as "Petitioner's Brief."

permit," and it expressly instructed [Petitioner] *not* to charge sales or use tax on the goods. (Emphasis in original.) (Petitioner's Brief, p4)

Petitioner also relied on the following instructions GM included on its purchase orders:

> Do not bill sales or use tax items delivered to all shipped to locations with the states listed below. GM holds direct pay authority with these states. As a result, in all of the identified states GM will remit directly to taxing authorities, all sales or use tax liability related to its purchase and use of tangible personal property and services. Therefore, effective immediately, this tax clause supersedes all tax code information found on this order except for those states not identified below, please continue to follow the specific tax code instructions found on this order. Listed below are the direct pay permit or sales tax license numbers for the eighteen sates, or GM locations in a state, where GM holds direct pay authority: MI #ME-XXXXXXX. (Petitioner's Brief, p5)

According to Petitioner, even though GM held this direct pay permit, Respondent concluded that the permit did not apply to the transactions between Petitioner and GM because GM's permit contained the following exclusion: "Tangible personal property consumed by a person performing any service for your company" is excluded from direct pay authorization. Petitioner argues that Respondent's conclusion is incorrect because it is "premised on the mistaken assumption that [Petitioner] somehow consumed the supplies at issue, rather than reselling them to GM." (Petitioner's Brief, p2) "[Respondent] concedes, however, that [Petitioner's] supervisors did not consume the GM supplies. Rather, the supplies were consumed by GM's janitors, who performed the actual janitorial work." (Petitioner's Brief, p6)

Petitioner's second argument is that it purchased the supplies for resale to GM. It is Petitioner's position that these sales are exempt from sales and use tax. Petitioner relies on MCL 205.52(1)(b), which provides an exemption from sales tax for property sold for resale, and MCL 205.94(1)(c), which provides a similar exemption from use tax for items purchased for resale. "Because [Petitioner] purchased the GM goods for resale, [Petitioner] is not liable for sales or use tax on its purchases of the supplies resold to GM. (Petitioner's Brief, p9)

Petitioner's final argument is in response to a position that it believes Respondent will take in its Answer to Petitioner's Motion, namely that the sales to GM "were merely incidental to the provision of supervisory services." (Petitioner's Brief, p14) Petitioner cites *Catalina Marketing Sales Corp v Department of Treasury*, 470 Mich 13; 678 NW2d 619 (2004), wherein the Michigan Supreme Court "established the 'incidental to service' test for determining whether a transfer of goods should be considered a non-taxable transaction which is merely incidental to the provision of a service, or instead as a taxable sale." (Petitioner's Brief, p15) Petitioner asserts that in this case the sales were not incidental to its provision of services to GM because "the products were delivered directly to GM and consumed by GM's janitors." (Petitioner's Brief, p14) Additionally, Petitioner states that its sale of approximately $16 million in cleaning supplies to GM "is hardly an incidental amount." (Petitioner's Brief, p16) Finally, according to Petitioner, "there is no necessary relationship between the provision of supervisory services and the sale of supplies." (Petitioner's Brief, p16)

In conclusion, Petitioner argues that there is no genuine issue as to any material fact and, as such, summary disposition should be granted in its favor pursuant to MCR 2.116(C)(10).

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY DISPOSITION

The assessment at issue is the result of an audit conducted for the period November 1, 2000, to April 30, 2004. Pursuant to the audit, Respondent determined that:

> Petitioner was a service provider to GM during the tax years at issue. In fulfilling its service contract with GM, Petitioner used tangible property. Petitioner was, therefore, liable for the payment of use tax on the tangible property it used in fulfilling its service contract with GM. (Respondent's Brief in Response to Petitioner's Motion[4], p3)

Respondent reached that conclusion after:

[4] Hereinafter referred to as "Respondent's Brief."

