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

Dallman Industrial Corporation,
Petitioner,

v

MTT Docket No. 311862

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Patricia L. Halm

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10) AS TO USE TAX AND INTEREST

ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF RESPONDENT PURSUANT TO MCR 2.116(I)(2) AS TO PENALTIES

At issue in this case is an assessment of use tax, interest and penalty levied by the Michigan Department of Treasury (Respondent) against Dallman Industrial Corporation (Petitioner). Petitioner is an Indiana corporation that manufactures ATM kiosks. Petitioner sold kiosks to customers located in Michigan, including banks, credit unions, and ATM manufacturers. Believing that these transactions were retail sales subject to Michigan's sales tax, Petitioner collected sales tax except in those situations in which the purchaser either claimed a tax exemption or held a direct pay permit. In 1997, Petitioner registered with Respondent as a seller and began remitting sales tax. Petitioner did not remit sales tax for the period 1995-1996; however, Petitioner asserts that this was not intentional as in May 1995, a fire destroyed its headquarters and financial documents.

It is Respondent's position that Petitioner acted as a manufacturer/contractor by installing the kiosks after delivery, thereby making improvements to realty. For this reason, it is Respondent's position that Petitioner owes use tax on the transactions at issue, not sales tax. To that end, Respondent issued Assessment No. L295600 in the amount of $177,586.85, including

$94,391 in use tax and $53,047.85 in interest. Respondent also assessed penalties in the amount of $30,148 for Petitioner's failure to file and pay tax for the 1995-1996 period.

For the reasons set forth herein, the Tribunal finds that Petitioner is not a contractor and that Petitioner is not liable for use tax on the transactions at issue. However, Petitioner's Motion for Summary Disposition is only partially granted as Petitioner failed to show reasonable cause to waive the penalty assessed by Respondent.

PETITIONER'S MOTION FOR SUMMARY DISPOSITION

During the time at issue, January 1, 1995, to June 30, 2001, Petitioner manufactured two styles of ATM kiosks. Petitioner described these styles as an ATM surround and an ATM building style kiosk. "An ATM surround is an enclosure for an ATM machine that is designed to be placed on a wall around an ATM machine. . .A building style ATM kiosk is a free standing structure in a drive-up location that encloses an ATM." (Petitioner's Brief in Support of Motion for Summary Disposition[1], p3)

Petitioner sold these kiosks to customers in Michigan. While Petitioner's sale contracts referenced charges for "delivery/installation," "the term referred only to delivery of the ATM kiosks to the customer's site. . .[Petitioner] did not provide any installation services to its customers in Michigan as it was not licensed to do so." (Petitioner's Brief, p3) For all of the sales at issue, the kiosks were delivered either to a storage facility or to the customer's location. Petitioner described the delivery process for ATM surround style kiosk as follows:

> The customer was responsible for preparation of the site for the ATM surround. Installation by the contractor involves permanently affixing the ATM surround over a customer supplied ATM and providing appropriate electrical hook-up, including dedicated circuits for the ATM. Security equipment on systems need to be put in place including cameras, locks and alarm systems...[Petitioner's] deliverymen would secure the ATM surround with temporary bolts to prevent the

[1] Hereinafter referred to as "Petitioner's Brief."

> structure from tipping over and hurting someone. The customer's contractor would be required to permanently install the ATM surround. The customer could not have opted for [Petitioner] to do the installation or for [Petitioner] to hire the contractor to do the installation. (Citations omitted.) (Petitioner's Brief, p4)[2]

Petitioner described the delivery process for ATM building style kiosk as follows:

> Delivery of a building style kiosk consisted of either delivering the kiosk to a storage facility or placing the kiosk on a cement slab for the customer's contractor to complete installation. A forklift is needed to move the building style ATM kiosk from the truck to the cement slab. The delivery person would put temporary bolts to secure the kiosk to the concrete to prevent the kiosk from tipping over and causing injury. The customer and his contractor were responsible for the installation of the ATM kiosk. [Petitioner] did not do any gluing or caulking and only provided uncrating and temporary anchoring. To install the building style kiosk, the customer's contractor would be required to prepare the cement slab for the kiosk, provide electricity to power the ATM and lights, and create dedicated circuits for the ATM. The contractor would also be required to install security equipment, including cameras, locks and alarm systems. (Citations omitted.) (Petitioner's Brief, pp4-5)

In January 1997, Petitioner registered with the Michigan Department of Treasury as a seller and began to collect and remit sales tax. However, Petitioner did not collect and remit sales tax on all of its sales as some sales were considered by Petitioner to be tax exempt. These included sales made to banks and credit unions that claimed exempt status as a governmental instrumentality, manufacturers that claimed a resale exemption, and those customers who held a direct pay permit.

According to Petitioner, the assessment at issue occurred because of Respondent's:

> . . .conclusion that the transactions for which [Petitioner] had claimed exemptions from sales tax were subject to use tax because [Petitioner's] sales of ATM kiosks were transactions that [ ] constituted the provision of construction services and that [Petitioner] was acting as a contractor engaged in the business of constructing, altering, repairing or improving real estate for others. (Petitioner's Brief, p6)

[2] Petitioner's claims as to installation and delivery are supported by the deposition of Ernest R. Dallman, attached to Petitioner's Motion as G2.

