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

General Motors Corporation,
Petitioner,

v

MTT Docket No. 295665

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

FINAL ORDER AND JUDGMENT

Administrative Law Judge Thomas A. Halick granted summary disposition based on a motion filed by Respondent and issued a Proposed Order on July 12, 2007. The Proposed Order provided, in pertinent part, that "[t]he parties shall have 21 days from date of entry of this Proposed Order and Judgment to file exceptions and written arguments with the Tribunal ... The exceptions and written arguments shall be limited to the matters relating to the motion."

The Tribunal, pursuant to Section 26 of the Tax Tribunal Act, as amended by 1980 PA 437, has given due consideration to the case file and finds that Petitioner has failed to show good cause to justify the modifying of the Proposed Order or the granting of a rehearing. Therefore, the Tribunal adopts and incorporates by reference the findings of fact and conclusions of law in the Proposed Order as its final decision.

Petitioner filed timely exceptions on August 1, 2007, indicating that:

i. "[T]here are material facts in issue, and Respondent is not entitled to a judgment as a matter of law."
ii. "[I]t is necessary to highlight the factual distinctions between Petitioner's use of the fuel placed in the fuel supply tank which is transported outside of Michigan versus its use (i.e. combustion) of the motor fuel when it performs off-highway diagnostic testing during the manufacturing process."
iii. The Proposed Order does not consider factual distinctions between Petitioner and *DaimlerChrysler*.
iv. "Petitioner also included a request for refund of motor fuel tax paid to Respondent for motor fuel that was used (i.e. combusted) in off-highway diagnostic testing of each motor vehicle manufactured by Petitioner."

Respondent did not file a response to Petitioner's exceptions.

Petitioner also filed a Motion to Amend and a Motion for Immediate Consideration, filed August 1, 2007. Petitioner claims that the "controversy in Docket No. 295665 relates, in portion, to the proper tax treatment of the motor fuel placed in the fuel supply tanks of motor vehicles which is used/burned as part of the diagnostic testing of each vehicle during the manufacturing process."

Petitioner further states that the term "end user" has been clarified by the Michigan Court of Appeals in *DaimlerChrysler Corporation v Michigan Department of Treasury*, 268 Mich App 528 (2006). Petitioner states that the Court's decision is pertinent to Petitioner's claims of tax refund and Petitioner desires the factual distinctions to be addressed by the Tribunal. Petitioner claims that this additional argument will not prejudice Respondent because ample time exists to explore facts and arguments relating to this issue. The Motion for Immediate Consideration was denied by the Tribunal on August 23, 2007. That Order also required Respondent to file a response to Petitioner's Motion to Amend "within 14 days of the entry of this Order."

Respondent filed its response to Petitioner's Motion to Amend on August 24, 2007. Respondent submits that the Tribunal should deny Petitioner's motion because "GM seeks to add a new issue … [of] whether its use of fuel for testing new vehicles on its private property constitutes end use." Respondent suggests that "[t]his is an entirely separate and new issue with different facts and different amounts of tax at issue from the current case." Therefore, the amendment should be denied because "[i]t is too late and prejudicial.…"

On September 5, 2007, Petitioner filed a motion requesting that the Tribunal strike Respondent's Response to Petitioner's Motion to Amend Petition and Motion for Immediate Consideration. In support of its motion, Petitioner contends that Respondent did not timely file its response as required by statute. Respondent has not filed a response to this motion.

TRIBUNAL'S FINDINGS

Administrative Law Judge Thomas A. Halick properly considered the motions and the evidence submitted in the rendering of his decision. Petitioner's claim that it has "also" included a claim for refund based upon its off-highway diagnostic testing is false and misleading. At no point in the case has Petitioner raised such a refund request. The only refund claimed, and therefore the only issue presented to be determined by the Tribunal, was for "[f]uel that remains in the fuel supply tanks of newly manufactured vehicles which are shipped out of state." (Petitioner's Petition for Review submitted November 5, 2002). Petitioner does not even use the words "diagnostic testing" in its original petition.

