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

Meridian Technologies Inc,
Petitioner,

v

MTT Docket No. 16-000142-R

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H Lasher

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment ("POJ") on August 4, 2017. The POJ states, in pertinent part, "[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal **in writing, by mail or by electronic filing, if available,** if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions)."

Neither party has filed exceptions to the POJ.

The Administrative Law Judge ("ALJ") considered the testimony and evidence submitted and made specific findings of fact and conclusions of law. The ALJ's determination that there is no genuine issue of material fact with respect to the validity of the assessments at issue in this appeal is supported on the record and by the applicable statutory and case law. Therefore,

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

IT IS FURTHER ORDERED that Final Assessment Nos. UE46588, UE46589, UE46590, and UD09530 are AFFIRMED.

This Order resolves the last pending claim and closes this case.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[1] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the

[1] See TTR 261 and 257.

Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[2] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[3] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[4]

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[5] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[6] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[7]

By Steven H. Lasher

Entered: September 13, 2017
ejg

[2] See TTR 217 and 267.
[3] See TTR 261 and 225.
[4] See TTR 261 and 257.
[5] See MCL 205.753 and MCR 7.204.
[6] See TTR 213.
[7] See TTR 217 and 267.

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

Meridian Technologies Inc,
Petitioner,

v

MTT Docket No. 16-000142-R

Michigan Department of Treasury,
Respondent.

Administrative Law Judge Presiding
Peter M. Kopke

PROPOSED ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

PROPOSED OPINION AND JUDGMENT

## INTRODUCTION

Petitioner filed this appeal disputing Final Assessment Nos. UE46588, UE46589, UE46590, and UD09530 on January 27, 2016. The assessments, which reflect additional tax due under the Michigan Business Tax Act ("MBTA") as a result of Respondent's denial of staffing company and contractor deductions claimed for the 2008-2011 tax years, were issued on December 23, 2015, following the entry of a Decision and Order of Determination.

On June 26, 2017, Respondent filed a motion requesting that the Tribunal enter summary disposition in its favor and dismiss the above-captioned case. In the Motion, which was filed pursuant to MCR 2.116(10), Respondent contends that there are no genuine issues of material fact with respect to Petitioner's eligibility for the deductions, and as such it is entitled to judgment as a matter of law.

Petitioner filed a response to Respondent's Motion for Summary Disposition on July 17, 2017. In the response, Petitioner contends that granting Respondent's motion is not proper because it is both a staffing company and a contractor as defined by the MBTA.

## RESPONDENT'S CONTENTIONS

Petitioner is a computer consulting company providing IT services to its clients, not a staffing company or construction contractor as defined by the MBTA. Petitioner identified its type of business as "Computer Consultant" and reported NAICS 54519 ("Other Computer Related Services") on its MBT returns for the tax years at issue. This code correlates to SIC 7379 ("Computer Related Services, Not Elsewhere Classified"); Petitioner did not use an NAICS code that correlates to SIC industry group 736, which includes employment agencies (7361) and help

supply services (7363).[1] Petitioner argues that its business activities are included within industry group 7363, but it is primarily engaged in providing IT consulting services on a contract or fee basis, not providing help supply services. Further, the help supplied under SIC 7363 is always under the direct or general supervision of the business to whom the help is furnished, and Petitioner's contracts and employment agreements establish that it retains control of its employees. Petitioner admitted that most of its employees worked under H-1B visas during the relevant time period, and to obtain an H-1B visa, the employer must establish an employer-employee relationship, including the right of control. In fact, the required control "may not exist in certain instances when the petitioners business is to provide its employees to fill vacancies in businesses that contract with the petitioner for personnel needs." To the extent the employer-employee relationship is established for immigration purposes, it is also established in this case. Petitioner would be unable to obtain H-1B visas if it lacked control over employees. That same control also establishes that Petitioner is not a staffing company as defined by the MBTA. Petitioner is best classified under SIC 7379, which is part of industry group 737 ("Computer Programming, Data Processing, and Other Computer Related Services"). Included within this code are businesses that provide computer consultants on a contract or fee basis, and Petitioner's employees provide IT-services in specialized areas as requested by the client on a contract or fee basis. Further, a business assigns a SIC code based on its primary business activity and the coding system does not permit a business to choose two classification codes. Thus, Petitioner cannot be classified under more than one SIC industry group despite its allusions to the possibility. Petitioner is also not a construction contractor under SIC major groups 15, 16, and 17, which apply to building construction general contractors and operative builders; heavy construction, other than building construction contractors; and construction special trade contractors, respectively. Petitioner provides IT and computer-related services and has offered no evidence or argument suggesting that it is involved in construction contracting.