In response to this conclusion, Petitioner argues that the transactions at issue were sales of tangible personal property and that Petitioner is not in the construction business. In support of this argument, Petitioner relies on the "incidental to service" test set forth by the Michigan Supreme Court in *Catalina Marketing Sales Corporation, et al v Michigan Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004).

> 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. (*Id*., p26)

Applying this test to the case at hand, Petitioner claims that in each of the transactions at issue, the buyer sought to purchase an ATM kiosk. "The contracts between [Petitioner] and its customers [are] for an ATM kiosk. . .Delivery services are an optional add-on to the contract, not the primary subject of the contract." (Petitioner's Brief, p9) Next, Petitioner claims that it "is in the business of manufacturing and selling ATM kiosks, not constructing, altering, repairing, or improving real property." (Petitioner's Brief, p9) As for the third part of the test, Petitioner states that it sold the ATM kiosks as a profitable retail enterprise and that it made its profits from the sale of the ATM kiosks, not on the delivery services. In response to the question of whether the ATM kiosks were available for sale without delivery, Petitioner states that it regularly sold the kiosks and did not deliver them. Regarding the fifth part of the test, namely, to what extent did intangible services contribute to the value of the item transferred, Petitioner states that "[t]he value of the ATM kiosk is in the physical property itself as demonstrated by the contract pricing for each of the surrounds ($3000 to $5000) and the building style kiosks ($14,000 to $18,000)." (Petitioner's Brief, p10) By comparison, delivery charges for the surrounds ranged from $250 to

$1,500, while delivery for the building style kiosks ranged from $1,000 to $1,500. Thus, under the incidental-to-service test, Respondent's "assessment of use tax on these transactions as the provision of construction services is contrary to the facts and the law." (Petitioner's Brief, p10)

Petitioner also relies on *World Book Inc v Dep't of Treasury*, 459 Mich 403; 564 NW2d 82 (1999), a case in which the Michigan Supreme Court held "that the correct test for deciding whether a sales transaction is subject to a sales, not a use, tax is whether it was consummated within the state. Only a transaction consummated within Michigan is a taxable 'sale at retail' under MCL § 205.51(1)(b); MSA 7.521(1)(b)." (*Id*., p411) According to Petitioner:

> In *World Book*, the Court held that when title transfer and delivery of the product occurred outside of Michigan, via delivery to a common carrier, the sale was consummated outside of Michigan. In this case, [Petitioner] retains control of the ATM kiosk until it is delivered at the customer's site in Michigan. Under *World Book*, [Petitioner's] sales are consummated in Michigan and are properly subject to the Sales Tax Act. (Petitioner's Brief, p11)

Petitioner also asserts that the Tribunal is without authority to consider Respondent's argument that the tax exemptions claimed by Petitioner were improper. Petitioner argues that:

> This Tribunal has previously ruled that [Respondent] may not assert a new theory of sales tax liability without following the appropriate administrative procedures provided under the Revenue Act, MCL 205.1 et seq. Similarly, [Respondent] cannot assert a new theory of use tax liability without following appropriate administrative procedures provided under the Revenue Act. *Montgomery Ward v Department of Treasury*, 191 Mich App 674; 478 NW2d 745 (1992). (Petitioner's Brief, p11)

Finally, Petitioner asserts that the penalty assessed by Respondent should be waived for reasonable cause. According to Petitioner:

> In May 1995, [Petitioner] had a fire that destroyed [Petitioner's] principle headquarters building, including all of its financial records relating to the tax periods beginning 1/1/1995. [Petitioner] needed considerable time to rebuild and reorganize its business operations. In June 1996, the chief financial officer left the employ of [Petitioner]. Based upon statements of the former chief financial officer, [Petitioner] reasonably believed that all Michigan sales and use tax returns required to be filed for the tax periods beginning 1/1/1995 and ending 12/31/1996

> had been filed. [Petitioner] timely filed sales and use tax returns for the tax years in issue beginning January 1, 1997 and forward. [Respondent] assessed a failure to file penalty based upon [Petitioner's] failure to file sales and use tax returns for the periods beginning 1/1/1995 and ending 12/31/1996. Under the law and Admin Rule 205.1013, [Petitioner] had reasonable cause for failure to file sales tax returns for the period beginning 1/1/1995 and ending 12/31/1996 because it reasonably believed returns had been filed and the destruction of records by the fire prevented [Petitioner] from determining otherwise. All penalties assessed against [Petitioner] should be waived. (Citations omitted.) (Petitioner's Brief, p12)

Petitioner submitted the following exhibits with its Motion:

1. A copy of Petitioner's Answers to Respondent's First Set of Interrogatories and Request for Production of Documents.
2. A copy of Petitioner's Registration for Taxes, effective January 1, 1997, and copies of Petitioner's Sales Tax Licenses.
3. Copies of documents (brochures, etc.) containing information about Petitioner's kiosks.
4. Copies of Proposals/Contracts and Billing Statements.
5. A copy of a Commodity Master Purchase Agreement.
6. Copies of tax exemption documents provided to Petitioner.
7. Copies of letters indicating that taxes owed were paid by Petitioner's customer directly to Respondent.
8. Copies of tax exemption documents provided to Petitioner.
9. A copy of Mr. Dallman's deposition.
10. A copy of Respondent's answers to Petitioner's First Set of Interrogatories and Requests for Production.
11. A copy of Respondent's Administrative Rule 205.71, applicable to contractors and sales or use tax.