There were several amended petitions that Petitioner submitted to the Tribunal. Its last amended petition to be accepted was on May 4, 2005. In its order, the Tribunal limited the amendment to include MCL 207.1033 as a statute that Petitioner could use in supporting its original claim. The Tribunal reasoned that there was no prejudice to Respondent because Respondent was on notice as to which statutes Petitioner would need to use in support of a refund claim. However, the amendment was limited to specific language and in no way augmented Petitioner's claim to include any additional refund issues.

Petitioner filed another Motion to Amend on August 1, 2007, 21 days after the Proposed Order was issued. This motion is Petitioner's first bid to include a claim for fuel that is "burned via off-highway diagnostic testing of each vehicle." Petitioner claimed that the recently released *DaimlerChrysler* decision clarified the terms "end user" and "use" as it related to its claim. These arguments have been repeated in Petitioner's Statement Supporting Exceptions.

Respondent counters that Petitioner is trying to insert a new claim that is a different tax refund. Respondent also states that even if the Tribunal would allow the new issue as a part of this petition, Petitioner would be barred from bringing it because the statute of limitations has run, per MCL 205.27a.

The Tribunal agrees with Respondent and finds that Petitioner is trying, through several different avenues of court rules, to insert a new issue that is precluded under MCL 2.118. The Tribunal has allowed Petitioner to amend its petition in the past to include statutes in support of its *current* claim. However, those amendments have been limited in nature so that the base of the original claims was not broadened. Just as the Tribunal did not allow additional claims in the past, so we refuse to allow any expansion of claims now. Therefore, Petitioner's Motion for Amendment and Petitioner's Statement Supporting Exceptions should be denied.

Petitioner filed a Motion to Strike on August 31, 2007, claiming that Respondent's response to the Motion to Amend was not timely filed. However, in its Order of August 23, 2007, the Tribunal ordered Respondent to file a response to Petitioner's Motion to Amend "within fourteen days." Respondent timely filed its response on August 24, 2007. Therefore, the Tribunal finds that Respondent's response was not untimely and Petitioner's Motion to Strike should be denied.

IT IS ORDERED that Petitioner's Motion to Amend is DENIED.

IT IS FURTHER ORDERED that Petitioner's Motion to Strike is DENIED.

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

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

MICHIGAN TAX TRIBUNAL

Entered: December 18, 2008
phg

By: Kimbal R. Smith III

* * *

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

General Motors Corporation,
Petitioner,

MICHIGAN TAX TRIBUNAL
NONPROPERTY TAX

Michigan Department of Treasury,
Respondent.

MTT Docket No. 295665
Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER

GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION AND

DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSTION

Petitioner appeals Respondent's denial of its request for a refund of motor fuel tax.

On April 30, 2004, Respondent filed a motion for summary disposition, a brief in support, documentary evidence, and an affidavit, asserting there is no genuine issue of material fact and that Respondent is entitled to judgment as a matter of law under MCR 2.116(C)(10).

On May 14, 2004, Petitioner filed a written response to the motion, a brief in support, documentary evidence and affidavits. Petitioner's response to Respondent's motion requested that the Tribunal enter judgment in its favor under MCR 2.116(I). On May 20, 2004, Respondent filed a brief in response to Petitioner's motion.

Petitioner, General Motors Corporation ("GM") was represented by PriceWaterHouseCoopers, LLC. Respondent, Michigan Department of Treasury ("Treasury" or "the Department"), was

represented by Assistant Attorney General Roland Hwang.

This case was placed in abeyance pending the outcome of *DaimlerChrysler* v *Treasury*, MTT Docket No. 295872, for which all appellate remedies have now expired. *DaimlerChrysler Corporation* v *Michigan Department of Treasury*, 477 Mich 962; 724 NW2d 279 (2006).

Based upon facts not in dispute, the Tribunal concludes that Petitioner is not entitled to an exemption or refund under the Motor Fuel Tax Act (2000 PA 403) as a matter of law. Respondent's motion for summary disposition is granted under MCR 2.116(C)(10) and TTR 230.