> A detailed review of Petitioner's records demonstrated that the company paid no sales tax on its purchases of janitorial supplies and equipment from its primary vendor Supply Pro, that it collected no sales tax from its customers, including GM, and that it paid no use tax on the supplies and equipment it used in fulfilling its service contracts with its customers. Petitioner was not registered for sales or use tax with the State of Michigan. Because **the audit demonstrated that Petitioner was a service provider, not a seller of tangible property**, to its customers, including GM, the Department issued a final assessment against Petitioner for use tax in the amount of $983,812.00, plus statutory interest.
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> On October 4, 2007, Petitioner submitted a payment to the Department for use tax associated with supplies it used in fulfilling its service contracts for non-GM customers during the tax period at issue. By making this payment, Petitioner effectively admitted that it owed use tax on tangible property the company used in fulfilling its non-GM service contracts. Except for Petitioner's claim that it "resold' supplies to GM and its claimed application of GM's direct pay permit, the company fails to sufficiently differentiate how the nature of the tangible property it used in fulfilling its service contracts with non-GM customers was in any substantive fashion different than that of the tangible property the company used in fulfilling its service contract with GM. (Emphasis added.) (Respondent's Brief, pp3-4)

Moreover, Respondent disagrees with Petitioner's assertion that it "resold" supplies to GM.

> The best evidence demonstrating that Petitioner's resale claim is simply without merit is the contract between [Petitioner] and GM. Here, GM's purchase order clearly represents a service contract between the automaker and Petitioner. In fact, the very first page of the purchase order stated that it was a "*Housekeeping Contract*." This document is quite telling. According to the contract:
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> > THIS THREE 3) YEAR *PERFORMANCE BASED CONTRACT* MAY BE SUBJECT TO EXTENSION AND SITE EXPANSION BY FUTURE QUOTE AND AWARD. *SERVICES* ARE PROVIDED PER THE "NON-TECHNICAL MAINTENANCE SPECIFICATION – HOUSEKEEPING PROGRAM" EFFECTIVE 10-01-04. REVISED 03-23-04. THE BASE LEVEL *OF SERVICE*, INCLUDING MANAGEMENT AND/OR LABOR AND ANCILLARY *SERVICES*, IS A *FIXED PRICE AGREEMENT* PREDICATED ON THE PLANT'S SPECIFIC OPERATING PLAN AND IS OUTLINED IN THE OPERATING PLAN HELD AT EACH SITE.
> >
> > *ANY SERVICES* REQUIRED OUTSIDE THE SCOPE OF THE BASE OPERATING PLAN OR ALTERATIONS TO THE APPROVED OPERATING PLAN WILL BE SUBJECT TO PRIOR APPROVAL BY WFG FACILITIES MANAGEMENT PERSONNEL.
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> > . . .

> 1. PROVISION OF SERVICES; STANDARD OF WORKMANSHIP
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> **SELLER AGREES TO PROVIDE SERVICES** TO BUYER IN ACCORDANCE WITH THE TERMS OF THIS CONTRACT AND THE STATEMENT OF REQUIREMENTS, WHICH HAS BEEN PROVIDED TO SELLER AND IS INCORPORATED INTO THIS CONTRACT BY REFERENCE ("*SERVICES*"). *SERVICES* WILL BE PERFORMED BY COMPETENT PERSONNEL, AND WILL BE OF PROFESSIONAL QUALITY, CONSISTENT WITH GENERALLY ACCEPTED INDUSTRY STANDARDS FOR THE PERFORMANCE OF SUCH SERVICES. **SELLER WILL ENSURE** THAT **IT HAS ALL NECESSARY RESOURCES TO PROVIDE THE SERVICES, INCLUDING**, WITHOUT LIMITATION, PROPERLY TRAINED AND LICENSED PERSONNEL, MACHINERY, **EQUIPMENT AND MATERIALS**. (Emphasis in Respondent's Brief.) (Respondent's Brief, pp7-8)

With this language, Respondent argues that "[t]he service contract's plainly-stated provisions debunks Petitioner's assertion that it resold tangible property to GM in a sales transaction." (Respondent's Brief, p9)

Additionally, Respondent argues that the fact that Petitioner billed GM a flat monthly rate

> . . .demonstrates that Petitioner was not reselling goods to GM, but merely using tangible property in the course of fulfilling its service contract with the automaker. . . At the very least, it makes no business sense, as a claimed seller or reseller of tangible property, for Petitioner to charge GM for only 3 mops per month at a cost of $10 per mop (i.e., the contracted monthly "base unit price") when employees under Petitioner's supervision and direction actually used 30. . . The undisputed factual evidence in this matter demonstrates that Petitioner did not sell or resell any tangible property to GM, but simply used the tangible property in issue in the course of fulfilling its contractual service obligations to the automaker. (Respondent's Brief, pp10-11)