12. A copy of Revenue Administrative Bulletin 2004-3.

13. A copy of Respondent's Administrative Rule 205.1013.

14. A copy of *Catalina Marketing Sales Corporation, et al v Department of Treasury*, 470 Mich 13; 678 NW2d 619 (2004).

15. A copy of *World Book Inc v Dep't of Treasury*, 459 Mich 403; 564 NW2d 82 (1999).

16. A copy of *Montgomery Ward & Company v Department of Treasury*, 191 Mich App 674; 478 NW2d 745 (1992).

RESPONDENT'S POSITION

As Respondent stated in its Reply to Petitioner's Brief in Support of its Motion for Summary Disposition[3], "[i]n the instant case, the question is whether the enclosures are predominately personal property sold at retail or improvements to realty." (Respondent's Brief, p15) If the answer to the question is that kiosks are predominately personal property sold at retail, the transactions at issue are subject to sales tax. If the answer is that the kiosks are improvements to realty, the transactions are subject to use tax.

In answer to that question, Respondent asserts that Petitioner "was a manufacturer that pre-fabricated the ATM enclosures, delivered, and installed the enclosures into a pre-cut hole, or on a prepared [surface]," and, as such, the transactions at issue are subject to use tax. (Respondent's Brief, p6) In addition, according to a report prepared by Respondent's auditor, Petitioner repairs, maintains, paints, disassembles, rigs, hauls away and relocates the kiosks.

Respondent argues that Petitioner's position that it does not install the kiosks is contrary to the language in its contracts. Moreover, pursuant to the deposition of Mr. Ernest Dallman, Petitioner's President, Petitioner acknowledges that it bolted the kiosks.

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

> [Petitioner] even provided instructions for completing the installation with electrical, alarm and data communications. A contractor-manufacturer does not have to complete every service or participate in every element of construction on real property to be a contractor. For instance, the installation of stoves in a home where gas fixtures were already present is considered the work of the contractor. (Respondent's Brief, p11)

In support of its position that the transactions at issue constitute improvements to real property, Respondent cites *Honeywell v Michigan Department of Treasury*, 167 Mich App 446; 423 NW2d 223 (1996). In that case, Petitioner operated a mechanical and electrical contracting business in Michigan.

> Acting as a subcontractor on construction projects, petitioner bids for contracts involving the installation of fire, security, and energy management systems. If a bid is successful, petitioner orders the necessary project equipment from its manufacturing plant in Illinois. . .Finished products are shipped to petitioner's Michigan office for installation in accordance with contract specifications. The Illinois plant and Michigan office are deemed part of the same division of petitioner's corporate organizational structure. (*Id*., p447)

The parties in *Honeywell* did not dispute that transactions at issue were subject to use tax. Instead, the dispute involved the definition of "price." The respondent relied upon a 1971 administrative rule in support of its definition of price. This rule, being 1979 AC, R 205.71, states:

> (6) Where a manufacturer affixes his product to real estate for others, he qualifies as a contractor and shall remit use tax on the inventory value of the property at the time the property is converted to the contract which value shall include all costs of manufacturing, fabricating, and processing. (*Id*., p450)

The Court of Appeals agreed with the respondent's position, stating:

> Petitioner was acting in a dual capacity of manufacturer and consumer. Although there was no "sale" in the traditional sense, fire, safety and energy management systems manufactured by petitioner were also consumed by petitioner in this state.
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> ***
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> We believe that it was. . .the intention of our Legislature to impose a tax on all tangible personal property consumed in this state. As the property consumed in

> this case was a finished product and not raw materials, respondent's interpretation of the definition of "price" fulfilled the Legislature's intent and, therefore, was authorized by the Legislature. (*Id*., pp450-451)

Given this, Respondent argues that Petitioner "is required to pay the full value of the property installed as fixture in use tax." (Emphasis in original.) (Respondent's Brief, p12)

Additionally, Respondent argues that because the kiosks are affixed to either the ground or a building and are not movable once they are delivered, they are considered fixtures. In support of this argument, Respondent cites *Michigan National Bank v City of Lansing*, 96 Mich App 551; 293 NW2d 626 (1980). In that case, the Court of Appeals set forth a test to use in determining whether something is a fixture. The test emphasized three factors to consider:

(1) Annexation to the realty, either actual or constructive;
(2) Adaption or application to the use or purpose of that part of the realty to which it is connected or appropriated; and
(3) Intention to make the article a permanent accession to the realty. (*Id*., p554)

In this case, Respondent argues that Petitioner annexed the kiosks to the realty, Petitioner made the kiosks for use at the realty, and it was intended that the kiosks be made a permanent addition to the property. Thus, the kiosks are an improvement to the realty.