## PETITIONER'S CONTENTIONS

Respondent is not entitled to summary disposition in its favor because in addition to providing computer technology consulting services, Petitioner is actively engaged as a technology staffing company. Petitioner provides its employees, who specialize in technology, to other businesses on a contractual or fee basis. Petitioner's employees are always on its payroll, but under the direct supervision of its clients. Petitioner "directs candidates to perform their duties under the supervision and control of" the business in which they are staffed, and "to comply with the rules, policies, and regulations" of these vendors. The compensation paid by Petitioner to its employees is wages, salary, and/or bonuses that fall under MCL 208.1107(3). Petitioner selected NAISC 5415 ("Computer Systems Design and Related Services") on it is MBT returns for the 2008-2011 tax years because it best embodies its business. Petitioner provides the following services listed under the general NAISC section of 5415 to its clients for a fee: Computer design services under NAISC 54151; computer programming services under NAISC 541511; computer system design services under NAISC 541512; and computer facilities management under NAISC 541513. NAICS 541519 best embodies all the services Petitioner provided to its customers through its staff, as no other code better exemplifies a technology firm that provides talent

[1] SIC industry group 7361 corresponds with NAICS codes 541612 (Human Resources and Executive Search Consulting Services) and 561310 (Employment Placement Agencies). SIC code 7363 corresponds with NAICS codes 561320 (Temporary Help Services and 561330 (Professional Employer Organizations).

solutions or a human capital company services with a focus in information technology that provides both hardware and software services to other business clients. Petitioner meets the definition of employee control requirements for guest workers under the H-1B visa program, and its contracts clearly establish that it is providing technology staffing services for its clients. Therefore, the roles of the contract staff provided are roles that fall within SIC 736.

## STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition; thus the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[2]

*A. Motions for Summary Disposition under MCR 2.116(C)(10).*

MCR 2.116(C)(10) provides for summary disposition when "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."[3] The Michigan Supreme Court, in *Quinto v Cross and Peters Co*,[4] 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

[2] See TTR 215.
[3] *Id*.
[4] *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).

> 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.[5]

In the event it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied.[6]

## CONCLUSIONS OF LAW

Under the MBTA, a staffing company was defined as "a taxpayer whose business activities are included in industry group 736 under the standard industrial classification code as compiled by the United States Department of labor."[7] The Standard Industrial Classification ("SIC") system was replaced by the North American Industrial Code System ("NAICS") in 1997, however, and as a result, taxpayers were required to report the applicable NAICS code. The United States Office of Management and Budget ("OMB") published a reference chart in the Federal Register to help businesses identify the NAICS code that corresponds to the former SIC code. SIC major group 736 ("Personnel Supply Services") includes two specific industries, which are identified by the four-digit codes 7361 ("Employment Agencies") and 7363 ("Help Supply Services"). Petitioner contends that it is best classified under SIC 7363, which is described as follows:

> 7363 Help Supply Services
>
> Establishments primarily engaged in supplying temporary or continuing help on a contract or fee basis. The help supplied is always on the payroll of the supplying establishments, but is under the direct or general supervision of the business to whom the help is furnished. Establishments which provide both management and staff to operate a business are classified according to the type of activity of the business. Establishments primarily engaged in furnishing personnel to perform a range of services in support of the operation of other establishments are classified in Industry 8744, and those supplying farm labor are classified in Agriculture, Industry 0761.
>
> - Employee leasing service
> - Fashion show model supply service
> - Help supply service
> - Labor pools
> - Manpower pools
> - Modeling service
> - Office help supply service
> - Temporary help service
> - Usher service

[5] *Id*. at 361-363. (Citations omitted.)
[6] *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).
[7] MCL 208.1113(6)(d)(ii).

Consequently, there are three requirements businesses must meet in order to qualify as a Help Supply Service establishment under the standard industrial classification code:

(1) The business is primarily engaged in furnishing temporary personnel on a contract or fee basis;

(2) The business employee remains on the payroll of the staffing company; and

(3) The business employee is under the direct or general supervision of the customer

Respondent contends that Petitioner does not qualify as a Help Supply Service establishment because it is primarily engaged in providing IT and computer-related services, not furnishing temporary personnel. In support, Respondent notes that Petitioner self-reported its principal business activity as "Computer Consultant" and identified its NAICS code as 54519 (Other Computer Related Services) on its MBT returns for the tax years at issue. This code corresponds to SIC 7379 (Computer Related Services, Not Elsewhere Classified). Respondent also notes that Petitioner's website indicates that it is a "global provider of business and technology solutions" and identifies its areas of business interest as consulting services, rapid application development, re-engineering, systems integration, technology transfer, data conversion services, web application development, offsite business solutions, and offshore ventures. The Application for Certificate of Authority to Transact Business or Conduct Affairs in Michigan filed with the Department of Consumer and Industry Services identifies the business Petitioner is to conduct in Michigan as follows: "To provide computer & IT consulting & development services." Petitioner's employment agreement states that it is "engaged in the business of developing software and providing information technology and computer related services to various industries in the United States." And its contract with C&T Information Technology Consulting states that Petitioner agrees to provide "consulting services," including development and maintenance of web-based java applications, technical and design documentation, software analysis, and code design and writing.

