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

Al Serra Chevrolet, Inc.,
Petitioner,

v

MTT Docket No. 315295

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

FINAL OPINION AND JUDGMENT

The Tribunal, having given due consideration to the file in the above-captioned case, finds:

1. Administrative Law Judge, Thomas A. Halick, issued a Proposed Opinion and Judgment on May 27, 2010. The Proposed Opinion and Judgment states, in pertinent part, "[t]he parties have 20 days from date of entry of this Proposed Opinion and Judgment to file any written exceptions to the Proposed Opinion and Judgment. The exceptions must be stated and are ***limited*** to the evidence submitted prior to or at the hearing and any matter addressed in the Proposed Opinion and Judgment." (Emphasis added.)

2. On June 15, 2010, Petitioner filed exceptions to the Proposed Opinion and Judgment. In the exceptions, Petitioner states:

   > The taxpayer objects to the proposed opinion and judgment . . . . The taxpayer's original petition to the Michigan Tax Tribunal requested a refund of any overpaid sales taxes collected from customers on supplies that the Michigan Tax Tribunal ruled were not subject to sales tax through an offset against assessed use tax. The proposed opinion and judgment issued May 27, 2010, in this matter indicates that a number of transactions upon which the taxpayer remitted sales tax are not, in fact, subject to sales tax.
   >
   > The Tax Tribunal ruled (on page 18) that the Petitioner "has provided no legal authority to support its claim that it has a right to a credit or offset for any such amounts collected from its customers." This is incorrect. The taxpayer remitted the sales tax to the State of Michigan and, thus, is entitled to a refund of the overpaid sales tax under MCL 205.30(2). Only the person that remits the tax is entitled to a refund of such tax. The statements in the opinion indicating that the Petitioner's customers could claim a refund of sales tax are incorrect. Moreover, there is no basis for the State to retain tax which it acknowledges was remitted but is not due. Finally, there is no requirement for Petitioner to refund (in advance) monies to customers as a prerequisite to obtaining a refund of sales taxes remitted but not lawfully due.

3. Respondent has not filed exceptions to the Proposed Opinion and Judgment or a response to Petitioner's exceptions.

4. The Administrative Law Judge considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment. More specifically:

   Petitioner claims that it properly collected *sales tax* on all property related to *the service department* and therefore, it is entitled to a reduction in the use tax assessment. . . . Petitioner's claim fails because it has failed to establish that there was a "transfer of ownership" of the property upon which Respondent assessed use tax. Ownership of such property did not transfer to Petitioner's customers. Therefore, there was no taxable "sale at retail" within the meaning of MCL 205.51(b) and the sales tax did not apply. . . . The facts establish that Petitioner became liable for use tax when it removed the property from inventory and consumed it. This liability cannot be extinguished by improperly collecting sales tax from customers on that same property. Petitioner's use tax obligation cannot be collected from the customer as a line item on the invoice.

   Petitioner argues that the property is exempt from use tax under MCL 211.94(1)(c) because it was purchased for resale. . . . Petitioner's claim is without merit because whether or not the resale exemption was properly claimed at the time of purchase, the property became subject to use tax when it was removed from inventory and converted to use by the repair shop or body shop. MCL 205.97.

   A taxpayer is not entitled to ignore a statutorily mandated tax obligation and argue as a defense that it complied with that obligation by collecting an unauthorized exaction from its customers and remitted that amount to the state. . . . Petitioner was not entitled as a matter of law to collect 6% of the price of such property from its customers.

   Assuming that Petitioner erroneously collected sales tax related to "shop supplies" from its customers and remitted it to the state, the tax would be held in trust for the benefit of the customers. The remedy in this situation is not to reduce the use tax assessment by an amount equal to the improperly collected sales tax, but rather the taxpayer could have pursued a claim for a refund of the improperly collected sales tax. In such cases, a refund could not be lawfully paid to the taxpayer (Petitioner), unless Petitioner first refunded any improperly collected sales tax to its customers, in order to avoid unjust enrichment. MCL 205.73(3). There is no evidence that any such claim has been made. The law does not permit a taxpayer to apply amounts unlawfully collected from customers to the taxpayer's use tax liability. Similarly, the state may not apply such sales tax revenues to satisfy Petitioner's use tax liability.