In response to Petitioner's application of the incidental-to-service test set forth in *Catalina*, *supra*, Respondent argues that the test indicates that the sale of the kiosks were incidental to the services provided by Petitioner and not the other way around, as advocated by Petitioner. Specifically, Respondent submits that the test should be answered as follows:

1. What did the buyer seek as the object of the transaction?

   > The buyer sought to either obtain an ATM enclosure building or a massive connected ATM enclosure that would be bolted and later glued into the building. [Petitioner] is a manufacturer-contractor, whose installation was prepped and followed by finishing contractors or the purchasing entity. [Petitioner] provided step-by-step instructions for the other services required to finish installation of the ATMs. (Respondent's Brief, p14)

2. What is the seller or service provider in the business of doing?

   The seller – [Petitioner] – is in the business of architecturally designing, prefabricating, delivering and installing ATM enclosures to improve realty. (Respondent's Brief, p14)

3. Were the goods provided as a retail enterprise with a profit-making motive?

   [Petitioner] has no proof that it engaged in retail sales in Michigan. [Petitioner's] specifications show that it pre-fabricated the enclosures, even custom-making some to fit certain specifications and preferences. (Respondent's Brief, p15)

4. Were the tangible goods available for sale without the service?

   [Petitioner's] pre-fabrication of the ATM enclosure, which is a fixture or realty itself, cannot be alienated from its value. The ATM enclosure is not available as a personal good that is readily transportable apart from any improvement to realty. Here, Catalina is distinguishable from the facts at hand in that Catalina evaluated whether the contract was predominately for services or goods. In the instant case, the question is whether the enclosures are predominately personal property sold at retail or improvements to realty. (Respondent's Brief, p15)

5. To what extent did the intangible services contribute to the value of the physical item transferred?

   The entire ATM is a construction or improvement of the real property in question, even if the enclosures were pre-fabricated in Indiana. They were [architecturally] engineered but ultimately the services were performed for Michigan customers, making [Petitioner] a manufacturer-contractor. (Respondent's Brief, p15)

As to Petitioner's claims that some of the transactions at issue were exempt from tax, Respondent asserts that there is no authority for this claim as it relates to the banks and credit unions. Respondent cites MCL 205.94(g) as statutory authority for exemptions from use tax for governmental entities. However, Respondent asserts that the banks and credit unions at issue are privately owned and not governmental entities. As such, these sales are not tax exempt.

Finally, in response to Petitioner's request that the penalties be waived for reasonable cause, Respondent argues that because Petitioner submitted no affidavits or other pleadings in

support of its position that there was a fire that destroyed its records, "there is a genuine issue of material fact as to whether [Petitioner] knowingly failed to report use tax for the year 1995, resulting in a penalty for unpaid use tax." (Respondent's Brief, p16)

Respondent submitted the following exhibits with its reply to Petitioner's Motion:

A. A copy of the Bill for Taxes Due for Assessment No. L295600.

B. A copy of Respondent's underlying Decision and Order of Determination.

C. Copies of documents (brochures, etc.) containing information about Petitioner's kiosks.

D. Copies of audit documents prepared by Respondent.

E. Copies of Proposals/Contracts and Billing Statements.

F. Several of Petitioner's Answers to Respondent's Interrogatories.

G. Copies of several pages of Mr. Dallman's deposition.

FINDINGS OF FACT

Petitioner, Dallman Industrial Corporation, is a corporation based in Indianapolis, Indiana. Petitioner is a manufacturer in the business of making ATM kiosks, either in the form of a surround or a building, as previously described. Petitioner sold kiosks to customers located in Michigan. These customers were banks and credit unions, ATM manufacturers, and others who held direct pay permits. The customers were given the choice of whether or not to have Petitioner deliver the kiosk. If the kiosk was delivered by Petitioner, it was delivered either to the location where the kiosk would be utilized or to a storage facility. If the kiosk was delivered to a location where it would be utilized, Petitioner would uncrate the kiosk, place it in the designated area, and secure it with temporary anchoring. Petitioner did not install the kiosk. Petitioner is not a contractor.

Petitioner registered as a seller for sales tax purposes on January 1, 1997. Petitioner's claim that a fire destroyed its principle headquarters in May 1995 was not supported by an affidavit or other documentary evidence. Sales tax was not collected and remitted by Petitioner for certain sales Petitioner claims were exempt from sales tax. These sales include sales to banks and credit unions claiming exemption as a governmental instrumentality, sales for resale, and sales to customers that held direct pay permits.

The assessment at issue is known as Assessment No. L295600 and is for the period January 1, 1995, through June 30, 2001. Respondent issued the Final Bill for Taxes Due on August 25, 2004. The amount at issue includes $94,391.00 in use tax, $30,148 in penalty, and $53,047.85 in interest, which continues to accrue pursuant to MCL 205.23, for a total of $177,586.85 as of the date of the Final Bill.