This case is factually and legally indistinguishable from *DaimlerChrysler* v *Treasury*, MTT Docket No. 295872. The Tribunal issued its Proposed Opinion and Judgment in that case on September 23, 2004. After subsequent briefing of the claim under MCL 207.1933 and MCL 207.1039, which are also before the Tribunal in this case, the Tribunal issued its "Final Decision on Proposed Order" on April 20, 2005. Therefore, judgment shall be entered in this case as a matter of law based on *DaimlerChrysler* v *Treasury*, MTT Docket No. 295872. On November 1, 2005, the Court of Appeals upheld the Tribunal's order granting summary disposition in favor of Respondent in *DaimlerChrysler* v *Treasury*, MTT Docket No. 295872. *DaimlerChrysler Corporation* v *Michigan Department of Treasury*, 268 Mich App 528; 708 NW2d 461 (2006). On December 8, 2006, the Supreme Court denied leave to appeal. *DaimlerChrysler Corporation* v *Michigan Department of Treasury*, 477 Mich 962; 724 NW2d 279 (2006).

Respondent's Allegations and Petitioner's Response

Respondent's motion sets forth the following allegations in paragraphs 1 through 7. Petitioner's responses are included in parentheses.

1. Petitioner is a corporation headquartered at the Renaissance Center in Detroit, Michigan. (Petitioner admits.)
2. The taxes involved are Michigan motor fuel taxes paid pursuant to the Motor Fuel Tax Act, 2000 PA 403, MCL 207.1001 *et seq* (MFTA). (Petitioner admits.)
3. Petitioner is not licensed as a motor fuel exporter. (Petitioner admits, and further states it is not in the business of exporting motor fuel but that it is in the business of manufacturing automobiles).
4. Petitioner has not shown that it has paid destination motor fuel taxes. (Petitioner admits and further states that it neither owns nor operates the vehicles in the destination states and does not owe motor fuel tax to those states).
5. In order to obtain a motor fuel tax refund, Petitioner must demonstrate it is the exporter, must be licensed as an exporter or supplier, or must prepay the destination state tax to the supplier, and provide proof of export. (Petitioner denies the allegation and further states that it does not export motor fuel and "would never comply with the exporter requirements as prescribed by the Motor Fuel Tax Act in order to achieve a return of the tax dollars…").
6. Petitioner has not established its right to a refund of motor fuel tax. (Petitioner denies the allegation).
7. There is no genuine issue of material fact. (Petitioner denies the allegation with regard to Respondent's motion, but claims that there is no genuine issue of material fact with

regard to Petitioner's request for summary disposition under MCR 2.116(I)(2).)

The first issue raised by Respondent is whether Petitioner is an "exporter" that "exports" motor fuel within the meaning the MFTA. Also at issue is whether Petitioner is entitled to the exemption or refund of motor fuel tax under any provision of the MFTA. Both parties have requested that the Tribunal enter a judgment as a matter of law.

Respondent's Argument

Respondent argues there is no genuine issue of material fact that Petitioner places motor fuel in the fuel tanks of motor vehicles that it manufactures in this state. Petitioner paid Michigan motor fuel taxes pursuant to the Motor Fuel Tax Act, 2000 PA 403, MCL 207.1001 *et seq*. (Petition, Paragraph 9). Petitioner filed a claim for a refund of motor fuel taxes on or about June 30, 2002. (Petition, Paragraph 2, and Exhibit A attached thereto; Exhibit A to Respondent's motion). Respondent denied the claim for refund by letter on October 1, 2002. (Petition, Paragraph 3 and Exhibit B attached thereto; Exhibit B to Respondent's Motion). Respondent's position is set forth in a letter to "motor fuel exporters" (Petition, Paragraph 22 and Exhibit C attached thereto; Exhibit C to Respondent's motion). The letter to motor fuel exporters states that it "provides guidance regarding the tax treatment of motor fuel exported from Michigan in the tanks of motor vehicles transported by common carrier and/or rail" and states that such exported fuel is not exempt under the MFTA. Petitioner is not licensed as a motor fuel exporter. (Affidavit of Dale Vettel, Paragraph 7, attached to Respondent's motion.) The MFTA requires Petitioner, in order to obtain a motor fuel tax refund, to be licensed as an exporter, to provide the Department with adequate proof of export, and to request a refund under Section 43, MCL 207.1043. (Affidavit of

Dale Vettel, Paragraph 9).