5. Petitioner contends that it is entitled to a refund of the overpaid sales tax under MCL 205.30(2). MCL 205.30(2) provides:

A taxpayer who paid a tax that the taxpayer claims is not due may petition the department for refund of the amount paid within the time period specified as the statute of limitations in section 27a. If a tax return reflects an overpayment or credits in excess of the tax, the declaration of that fact on the return constitutes a claim for refund. If the department agrees the claim is valid, the amount of overpayment, penalties, and interest shall be first applied to any known liability as provided in section 30a, and the excess, if any, shall be refunded to the taxpayer or credited, at the taxpayer's request, against any current or subsequent tax liability.

The Tribunal has considered Petitioner's assertion and notes that in its original petition, Petitioner states:

The third contested use tax liability is the use tax assessed in the Body Shop. For the year 2000 the body shop stopped paying use tax on its supplies and included an item on customer invoices for supplies. The supplies were supposed to be subject to sales tax, however during the years under audit the body shop (unlike our service department which did collect sales tax on supplies) did not collect sales tax on the supplies shown on the customer invoices.

The auditor . . . picked up the shop supplies as an exception for sales tax purposes in his sample. We were charged sales tax based on the supplies shown on the repairs orders (invoices) selected in the auditor's sample. The supplies were included as an exception for the sales tax audits and were 28.33% of the total sample error.

The auditor then charged use tax on the supplies purchase tax-exempt and did not allow a credit for the sales tax we were assessed and paid on the supplies shown on the invoices. In other words, we were charged sales tax for the supplies on the invoices and use tax on the same supplies. We request a credit of $3,111 on the use tax assessed. . . .

Upon further review of Respondent's audit work papers, it is apparent that Respondent did in fact assess sales tax against Petitioner for shop supplies used and consumed by Petitioner's body shop. Petitioner did not charge its customers sales tax on these materials. Respondent acknowledges that the materials were not transferred to the customers in a retail sale and therefore should not be subject to sales tax. Rather, Respondent asserts that the shop materials were consumed by Petitioner in the provision of a service and were therefore subject to use tax. Despite assessing sales tax on the body shop supplies, Respondent included the shop materials in its use tax assessment as well.

The Tribunal finds that the shop supplies were not subject to sales tax and that Respondent erred in its determination and imposition of sales tax. Petitioner did not collect sales tax from its customers but instead incurred the expense directly in fulfilling its sales tax audit obligation. There is no obligation on the part of Petitioner to reimburse its customers.

In the Proposed Opinion and Judgment, the Administrative Law Judge erred by stating that the sales tax audit and any resulting sales tax deficiency or assessment are not at issue in this case. Because Petitioner requested in its Petition a credit for the over paid sales tax, the Tribunal finds that it is entitled to a refund under MCL 205.30(2), and that the amount of overpayment and any interest shall be first applied to the use tax liability. Therefore, Respondent shall apply the overpayment of sales tax in the amount of $3,111.00 to Petitioner's use tax liability.

The Tribunal further finds that Petitioner is not entitled to a refund or credit for sales tax erroneously collected and remitted on the shop supplies charged to customers of the repair shop. The Administrative Law Judge was correct in determining that to avoid unjust enrichment, Petitioner must first show that unlawfully collected sales tax was refunded to its customers prior to a claim for refund with Respondent.

6. Given the above, Petitioner has shown good cause to justify the modifying of the Proposed Opinion and Judgment. As such, the Tribunal adopts the Proposed Opinion and Judgment as modified, as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgment in this Final Opinion and Judgment. As a result:

   a. The taxes, interest and penalties as levied by Respondent are as follows:

Assessment Number: L814824

Taxes	Interest*	Penalties
$11,963.00	$3,657.51	0

*Interest continues to accrue as provided by 1941 PA 122.

   b. The final taxes, interest and penalties are as follows:

Assessment Number: L814824

Taxes	Interest**	Penalties
$8,852.00	TBD	$0

** Interest shall be recalculated in accordance with 1994 PA 122.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as finally shown here in within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties as required by this Order within 28 days of entry of this Final Opinion and Judgment.

MICHIGAN TAX TRIBUNAL

Entered: December 20, 2010 By: Cynthia J Knoll

* * *

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
NONPROPERTY TAX

Al Serra Chevrolet, Inc., Petitioner,	MICHIGAN TAX TRIBUNAL ENTIRE TRIBUNAL MTT Docket No. 315295
v	
Michigan Department of Treasury, Respondent.	Administrative Law Judge Presiding Thomas A. Halick

PROPOSED OPINION AND JUDGMENT

Introduction and Overview

A hearing was held before the Tax Tribunal on September 15, 2009, on Petitioner's appeal of an assessment of use tax. Petitioner's representative and sole witness was David M. Malek, Tax Director for Al Serra Chevrolet, Inc. Respondent was represented by Heidi Johnson-Mehney, Assistant Attorney General. Respondent presented testimony of Henry C. Wagner, Senior Auditor for the Michigan Department of Treasury. Based upon the documentary evidence and

sworn testimony, it is concluded that the assessment shall be affirmed in part as follows:

Proposed Judgment

Assessment No.	Tax	Penalty	Interest*
L814824	$11,963.00**	0	$3,657.51

*Interest continues to accrue as provided by 1941 PA 122.