In response to Petitioner's position regarding GM's direct pay permit, Respondent argues that the fact that GM had a direct pay permit does not negate either party's responsibility for payment of the tax. As for the language relied upon by Petitioner in GM's purchase orders, Respondent argues that this language "is not indicative that its terms applied to Petitioner. GM was required by the Department to place this language on its purchase orders. This language was

entirely for GM's protection (regarding being charged for sales or use taxes), not its vendors or service providers (e.g., Petitioner)." (Respondent's Brief, p12)

As Petitioner anticipated, Respondent argued that if the Tribunal finds that "there was a transfer of tangible property in a sale transaction between Petitioner and GM, it should find that such transfer was incidental to the service contract between the two parties." (Respondent's Brief, p13) According to Respondent, when a transaction involves the provision of services and the sale of tangible property, the transaction must be categorized as either a service or the sale of property. After applying the test set forth in *Catalina, supra*, Respondent argues that the transactions at issue must be classified as a sale of services.

FINDINGS OF FACT

The assessment at issue is known as Assessment No. M98445. Respondent issued the Final Bill for Taxes Due on July 5, 2005. The amount at issue includes $983,812.00 in use tax and $156,203.04 in interest, which continues to accrue pursuant to MCL 205.23. The assessment is the result of an audit conducted by Respondent for the period November 1, 2000 through April 30, 2004. Petitioner was assessed use tax for capital asset purchases (e.g. equipment sales and re-leases to GM) and billable supplies. During the time in question, Petitioner was not registered under either the use tax act (MCL 205.95) or the STA.

MOTIONS FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

In the instant case, Petitioner filed a Motion for Summary Disposition under 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 1111(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.
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> 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.
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> 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).
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> 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*., pp361-363) (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). On the other hand, under MCR 2.116(I)(2), "[i]f it appears to the court

that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." In the instant case, the Tribunal finds that there is no genuine issue of material fact and that Respondent is entitled to judgment as a matter of law.

CONCLUSIONS OF LAW

In this case the first question to be decided is whether, as Respondent asserts, the "incidental to service" test must be applied. The incidental to service test was first set forth in *University of Michigan Board of Regents v Department of Treasury*, 217 Mich App 665; 553 NW2d 349 (1996). In that case, the Court of Appeals was asked to determine whether sales tax should be applied to (1) photocopies made at various University facilities for which there was a five cent per copy charge, and (2) to replacement diplomas ordered by University graduates for whom there was a five dollar per diploma charge. The Court held that the sale of photocopies was not subject to sales tax because they were not sold to generate a profit. Instead, these sales were incidental to the University's educational purpose. As for the sale of replacement diplomas, the Court held that this was a service that the University offered and that the paper was merely incidental to this service.

In *Catalina Marketing Sales Corp, supra*, the Michigan Supreme Court was asked to determine whether a "'Checkout Coupon' program, which involves both the transfer of tangible personal property and the provision of services, constitutes a sale at retail" subject to sales tax. (*Id*., p14) In that case, the Tribunal applied the "real object test," set forth by the Department of Treasury in Revenue Administrative Bulletin 1995-1 and "held that the direct object of the transaction was the coupon and, therefore, the entire transaction was subject to sales tax." (*Catalina*, p21) The Court disagreed, stating:

We reject the department's narrow reading of the real object test. Under RAB 95-1 the question is whether, from the perspective of the client, the real object sought by the client was the purchase of the tangible good or the receipt of the services. The weakness of this test is that it is not consistent with the statutory definition of "sale at retail." The real object test focuses exclusively on the perspective of the purchaser. However, the purchaser's point of view is not given special consideration under the language of the statute. Instead, the statute's perspective is more broadly focused and requires a fuller analysis that weighs not only the perspectives of the parties to the sale, but also the nature of the product and service. This latter approach is subsumed within the "incidental to service" test articulated by the Court of Appeals in *Bd of Regents, supra.*

Accordingly, we adopt the "incidental to service" test for categorizing a business relationship that involves both the provision of services and the transfer of tangible personal property as either a service or a tangible property transaction. Under this test, "sales tax will not apply to transactions where the rendering of a service is the object of the transaction, even though tangible personal property is exchanged incidentally." The "incidental to service" test looks objectively at the entire transaction to determine whether the transaction is principally a transfer of tangible personal property or a provision of a service. The sales tax is a tax on sellers for the privilege of engaging in the business of retail sales. If the consideration paid in a transaction is not paid for the transfer of the tangible property, but for the service provided, and the transfer of the tangible property is only incidental to the service provided, the transaction is not a sale at retail under MCL § 205.51(1)(b).