MOTIONS FOR SUMMARY DISPOSITION

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

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

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

> First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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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. (Citations omitted.) *(Id*., p361-363)

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."

CONCLUSIONS OF LAW[4]

The primary issue in this case is whether Petitioner is a manufacturer that made retail sales of tangible personal property (ATM kiosks) to customers in Michigan and, as such, is liable for sales tax on these transactions, or whether Petitioner is both a manufacturer and a contractor

[4] The statutory citations are those in effect for the tax years at issue. The General Sales Tax Act and the Use Tax Act have undergone revisions since that time.

that manufactured tangible personal property, sold the property to customers in Michigan, and acted as a contractor by installing the property, thereby becoming liable for use tax on these transactions. The remaining issues are whether Petitioner's actions in accepting its customers' claims of tax exemptions should be upheld and whether Petitioner has shown reasonable cause to waive the penalties assessed by Respondent.

During the tax years at issue, the General Sales Tax Act (GSTA), being MCL 205.51 *et seq*, stated 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, as defined in section 1, 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))

Pursuant to Section 1: "'Sale at retail' is defined as a transaction by which the ownership of tangible personal property is transferred for consideration, if the transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, *or for any purpose other than for resale*. . . ." (Emphasis added.) (MCL 201.51(1)(b)) "Gross proceeds" was defined as "the amount received in money, credits, subsidies, property, or other money's worth in consideration of a sale at retail within this state. . . ." (MCL 201.51(1)(i))

The GSTA contains multiple tax exemptions, one of which provides that:

> (7) A person subject to a tax under this act shall not include in the amount of his or her gross proceeds used for the computation of the tax any proceeds of his or her business derived from sales to the United States, its unincorporated agencies and instrumentalities, any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States. . .and this state or its departments and institutions or any of its political subdivisions. (MCL 205.54)

During the tax years at issue, the Use Tax Act (UTA), being MCL 205.91, *et seq*, stated, that, but for specific exemptions:

> 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 or services specified in section 3a. Penalties and interest shall be added to the tax if applicable as provided in this act. (MCL 205.93(1))

"Price" is defined, in pertinent part, as:

> . . .the aggregate value in money of anything paid or delivered, or promised to be paid or delivered, by a consumer to a seller in consummation and complete performance of the transaction by which tangible personal property or services are purchased or rented for storage, use, or other consumption in this state, without a deduction for the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or any other expense. The price of tangible personal property, for affixation to real estate, withdrawn by a construction contractor from inventory available for sale to others or made available by publication or price list as a finished product for sale to others is the finished goods inventory value of the property. If a construction contractor manufactures, fabricates, or assembles tangible personal property before affixing it to real estate, the price of the property is equal to the sum of the materials cost of the property and the cost of the labor to manufacture, fabricate, or assemble the property but does not include the cost of labor to cut, bend, assemble, or attach property at the site of affixation to real estate. . .For purposes of this subdivision, "manufacture" means to convert or condition tangible personal property by changing the form, composition, quality, combination, or character of the property and "fabricate" means to modify or prepare tangible personal property for affixation or assembly. (MCL 205.92(f))

Like the GSTA, the UTA contains multiple tax exemptions. In particular, MCL 205.94 provides that:

> (a) Property sold in this state on which transaction a tax is paid under the general sales tax act. . .if the tax was due and paid on the retail sale to a consumer.
> (b) Property, the storage, use, or other consumption of which this state is prohibited from taxing under the constitution or laws of the United States, or under the constitution of this state.
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> (g) Property or services sold to the United States, an unincorporated agency or instrumentality of the United States, an incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States. . .this state, a department or institution of this state. . . .

In *World Book, Inc v Department of Treasury*, 459 Mich 403; 590 NW2d 293 (1999), the Michigan Supreme Court discussed the differences between the GSTA and the UTA.

> As it is a "privilege tax," the sales tax is imposed directly on the seller. However, the seller may pass it on to the purchaser and collect it at the point of sale.
>
> In contrast with the General Sales Tax Act, the Use Tax Act provides for an excise 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 or services specified...." MCL 205.93(1); MSA 7.555(3)(1). The Use Tax Act places the ultimate liability on the consumer. MCL 205.97; MSA 7.555(7). However, sellers with sufficient connection to Michigan are required to collect the tax and remit it to the Department of Treasury. MCL 205.95(a); MSA 7.555(5)(a); MCL 205.97; MSA 7.555(7).
>
> The provisions of the General Sales Tax Act and the Use Tax Act are complementary. Thus, as a general rule, property for which a consumer has already paid a use tax is not subject to the provisions of the General Sales Tax Act. Similarly, the Use Tax Act does not apply to property sold in Michigan on which Michigan sales tax has already been paid, if the tax was due and paid on the retail sale to a consumer. MCL 205.94(a); MSA 7.555(4)(a). Also, use tax is not owed on goods already subjected to certain other sales or use taxes in another state. MCL 205.94(e); MSA 7.555(4)(e). (Citations omitted.) (*Id*., p408)

In this case, Respondent argues that Petitioner is liable for payment of use tax, while Petitioner argues that it is liable for payment of sales tax. Respondent bases its argument on its belief that Petitioner not only manufactured and sold the kiosks to customers in Michigan, it acted as a contractor by installing the kiosks at the customers' Michigan locations. In other words, Respondent believes that Petitioner used the kiosks in its construction services.