** This amount includes a reduction of $1,862 for tax that was imposed upon demonstration vehicles. *Betten Auto Center, Inc v Dep't of Treasury*, 478 Mich 864; 731 NW2d 424 (2007).

Procedural History

Petitioner filed this appeal in the Tax Tribunal on May 31, 2005, contesting a portion of the subject assessment, and requesting that the assessment be reduced from $13,285 to $2,225.33. Respondent filed an answer requesting that the assessment be upheld.

On February 17, 2006, the parties filed a joint motion to hold this case in abeyance pending the outcome of *Betten-Friendly Motors Co v Dep't of Treasury*, Court of Appeals Docket No. 265978, *Betten-Friendly Motors Co v Dep't of Treasury*, Court of Appeals Docket No. 265977, and *Betten-Friendly Motors Co v Dep't of Treasury*, Court of Appeals Docket No. 265976. The Tribunal granted the motion placing the case in abeyance on March 17, 2006.

On May 25, 2007, the Supreme Court issued its decision in *Betten Auto Center, Inc v Dep't of Treasury*, 478 Mich 864; 731 NW2d 424 (2007), and this case was taken out of abeyance. The Tribunal entered a stipulated scheduling order on April 3, 2008, in which the parties agreed to a hearing date to be determined after September 30, 2008. In April 2009, this case was assigned to this ALJ, and a prehearing conference was held on June 3, 2009. The Prehearing Conference Summary entered June 11, 2009, states that "The issue related to demo vehicles has been resolved by *Betten Auto Center, Inc v Dep't of Treasury*, 478 Mich 864; 731 NW2d 424 (2007), and Respondent shall consent to entry of judgment in favor of Petitioner on that issue." The tax affirmed above ($11,963.00) does not include tax related to use tax imposed on demo vehicles.

Findings of Fact

The parties stipulated to the admissibility of Respondent's Exhibits 1 through 6 ("R 1 through R 6"):

1. Informal Conference Recommendation and Decision and Order of Determination
2. Audit Report of Findings and attached workpapers (13 pages of the audit report are also marked as P-8)
3. Letter from Petitioner to Respondent dated February 1, 2006, with exhibits (this letter is also marked as "P-1, with attached exhibits P-2a, P-2b, P-3a, P-3b, P-4, P-5a, P-5b, P-6, and P-7)
4. Annual Returns for sales, use, and withholding taxes
5. Letter of Inquiry from Respondent to Petitioner dated February 20, 2004
6. Final Assessment No. L814824

Petitioner is an automobile dealer that provides auto repair and body shop services. Respondent conducted an audit of Petitioner for the period commencing October 1, 1998 through March 31, 2002, and determined a deficiency of use tax, with no penalty. Respondent's Exhibit 2 ("R 2"), Audit Report. Respondent imposed use tax upon tangible personal property that Petitioner used in the repair shop and the body shop. From October 1, 1998 through December 31, 1999, Petitioner paid sales tax on all "supplies" when it purchased them from outside vendors. Starting January 1, 2000, Petitioner stopped paying sales tax at the time it acquired the supplies and began charging customers for the supplies, indicated by a line item on the customer

invoices. Also at that time, the repair shop began charging the customer 6% sales tax on the price of the supplies. The sales tax was collected from the customers and remitted to the department. Petitioner considered the supplies to be sold to the customer in a sale at retail regardless of whether the customer took possession of or title to the items. The body shop also charged the customers for supplies, but did not collect or pay sales tax on the supplies.

The portion of the assessment related to use tax upon demonstration vehicles is no longer in dispute, and Respondent has admitted that Petitioner is entitled to a reduction in the assessment for such amounts. The amount originally assessed was $13,285. The tax related to the demonstration vehicles is $1,862, which is no longer in dispute, meaning that the Respondent claims that the tax due is $11,963.