Having reviewed the documentation accompanying Respondent's motion under the criteria for MCR 2.116(C)(10), the Tribunal finds that it has met its burden of providing affirmative evidence that negates an essential element of Petitioner's claims. The Tribunal further finds that in response, Petitioner has failed to establish a genuine issue of material fact as to that element. More specifically, Petitioner, despite labeling itself as a "technology staffing company," has failed to provide affidavits or other documentary evidence that would support a finding that it is primarily engaged in furnishing temporary personnel as opposed to providing IT and computer-related services. Petitioner cites the documentation provided with its response only with respect to the supervision issue, but that issue need not be reached unless it is first determined that Petitioner is primarily engaged in furnishing temporary personnel on a contract or fee basis. Further, a review of that documentation in the proper context supports Respondent's contention that Petitioner is primarily engaged in providing IT and computer-related services and not furnishing temporary personnel. By way of example, the Apex Vendor Agreement states that Petitioner "agrees to supply qualified individuals to serve as temporary technical employees or independent contractors," and that it "understands that such individuals will be providing services to APEX and/or APEX's clients." With respect to "Services to be Performed," however, the agreement states that "APEX hereby retains VENDOR to perform information

technology services for APEX or its Client . . . ." Indeed, Petitioner appears to acknowledge the primary service area suggested by Respondent in its response to Respondent's motion for summary disposition, wherein it states as follows: "Meridian provides the services listed under the general NAISC section of 5415-Computer Systems Design and Related Services to its clients for a fee. Meridian provides the following services: computer design services under NAISC 54151; computer programming services under NAISC 541511; computer system design services under NAISC 541512; and computer facilities management under NAISC 541513. As a result, Meridian is properly categorized under NAICS code 541519 because it is best embodies all the services it provided to its customers through its staff." And despite its assertion to the contrary, the fact that Petitioner supplies its employees to other businesses on a contract or fee basis does not render it a staffing company within the meaning of the MBTA. While this may be a faucet of Petitioner's business activities, SIC looks to the *primary* business activity, i.e., the provision of IT and computer-related services.

As indicated above, "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."[8] Though Petitioner argued that case law favors it due to statutory ambiguity, it failed to identify that portion or portions of the statute purported to be ambiguous, and it is not enough for it "simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for [its] claims, or unravel and elaborate for [it its] arguments, and then search for authority either to sustain or reject his position."[9] Further, the opposite is true because the staffing company and contractor provisions are deductions from the tax base, and like exemptions, they require strict construction and place the burden of proof on the taxpayer.[10] Petitioner has failed to meet its burden in this case with respect to both of its claims, and in fact wholly failed to address the contractor issue outside of a generalized allegation that it qualifies as such within the meaning of the MBTA. As such, Respondent is entitled to summary disposition in its favor.[11]

---

[8] *Quinto*, 451 Mich at 362-363 (citations omitted).

[9] *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

[10] See *Alliance Obstetrics & Gynecology v Dep't of Treasury*, 285 Mich App 284, 286; 776 NW2d 160 (2009). See also *Detroit v Detroit Commercial College*, 322 Mich 142; 33 NW2d 737 (1948) "It is a well-settled principle that, when a specific privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication . . . . In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant." *Id.* at 149, quoting 2 Cooley, Taxation (4th ed.), § 672, p. 1403.

[11] To the extent that Petitioner would or does argue that it qualifies as a contractor because it provides its services on a contract basis, this argument is without merit given its failure to establish a genuine issue of material fact with respect to its primary business activity. As noted by Respondent, the contractor deduction is only available "for a person included in major group 15, 16, or 17 under the standard industrial classification code as compiled by the

## JUDGMENT

Given the above, the Tribunal finds that there is no genuine issue of material fact with respect to the validity of the assessments at issue in this appeal and Respondent is entitled to judgment as a matter of law. Petitioner is primarily engaged in providing IT and computer-related services and it was therefore disqualified from claiming the staffing company and contractor deductions on its MBT returns for the 2008-2011 tax years. Therefore,

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

IT IS FURTHER ORDERED that Final Assessment Nos. UE46588, UE46589, UE46590, and UD09530 are AFFIRMED.

IT IS FURTHER ORDERED that the parties have 20 days from date of entry of this POJ to notify the Tribunal in writing, by mail or by electronic filing, if available, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions). Exceptions are limited to the evidence submitted prior to or at the hearing and any matter addressed in the POJ. There is no fee for filing exceptions. The opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions. A copy of a party's written exceptions or response must be sent by mail or electronic service, if agreed upon by the parties, to the opposing party and proof must be submitted to the Tribunal that the exceptions or response were served on the opposing party.

By Peter M. Kopke

Entered: August 4, 2017
ejg

---

United States department of labor . . ."[11] These groups include (15) building construction general contractors and operative builders, (16) heavy construction, other than building construction contractors, and (17) construction special trade contractors.