The Tribunal disagrees. While Petitioner delivered the kiosks, which included unloading the kiosk from the truck, unpacking the kiosk, placing it in position and securing it with a temporary bolt, the Tribunal does not believe that this constitutes installation services such that Petitioner should be deemed a contractor. In making this determination, the Tribunal reviewed the deposition of Petitioner's President wherein he testified that the kiosks were fastened with temporary bolts and that a contractor, hired by the customer, was required to install the

permanent bolts. Petitioner's President further testified that Petitioner is not licensed to perform installation services in Michigan. The Tribunal finds this testimony credible and persuasive.

In response to Respondent's argument that Petitioner's contracts indicate that it will provide installation services, the Tribunal reviewed the answers provided by Petitioner to Respondent's interrogatories. Specifically, in response to Interrogatory No. 10, Petitioner states that it:

> . . .did not perform installation of ATM kiosks during the Audit Period and accordingly has no form service contracts, and/or form installation contracts involving the service or installation of ATM kiosks. Petitioner's sales documents refers to "delivery/installation" but that term refers to delivery services. Petitioner's charges for "delivery/installation" are charges for delivery of the ATM kiosk to the customer's site. The ATM surround is designed to be placed on a wall around an automated teller machine. Delivery of an ATM surround involves either delivering the ATM kiosk to a storage facility or placing the ATM surround over a precut hole in the wall. Petitioner puts in two bolts to hold the ATM surround in place to prevent injury to persons coming in contact with the ATM surround. At this point the ATM surround is not permanently affixed to the wall. The ATM may not be present when the ATM surround is delivered. Installation is still required for the ATM surround and ATM to perform the functions they were designed to perform. An electrician is needed to provide electricity to the ATM surround and ATM. Dedicated circuits are needed for the ATM. This may require moving the ATM surround during the process. Security equipment and systems need to be put in place including cameras, locks and alarm systems. An alarm company is hired by the owner to install security for the ATM and the ATM surround. Subsequently, a service provider will install the ATM surround by permanently affixing the ATM surround into the wall using the appropriate epoxies, glues and fasteners.
>
> Similarly, when the ATM kiosk sold is a building style kiosk designed to be a free standing structure in a drive-up location, delivery does not include installation of the ATM kiosk. Delivery of the building style ATM kiosk involves either delivering the ATM kiosk to a storage facility or placing the ATM kiosk on a cement slab for completion by owner's contractors. A forklift is needed to move the ATM building style kiosk to the cement slab. Once the building style ATM kiosk is positioned, Petitioner puts bolts through the kiosk into the concrete slab to hold the ATM kiosk in place to prevent injury to persons coming in contact with the ATM kiosk. Building style ATM kiosks are top heavy and may tip over and cause injury if not secured. At this point the ATM kiosk is not permanently affixed to the cement slab. The ATM may not be present when the ATM kiosk is delivered. Installation is still required for the ATM kiosk and ATM to perform

> the functions they were designed to perform. An electrician is needed to provide electricity to the ATM kiosk and ATM. Dedicated circuits are needed for the ATM. This may require moving the ATM kiosk during the process. Security equipment and systems need to be put in place including cameras, locks and alarm systems. An alarm company is hired by the owner to install security for the ATM and the ATM kiosk. Subsequently, a service provider will install the ATM kiosk by permanently affixing the ATM kiosk into the cement slab using the appropriate epoxies, glues and fasteners. Both the ATM surround and building style ATM kiosks are designed to be moved, and are frequently moved, to different locations.

Again, the Tribunal finds this explanation of what happened after the kiosks were delivered both credible and persuasive. Given this, the Tribunal cannot find that Petitioner installed the kiosks or that it acted as a contractor. Instead, the Tribunal finds that Petitioner manufactured the kiosks, sold them to customers in Michigan, and delivered them upon request.

Petitioner urges the Tribunal to consider the transactions at issue under the test set forth in *Catalina, supra*. However, while the Tribunal would agree with the outcome urged by Petitioner under *Catalina*, the Tribunal does not believe it is necessary to perform this test. In this case, the sale of a kiosk did not necessarily include delivery. Delivery by Petitioner was optional. Given this, Petitioner very clearly offered a product that could be delivered, at an additional charge, if the customer so desired. Thus, the transactions are mixed transactions involving the separate sale of goods (the kiosks) and services (delivery) as opposed to transactions that involve goods and services that are intertwined, or bundled.

The next issue to be resolved is Petitioner's claim that certain of its sales were exempt under the GSTA. Petitioner asserts that, under *Montgomery Ward, supra*, the Tribunal is without authority to consider Respondent's argument that Petitioner's sales to banks and credit unions are not exempt sales because it failed to make this argument in the proceedings below.