Respondent states that the MFTA imposes tax on motor fuel imported into or sold, delivered, or used in this state. Tax is imposed upon removal of fuel from the bulk transfer/terminal system. Petitioner uses the motor fuel "downstream" from the bulk transfer/terminal system. Petitioner takes delivery, stores, and uses the motor fuel in Michigan, and is liable for motor fuel tax. MCL 207.1008.

Initially, Respondent claimed that Petitioner is an "exporter, which is defined in statute as "a person who exports motor fuel." MCL 207.1002(u). "Export" means:

> …to obtain motor fuel in this state for sale or other distribution outside of this state. Motor fuel delivered outside of this state by or for the seller constitutes an export by the seller and motor fuel delivered outside of this state by or for the purchaser constitutes an export by the purchaser. MCL 207.1002 (t).

Petitioner obtains large quantities of motor fuel and places it in the vehicle fuel tanks and distributes it in those vehicle fuel tanks by transporting the vehicles on trucks to other states where others will use the motor fuel to power the vehicles on public roads. (Respondent's Brief in Support, page 4).

Respondent argues that Petitioner is not entitled to a refund under Section 43 of the MFTA, MCL 207.1043, which is the only applicable section under which Petitioner, as an "exporter," would be eligible to apply. Petitioner has not provided proof of payment of tax to the destination

state, as required under section 43(a) and has not complied with section 85(1)(b). (Affidavit of Dale P. Vettel). (Section 85 requires an exporter to be licensed or meet other requirements and imposes criminal penalties for failure to abide by the requirements of the section.)

Respondent claims that section 43 of the MFTA governs Petitioner's refund claim and that section 47 does not apply. Petitioner has not shown that it is entitled to a refund under either section 47 or section 30 of the Revenue Act, MCL 205.30.

On May 21, 2004, Respondent filed a Response in Opposition to Petitioner's Request for Judgment Pursuant to MCR 2.116(I)(2) in which Respondent reiterates its claim that Petitioner is an "exporter" and does not qualify for exemption or refund under provisions applicable to exporters. Respondent further points to Petitioner's documentary evidence, a "Vehicle Terms of Sale Bulletin" that governs Petitioner's sales of manufactured vehicles to dealers. ("Vehicle Term of Sale Bulletin"attached to Petitioner's Response to Respondent's motion, and attached to Respondent's Brief in Response in Opposition to Petitioner's Request for Judgment Pursuant to MCR 2.116(I)(2)). That agreement provides that transfer of title, risk of loss, and control over the vehicles transfers to the purchaser (dealer) upon delivery to the common carrier in this state. Respondent asserts, "In such cases where the vehicle is shipped out of state via carrier or transport truck, Petitioner would not be an exporter of the motor fuel." In such case, Respondent agrees that Petitioner is not the exporter of the motor fuel in the vehicles, and that therefore, the provisions on exportation of motor fuel are not applicable.

Respondent claims the MFTA contains no provision for an exemption or refund of motor fuel

sold in a transaction within this state under these circumstances. Respondent argues that nothing prevents the purchaser or its agent from delivering the vehicles to an in-state destination, and ultimately to be used on Michigan's roads. Respondent claims that Petitioner lacks standing to seek a refund under these circumstances.

Petitioner's Argument

Petitioner claims it is entitled to a refund of motor fuel tax for the period of April 1, 2001 to April 30, 2001, in the amount of $56,563, plus statutory interest. (Petition, Paragraph 7).

Petitioner claims it is not an exporter of motor fuel and was not in the business of exporting motor fuel during the periods in question. The fuel that is shipped out of the state in the tanks of newly manufactured vehicles is incidental to Petitioner's business of manufacturing motor vehicles. (Petition, Paragraph 10.) The fuel in question was not consumed in Michigan upon public roads or highways. (See, Affidavit of Gregory E. Gursky ("Gurskey"), paragraphs 5, 6, 7, 8, and 9).