Facts Related to the Service Shop

Respondent's auditor, Henry C. Wagner, testified that Petitioner's business consists of several departments, including the car sales, repair department, body shop, and parts department. The repair department is also referred to as the "repair shop" or "service shop." Each department "stands on its own as far as a profit/loss so that each department will actually sell to each other." For example, the parts department sells parts and supplies to the body shop. A part is taken from the parts department's tax-free inventory and sold to the body shop. The sale price is included in the parts department's gross receipts and the body shop records an expense. Petitioner is not required to charge sales tax on sales between departments. TR 27.

The service department purchased parts and supplies from the parts department. When the service shop performed a service for a customer, it created an invoice with a separate charge for labor, parts, and a "miscellaneous charge," which is also described on the customer invoice as "shop supplies and hazardous waste removal." The miscellaneous charge included items that are transferred to the customer (affixed to the vehicle) and also included property that shop employees used or consumed in the process of performing the repair service, but the invoices do not distinguish between these items and Petitioner applied sales tax applied to all such items. The miscellaneous charge was based on a percentage of certain costs of the "supplies" not to exceed $10 per invoice. Petitioner charged the customer sales tax on that amount. TR 31. For example, Exhibit R 3 includes invoice number CS375537, which shows a miscellaneous charge of $10.00, and 6% sales tax totaling 60 cents was applied to this charge. Other invoices state a miscellaneous charge of $.47 and $3.78. It is not clear from the invoices exactly how this charge was calculated. The invoices do not provide detail regarding the types of miscellaneous supplies that are included in the charge.

Petitioner's witness, Mr. Malek, testified that "supplies" include "bolts and paper, anything that is used in the performance of the service work for the customer." (TR 9). As testified by Mr. Wagner, a bolt is affixed to a customer's vehicle and is transferred to the customer, as distinguished from supplies such as "Oil-Dri" that are used or consumed by Petitioner and not transferred to the customer. Other "consumable items" not transferred to the customer are drop cords and air hoses. TR 39.

Two of the invoices relate to repair services performed in August 2000, and each includes a line item for "Shop supplies & haz waste removal." Based on this description, it cannot be determined whether any particular "miscellaneous charge" included only property that Petitioner consumed while performing a service, property that was transferred to the customer, or a combination of the two. There are no facts in evidence regarding whether "hazardous waste removal" is a description of property or whether it applies to a service. The term "shop supplies" is not sufficiently precise to support a conclusion, based on the invoice alone, that the shop supplies were transferred to the customer, or whether they were consumed by Petitioner in providing the repair services.

Respondent's auditor stated that he found no useful records to allow him to show what part of the "line item miscellaneous charge" on the customer invoices was for items transferred to the customer, if any, and what part was for supplies that were consumed by the dealership.

Although the customer invoices were inadequate to allow an accurate determination of use tax on consumed items, the auditor was able to identify the items to which use tax applied by examining the detailed general ledger and invoices related to transactions between the service shop and the parts department. Mr. Wagner further stated that prior to 2000, Petitioner paid sales tax to a third-party vendor at the time of purchase, and therefore, no use tax was due for those periods. Thereafter, Petitioner chose not to pay sales tax at the time of purchase, apparently because the third-party vendor did not want to distinguish between taxable and exempt items. Based on the review of the invoices and detailed general ledger, the auditor distinguished between items that

were physically transferred to the customer, such as nuts, bolts, clips, and lubricants, as opposed to shop supplies that were consumed by Petitioner and not transferred to the customer. The use tax deficiency was calculated on the items that did not transfer to the customer.

Mr. Wagner stated that the items that he identified that were subject to use tax were "common sense type items" meaning that it was immediately apparent that they were used or consumed by Al Serra and not transferred to the customer, such as: garbage bags, air hoses, electrical cords, safety glasses, jersey gloves. He further opined that it would be a simple matter for the parts department to determine which items cannot be resold to its customers. TR 35. From these facts it can be found that Respondent's use tax assessment only included use tax on items that were used and consumed by Petitioner and did not include tax on items transferred to the customer to which sales tax applied.

Mr. Wagner indicated that when the items transferred from one department to another, it does not constitute a "sale" but that a use tax would accrue at that point, because the items are converted from a tax-free inventory for use or consumption. At that point in time, it is clear that the items were acquired for use or consumption and not for resale. TR 39. Mr. Wagner calculated the use tax liability at that point, and not by reference to the customer invoices with the miscellaneous charge. Respondent's auditor testified that he was able to track the use of supplies and imposed use tax on those items only. TR 43.

Mr. Wagner testified how Al Serra could avoid the "tracking problem."