In *Montgomery Ward*, the petitioner was assessed for a single business tax liability. The petitioner appealed this assessment to the Court of Claims wherein the respondent filed "an

amended answer and counterclaim, in which it presented a new and alternate theory of liability." (*Id*., p677) The petitioner filed a motion for summary disposition, arguing that:

> . . .the counterclaim filed by [respondent] set forth an additional theory of recovery of taxes due from [petitioner] that was based on a completely different set of operative facts than the first assessment. [The petitioner] claims that the defendant's filing of a completely different claim violated its rights to notice of assessment, the right to an informal conference, the amount of tax, interest and penalty, and the reasons and authority for the assessment. According to [the petitioner], the denial of these rights clearly violated the mandatory statutory protections provided by the revenue act. (*Id*., p682)

The Court of Claims agreed and granted the petitioner's motion for summary disposition. The respondent appealed this decision to the Court of Appeals.

In its decision, the Court of Appeals discussed the revenue act and MCL 205.21(2) in particular. Pursuant to this statute, the Department of Treasury must provide a person to whom a tax liability has been assessed the opportunity to an informal conference and a written decision. The Court also discussed the Court of Claims' decision, wherein the Court of Claims "found that [the respondent] had failed to [provide the petitioner this opportunity] before bringing its counterclaim, that it therefore had failed to exhaust its administrative remedies before bringing its counterclaim, and that the court was without subject-matter jurisdiction." (*Id*., p683)

The Court of Appeals upheld the Court of Claims' decision, stating:

> In reaching this decision, the court reasoned that pursuant to *Bechtel Power Corp v Dep't of Treasury,* 128 Mich App 324, 340 NW2d 297 (1983), revenue statutes must be construed against the taxing authority, that the mandatory directives of the Single Business Tax Act and the revenue act required defendant to grant these procedural rights to plaintiff, and that the Court of Claims Act and the revenue act, because they deal with the same subject matter, must be construed in the event of a conflict to preserve the meaning and intent of each other so that neither denies the effectiveness of the other.
>
> This reasoning is especially persuasive because otherwise defendant could "counterclaim" any amount on any theory for the tax years in question. Defendant argues that there is no problem with lack of notice because the counterclaim deals with the same set of "operative facts." This is not much assurance to a taxpayer if

> any liability alleged to have accrued within a given tax year is considered to have arisen from the same set of "operative facts." Under such circumstances, a taxpayer could be ambushed at the appellate level with an entirely new theory of tax liability and be forced to defend against a much larger tax liability than that from which it originally appealed.
>
> The procedural situations of taxpayer appeal cases are not analogous to the situation in which the typical "counterclaim" arises. In taxpayer appeal cases, the plaintiff's or taxpayer's claim is for relief from a tax assessment imposed by the treasury. If counterclaims are allowed, the defendant would be allowed to assert additional claims against the plaintiff, and the plaintiff would be forced to defend itself without the procedural safeguards considered necessary in the revenue act for imposing tax assessments. (Citation omitted.) (*Id*., pp683-684)

A review of Respondent's Decision and Order of Determination reveals no discussion regarding Petitioner's claim of exemption for sales to banks and credit unions claiming to be governmental instrumentalities. As such, it cannot be said that Respondent provided Petitioner with the requisite notice of its position that these claims of exemption were improper, an opportunity to have this issue considered at an informal conference, and a written decision as to Respondent's position. Given this, the Tribunal finds that while it has subject matter jurisdiction over this type of claim, Respondent failed to exhaust its administrative remedies. Therefore, Respondent's claims as to this issue are dismissed. Moreover, because Respondent did not discuss any of the other tax exemptions claimed by Petitioner (i.e., resale) in its response to Petitioner's Motions, the Tribunal finds that there are no further issues regarding tax exemptions to be decided.

The final issue under appeal is whether Petitioner has shown reasonable cause to waive the penalty assessed by Respondent. Pursuant to MCL 205.59(1): "The tax imposed by this act shall be administered by the commissioner pursuant to 1941 PA 122, MCL 205.1 to 205.31, and this act." MCL 205.1 *et seq* is known as The Revenue Act. It is this Act, specifically MCL 205.24, in which Respondent is authorized to assess the penalty at issue, specifically a penalty

for failure to file a tax return and/or pay the tax. This penalty is set forth in MCL 205.24, which provides, in pertinent part: "If a taxpayer fails or refuses to file a return or pay a tax administered under this act within the time specified, the department, as soon as possible, **shall** assess the tax against the taxpayer and notify the taxpayer of the amount of the tax." (Emphasis added.) MCL 205.24(1).

This wording indicates that the penalty is non-discretionary and must be assessed by the Department. However, "[i]f a return is filed or remittance is paid after the time specified and it is shown to the satisfaction of the department that the failure was due to **reasonable cause** and not to willful neglect, the state treasurer or an authorized representative of the state treasurer **shall** waive the penalty prescribed by subsection (2)." (Emphasis added.) (MCL 205.24(4)) Thus, the statute provides an opportunity for the penalty to be waived if reasonable cause is shown. The burden of establishing reasonable cause falls on the petitioner and is met through clear and convincing evidence. 1999 AC, R 205.1013(4).