Petitioner claims a refund under MCL 207.32, 207.1047, 207.1048, and 205.30, on the grounds that motor fuel was not put to a taxable use because the vehicles were not used on the public roads and highways of Michigan. (Petition, Paragraph 19 and Exhibit A thereto; Exhibit A to Petitioner's Response; and Gurskey, paragraphs 9.)

Petitioner points to an error in a "position letter" dated November 12, 2002 from the Department of Treasury, which stated that the MFTA allows a person to seek a refund under section 30 of the

MFTA, when in fact the letter should state that a refund may be requested under section 30 of the *Revenue Act*, MCL 205.30.

Petitioner, by its "Vehicle Terms of Sale Bulletin," transfers title to the vehicles to purchasers when the common carrier takes possession in Michigan. (Gurskey, paragraph 12).

Petitioner argues it is entitled to an exemption under the intent of the MFTA as set forth at MCL 207.1008(6). It is not disputed that Petitioner does not operate the motor vehicles on Michigan public roads and highways.

Petitioner also makes certain arguments by analogy to federal law and argues it has been denied a remedy for the recovery of taxes.

CONCLUSIONS OF LAW

This matter comes before the Tribunal on Respondent's motion for summary disposition under MCR 2.116(C)(10). Petitioner filed a timely response and a brief in opposition to Respondent's motion. Petitioner's response and brief also included a request that the Tribunal enter judgment in its favor under MCR 2.116(I)(2), along with a motion fee. The Tribunal accepted Petitioner's request for judgment as a motion under TTR 230 and accepted Respondent's response thereto (filed May 20, 2004).

When reviewing a motion for summary disposition, the Tribunal gives the benefit of the doubt to the nonmoving party to determine whether a record might be developed that will leave open an

issue on which reasonable minds could differ. *Arbelius* v *Poletti,* 188 Mich App 14; 469 NW2d 436 (1991). All inferences are to be drawn in favor of the nonmoving party. *Mt Carmel Mercy Hospital* v *Allstate Ins Co,* 194 Mich App 580; 487 NW2d 840 (1992). The court must determine whether it would be possible for the claim asserted to be supported by evidence at trial. *Bowkus* v *Lange,* 196 Mich App 455; 494 NW2d 461 (1992). The party opposing the motion has the burden of showing, by documentary evidence, that there is a genuine issue for trial. *Hutchinson* v *Allegan Co Bd of Road Commissioners,* 192 Mich App 241; 472 NW2d 71 (1991). The Tribunal must consider pleadings, affidavits, depositions, admissions, and other documentary evidence available to it, and should grant the motion where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Weymers* v *Khera,* 210 Mich App 231; 533 NW2d 334 (1995).

The Tribunal finds there is no genuine issue of material fact. In the recent ruling in *DaimlerChrysler Corporation* v *Michigan Department of Treasury,* MTT Docket No. 295872 (entered April 20, 2005), the Tribunal decided identical legal issues under indistinguishable facts such that judgment must be entered in favor of Respondent as a matter of law. The Tribunal's order in that case was upheld on appeal in *DaimlerChrysler Corporation* v *Michigan Department of Treasury,* 268 Mich App 528; 708 NW2d 461 (2006). On December 8, 2006, the Supreme Court denied leave to appeal. *DaimlerChrysler Corporation* v *Michigan Department of Treasury*, 477 Mich 962; 724 NW2d 279 (2006).

JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition is GRANTED and Respondent's denial of Petitioner's request for refund is AFFIRMED. Petitioner's request for summary disposition under MCR 2.116(I) is DENIED. No costs awarded to either party.

IT IS FURTHER ORDERED that the parties shall have 21 days from date of entry of this Proposed Order and Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the matters relating to the motion. This Proposed Order 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 Tax Tribunal Act (MCL 205.726).

MICHIGAN TAX TRIBUNAL

Entered: July 12, 2007

By: Thomas A. Halick