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We agree with the statement in Am Jur 2d that the court must objectively examine the totality of the transaction in determining whether it is subject to sales tax:

> When tangible goods or items are provided in conjunction with services, courts examine the totality of the transaction to determine its taxability. The essence of the transaction test specifically applies to those sales tax cases in which it is initially unclear whether the transaction mixes sales and services. For purposes of determining whether a transaction falls within a sales tax statute, the court considers whether the tangible personal property serves exclusively as the medium of transmission for an intangible product or service; if the intangible component is the true object of the sale, the intangible object does not assume the taxable character of a tangible medium. Where the item is the substance of the transaction, and the service or skill provided is merely incidental, the transaction is one for tangible personal property, to which sales tax may be applied. The focus belongs on the transaction, not the character of the participants. [68 Am Jur 2d, Sales and Use Taxes, §62 pp 51-52]

> In determining whether the transfer of tangible property was incidental to the rendering of personal or professional services, a court should examine what the buyer sought as the object of the transaction, what the seller or service provider is in the business of doing, whether the goods were provided as a retail enterprise with a profit-making motive, whether the tangible goods were available for sale without the service, the extent to which intangible services have contributed to the value of the physical item that is transferred, and any other factors relevant to the particular transaction. (Emphasis added.) (Citations omitted.) (*Id*. pp24-26).

Having reviewed the exhibits submitted in this case, including bid summaries, purchase orders and invoices, the Tribunal finds incorrect Respondent's position that "Petitioner was a service provider, not a seller of tangible property." (Respondent's Brief, p3) These documents clearly indicate that the services Petitioner provided to GM were separate and distinct from the tangible personal property Petitioner sold to GM and that, while contained in the same statement, each were billed separately. Moreover, these transactions are not "single transactions" contemplated by the holdings in *University of Michigan, supra*, and *Catalina, supra*, in that they do not contain one price for both a service and a sale of tangible personal property. The Tribunal agrees with Petitioner that the transactions in question are similar to the example set forth in Hellerstein, *State Taxation*, ¶ 13.02[1], wherein the transaction is taxable in part and nontaxable in part, similar to the typical automobile repair bill. (Petitioner's Brief, p14) Given this, the Tribunal finds that the "incidental to service" test does not apply to the transactions in question.

Having made this determination, the next question to be resolved is whether the assessments at issue are correct. In this case, there are two distinct transactions potentially subject to either Michigan's Sales Tax or Michigan's Use Tax; the first being Petitioner's purchase of supplies and equipment from suppliers such as Supply Pro, the second being Petitioner's sale of the supplies and equipment to GM. To avoid confusion, each transaction will be separately analyzed to determine which tax is applicable and whether Petitioner is liable for payment of the tax.

I. Transaction #1: Petitioner's purchase of supplies and equipment.

A. Sales Tax.

Section 52 of Michigan's General Sales Tax Act[5] provides that, but for specific exemptions:

> [T]here is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act. (MCL 205.52(1))

Section 52 defines "sale at retail" or "retail sale" to mean "a sale, lease, or rental of tangible personal property for any purpose other than for resale, sublease, or subrent." (MCL 205.51(1)(b)). Thus, products purchased for resale are not considered to be a "retail sale" and are exempt from sales tax.

In this case, Petitioner purchased certain supplies and equipment to fulfill its obligations under a service contract it held with GM. When it purchased these items from the various sellers, Petitioner provided the sellers with a "Michigan Sales and Use Tax Certificate of Exemption" which exempted the seller from paying sales tax on those purchases. Included with Petitioner's Brief was a copy of the exemption certificate provided by Petitioner to Supply Pro. (Petitioner's Brief, p3, and Exhibit No. 7) The exemption certificate indicated that the basis for the exemption claim is "Resale, At Wholesale."

Black's Law Dictionary, (5th ed rev), p1174, defines "resale" as the "act of retailer who purchases goods from manufacturer or wholesaler for purpose of selling such goods in normal course of business." "Retailer" is defined as:

[5] Hereinafter referred to as the "GSTA."