Waivers for reasonable cause are discussed in Respondent's Revenue Administrative Bulletin 1995-4[5].

> If a taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return or pay the tax within the prescribed time, then the delay is due to reasonable cause. In determining whether a taxpayer was unable to file a return or pay a tax in spite of the exercise of ordinary business care and prudence, the department shall consider all facts and circumstances surrounding the taxpayer, the nature of the tax, and the like.
>
> ***
>
> Examples that are illustrative, but not conclusive, in showing reasonable cause include:
>
> 1. The failure to file or pay is caused by the death or serious illness of the taxpayer responsible for filing;

[5] This RAB was replaced on July 19, 2005 by RAB 2005-3.

2. The failure to file or pay is caused by the destruction by fire or other casualty of the taxpayer's records or the taxpayer's business;
3. The failure to file or pay is caused by the prolonged unavoidable absence of the taxpayer responsible for filing and the taxpayer is precluded due to circumstances beyond the taxpayer's control, from making alternate arrangements for filing or paying;
4. A showing that the completed return or payment was timely mailed, that is, the United States postmark stamped on the envelope is dated on or before the due date set for filing the return, including extensions;
5. A showing that the delay or failure is caused by erroneous written information that has been prepared contemporaneously and given to the taxpayer by an employee of the department.

Petitioner asserts that reasonable cause is shown because in May 1995, a fire destroyed Petitioner's principle headquarters, including its financial records. Also, in June 1996, Petitioner's chief financial officer left Petitioner's employ. Petitioner states that, "[b]ased upon statements of the former chief financial officer, [it] reasonably believed that all Michigan sales and use tax returns required to be filed for the tax periods beginning 1/1/1995 and ending 12/31/1996 had been filed." (Petitioner's Brief, p12) However, Petitioner did not submit any affidavits or other documentary evidence in support of these statements.

Even if these statements are assumed to be true, the Tribunal finds that Petitioner's claim that it reasonably believed the returns were filed lacks credibility as there is no reason to believe that the former chief financial officer filed Petitioner's tax returns for the six months following the end of his/her employment with Petitioner. In other words, while it may have been reasonable, based on statements made by the former chief financial officer, to believe that returns had been filed for the tax periods beginning 1/1/1995 and ending 6/31/1996, the Tribunal finds that reliance on these statements for tax periods beginning 7/1/1996 and ending 12/31/1996 would not have been reasonable.

Moreover, pursuant to MCL 205.53(1):

> If a person engages or continues in a business for which a privilege tax is imposed by this act, the person shall under rules the department prescribes, apply for and obtain from the department. . .a license to engage in and to conduct that business for the current tax year. . .The applicant or taxpayer shall be licensed to engage in and conduct the business. . .A person shall not engage or continue in a business taxable under this act without securing a license.

In this case, Petitioner did not register with the state as a seller for sales tax purposes until January 1, 1997. Petitioner makes no attempt to explain why it waited for two years to apply for a license that is not only required by the State of Michigan, but subjects a person to a misdemeanor charge, punishable by fine of not more than $1,000 or imprisonment for not more than one year, or both, for failing to obtain the requisite license. This is a license that should have been obtained prior to Petitioner's Michigan retail sales, or at the very least, shortly thereafter. For these reasons, the Tribunal finds that Petitioner has not shown reasonable cause to waive the penalty assessed by Respondent.

To summarize, the Tribunal finds that, as a matter of law, Petitioner is entitled to partial judgment on its Motion for Summary Judgment under MCR 2.116(C)(10). Petitioner is not liable for tax on its sales to customers located in Michigan under the Use Tax Act. Instead, as Petitioner asserted, these transactions are subject to tax under the General Sales Tax Act. Moreover, because Respondent failed to comply with MCL 205.21(2), Respondent's argument that the tax exemptions claimed by Petitioner for sales to banks and credit unions asserting to be governmental instrumentalities should be denied is dismissed. Finally, Petitioner failed to show reasonable cause for waiver of the penalty assessed by Respondent for failure to file and pay. For this reason, Respondent is granted partial summary judgment under MCR 2.116(I)(2).

Therefore,

IT IS ORDERED that Petitioner's Motion for Summary Disposition is GRANTED as to use tax and interest.

IT IS FURTHER ORDERED that the tax and interest assessed against Petitioner under Assessment No. L295600 is CANCELLED.

IT IS FURTHER ORDERED that Petitioner's Motion for Summary Disposition relating to the waiver of penalty is DENIED.

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

IT IS FURTHER ORDERED that the penalty assessment levied against Petitioner under Assessment No. L295600 is AFFIRMED.

These Orders resolve all pending claims in this matter and close this case.

MICHIGAN TAX TRIBUNAL

Entered: June 6, 2011

By: Patricia L. Halm