> A person engaged in making sales to ultimate consumers. One who sells personal or household goods for use or consumption.
>
> The essential distinction between a "wholesaler" and "retailer" as respects application of the Fair Labor Standards Act is that the person buying from the retailer is the ultimate user or consumer of the article or commodity or does not sell it again whereas the one buying from a wholesaler buys only for the purpose of selling the article again . . . . (Emphasis added.) (*Id*., p1182)

"Wholesaler" is defined as "[o]ne who buys in comparatively large quantities, and then resells, usually in smaller quantities, but never to the ultimate consumer." (Emphasis added.) (*Id*., p1432) Given these definitions, it is clear that Petitioner's exemption certificate selection of "Resale, At Wholesale" is incorrect; in reality, the correct basis for the exemption is "Resale, At Retail."[6] Because the transaction at issue is for "resale," regardless of how Petitioner characterizes it, but for the exemption the transaction would be subject to sales tax.

B. Use Tax.

Pursuant to Michigan's Use Tax Act[7]: "There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property." (MCL 205.93(1)) Respondent argues that Petitioner is responsible for payment of use tax because it used the property at issue in fulfilling its service contract. In this case, the Tribunal finds that Petitioner did not use, store or consume the tangible personal property at issue. Instead, Petitioner purchased the products for resale to GM and it was GM's janitors who used the property. As in the STA, property purchased for resale is exempt under the UTA. See MCL 205.94(1)(c)(i). Thus, Petitioner is exempt from payment of use tax for these transactions. However, as GM actually used the property, GM could be subject to use tax.

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[6] Pursuant to the exemption certificate, to claim this exemption the certificate holder must possess a sales tax registration number. Petitioner did not.
[7] Hereinafter referred to as "UTA."

II. Transaction #2: Petitioner's sale of supplies and equipment to GM.

A. Sales Tax.

Pursuant to Section 52 of the GSTA, "there is levied upon and there shall be collected from all persons engaged in the business of making sales at retail" a tax at the rate of 6%. (Emphasis added.) As previously discussed, Petitioner is in the business of making retail sales; therefore, Petitioner is responsible for payment of sales tax on its sales of tangible personal property to GM. However, Petitioner claims that GM's direct payment authorization exempts Petitioner from paying tax under the GSTA and the UTA. It is Petitioner's position that, under the direct pay permit, "GM was to accrue and remit sales or use tax on its purchases of supplies" from Petitioner. (Petitioner's Brief, p5) For this reason, GM's direct payment authorization must be examined.

Direct payment authorizations are applicable to use tax purchases only and are found in Section 8 of the UTA, which provides that:

> (1) The department may authorize a person to assume the obligation of self-accruing and remitting use tax due on purchases or leases directly to the department under a direct payment authorization, if the following conditions are met:
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> (a) The authorization is to be used for the purchase or lease of tangible personal property or services.
>
> (b) The authorization is necessary because it is either impractical at the time of acquisition to determine the manner in which the tangible personal property or services will be used or it will facilitate improved compliance with the tax laws of this state.
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> (c) The person requesting authorization for direct payment maintains accurate and complete records of all purchases or leases and uses of tangible personal property or services purchased pursuant to the direct payment authorization in a form acceptable to the department. (MCL 205.98)

According to Revenue Administrative Bulletin (RAB) 2000-3: "The direct payment authorization provided for in section 8 is a record keeping and remittance procedure. It is not an exemption and does not reduce a taxpayer's liability." (Emphasis added.) The Tribunal agrees; there is nothing in MCL 205.98 that exempts a person holding a direct payment authorization from payment of use tax. Therefore, GM's possession of a direct payment authorization does not release it from responsibility for payment of use tax.

On the other hand, the GSTA provides that "[a] sale of tangible personal property to a person holding a direct payment permit under section 8 of the use tax act, 1937 PA 94, MCL 205.98" is exempt. See MCL 205.54a(1)(n). Thus, the sale of tangible personal property to a person holding a direct payment authorization is exempt from Michigan's sales tax, but it is not exempt from Michigan's use tax.

GM's direct payment authorization was issued by the Michigan Department of Treasury on December 4, 1996, and covers purchases of tangible personal property made by GM in the State of Michigan. The authorization includes several exclusions, including one relating to contractors and one relating to "company employees." At issue is the authorization's eighth exclusion, which provides that "[t]angible personal property consumed by a person performing any service activity for your company" is not covered by the authorization. (Emphasis added.) (Petitioner's Exhibit 8) Because the authorization specifically utilized the words "contractor" and "company employees" in other exclusions, the Tribunal finds that use of the word "person" in this exemption means that the exclusion does not apply to tangible personal property consumed by anyone performing a service activity for GM, be it a GM employee or not.

There is no dispute that GM's janitors consumed the tangible personal property at issue while performing janitorial services for GM. Therefore, the products Petitioner sold to GM are

not covered by GM's direct payment authorization. Because these sales are not covered by GM's authorization, these transactions are subject to sales tax.

B. Use Tax.

To repeat, Section 3 of the UTA provides that: "There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property." (MCL 205.93(1)) Section 2 of the Act defines "use" as "the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given." (MCL 205.92(b)) Consumer is defined as "the person who has purchased tangible personal property or services for storage, use, or other consumption in this state ...." (MCL 205.92(g)) In this case, there is no doubt that GM purchased the supplies and equipment and that it was GM's janitors who used these items. Because GM's direct pay authorization does not apply to "[t]angible personal property consumed by a person performing any service activity for your company," the Tribunal finds that GM is responsible for payment of use tax on supplies and equipment purchased from Petitioner.

Having reached the conclusion that Petitioner's sale of supplies and equipment to GM are taxable to Petitioner under the GSTA and to GM under the UTA, the question becomes, which tax applies? Is Petitioner liable for sales tax as "a person engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration?" (MCL 205.52). Or is GM liable for use tax as the person in this state that had the privilege of using, storing, or consuming the tangible personal property purchased from

Petitioner? (MCL 205.93(1)) As Petitioner correctly states, "[s]ales or use tax may be incurred on any taxable transaction but not both." (Petitioner's Brief, p9)

In *Ameritech Publishing, Inc v Department of Treasury*, 281 Mich App 132; 761 NW2d 470 (2008), the Michigan Court of Appeals stated that "[t]he use tax is complementary to the sales tax. The UTA is designed to cover those transactions not covered by the General Sales Tax Act (GSTA), MCL 205.51 *et seq.*" (Citations omitted). (*Id*., p 136) In *General Motors Corp v Department of Treasury*, 466 Mich 231; 644 NW2d 734 (2002), the Michigan Supreme Court stated:

> The sales tax and the use tax are interrelated. Sales tax is imposed by the General Sales Tax Act (GSTA) on the gross proceeds of a business. MCL 205.52(1). The GSTA defines "[g]ross proceeds" as the "amount received in money, credits, subsidies, property, or other money's worth in consideration of a sale at retail...." MCL. § 205.51(1)(i). In contrast, pursuant to the Michigan Use Tax Act (UTA), use tax is generally imposed on the privilege of "using, storing, or consuming tangible personal property." MCL 205.93(1).
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> The sales and use taxes, while imposed in different ways, do not operate in isolation. Rather, provisions of the UTA and the GSTA are supplementary and complementary. UTA § 4(1)(a)'s exemption is an expression of a legislative intent to avoid pyramiding of sales and use tax. In other words, a transfer of property that has already been subjected to Michigan's sales tax is not subject to this state's use tax. (Citations omitted.) (*Id*., p237)

Given this, it is clear that Michigan's sales tax, if applicable, is imposed first and that the use tax is only imposed on transactions not covered by the sales tax. Therefore, the Tribunal finds that Petitioner is responsible for sales tax on its sales of supplies and equipment to GM.

Finally, Petitioner argues that GM's purchase orders instructed Petitioner not to charge sales or use tax on the products it sold to GM. Petitioner relied upon this language and did not bill GM for either of these taxes. Given this, it is Petitioner's position that GM is responsible for the tax. (Petitioner's Brief, p5) The Tribunal finds, contrary to Petitioner's contention, that

the language contained within GM's direct pay permit does not negate Petitioner's sales tax liability. Petitioner relied upon this language to its own detriment.

To summarize, the Tribunal finds that Petitioner is responsible for payment of sales tax on its sale of tangible personal property to GM, plus interest. Additionally, the Tribunal finds that while there are no genuine issues of material fact, Petitioner's Motion for Summary Disposition under MCR 2.116(C)(10) must be denied and that Respondent shall be granted summary disposition under MCR 2.116(I)(2).

Therefore,

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

IT IS FURTHER ORDERED that Summary Disposition in favor of Respondent pursuant to MCR 2.116(I)(2) is GRANTED.

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

MICHIGAN TAX TRIBUNAL

Entered: October 21, 2010 By: Patricia L. Halm