> …Al Serra could give a blanket claim, bring that into their…parts inventory as 100 percent exempt so that the parts has a hundred percent exempt inventory, and at some point the other departments will requisition to the parts department for those supplies. I mean, they actually make a requisition for it. The parts [department] to bring [the parts] out of inventory will do an invoice that basically shifts that sale to the other department and so it does get recognized on an individual basis… . That's how I captured it, I saw that invoice. And they could hit a tax on that internal charge at that point. TR 34 [Testimony of Henry Wagner].

Mr. Wagner testified that Petitioner could also avoid the problem by paying sales tax to the third party vendor at the time they purchased the supplies.

Facts Related to the Body Shop

During the audit, Mr. Wagner discovered that the body shop bought goods from another department tax free and that those items were sold from the other department's tax-free inventory. Petitioner stated that starting in the year 2000 it "stopped paying use tax on its supplies. . . ." Petition, paragraph 5. Unlike the service shop, Petitioner's body shop did not charge sales tax to its customers on any of the items identified as "supplies."

Certain items, such as masking tape and sandpaper, were used and consumed in the process of performing body shop services and were not transferred to the customer. The auditor determined that use tax applied to Petitioner's use and consumption of the body shop supplies (but not to any items that were physically transferred to the customer) for periods during which Petitioner purchased the property tax free. Use tax was not imposed on items that transferred to the customer, such as fasteners, clips, sealants, epoxy kits, corrosion protection. Mr. Wagner testified

that, "Those are the type of things that I ended up picking up for the sales tax audit." TR 44. (The sales tax audit and any resulting sales tax deficiency or assessment are not at issue in this case.)

To determine the amount of the deficiency for the entire audit period, the auditor conducted a "block sample" for a one year period (2001). The auditor examined the general ledger and invoices to determine the purchases. The auditor and the taxpayer agreed to examine a sample of invoices due to the large number of invoices. Any deficiency would be determined from this sample, and the error rate from that sample would be applied against the balance of those accounts for the specific transaction types. Mr. Wagner based the deficiency on the best available information.

Conclusions of Law

At issue is use tax imposed on certain tangible personal property that Petitioner's body shop and service shop acquired from other departments within Al Serra Chevrolet or from an outside vendor. The property was not transferred to customers, but was used or consumed by Petitioner in performing a service. The use tax act provides as follows:

> (1) 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. . . . MCL 205.93(1).

Property is exempt from use tax if sales tax was due and paid on the retail sale of the property to a consumer. MCL 205.94(1)(a). In this case, Petitioner is the "consumer" of the property at issue and it did not pay sales tax at the time of purchase. Therefore, the exemption under sec. 94(1)

does not apply.

Petitioner used and consumed tangible personal property and thus was subject to use tax equal to 6% of the "price" of that property. The "price" is the amount that Petitioner (as the consumer of the property) paid to the seller to acquire the property. MCL 205.92(f). The use tax is not imposed on the "price" that Petitioner may have charged its customers for the property (in the form of a "miscellaneous charge" on repair shop invoices). The use tax accrued at the point in time when the service shop and repair shop acquired the property and used it in the performance of a service.

A consumer who acquires property for use in Michigan (or property that is subsequently converted to the purposes of use or consumption) is liable for the use tax. MCL 205.97. As Respondent's auditor testified, the use of the property could be "tracked" as a "use tax accrual" when the parts department transferred the property to the body shop. TR 39.

Respondent denies that the assessment at issue includes any tax on property that was transferred to the customer. This denial is supported by the testimony of Mr. Wagner, which is found to be credible and persuasive. TR 29. Petitioner offered no substantial evidence to the contrary. Based on the foregoing, a use tax liability arose when Petitioner removed the property from tax-free inventory for use and consumption in the performance of a service.

Respondent's testimony at the hearing established that the entire amount of the assessment in

dispute arises from use tax upon Petitioner's use and consumption of certain tangible personal property that it purchased tax free. Respondent examined Petitioner's books and records (general ledger and invoices) and found reason to believe that the returns filed were inaccurate and that additional tax was due. Respondent assessed the amount of tax due based on information that was available. MCL 205.104. As such, the assessment is *prima facie* correct and the burden of proof in refuting the assessment is upon the taxpayer. MCL 205.104.

Petitioner presented evidence related to three issues at the hearing. Any other claims or issues set forth in the pleadings or in the Prehearing Conference Summary for which no evidence was offered are deemed abandoned. Petitioner frames the issues as follows:

I. Petitioner claims that "ownership of tangible personal property has been transferred for consideration" and that it properly charged sales tax to the customer on the invoice, and therefore, no use tax applies. TR 10. The property was purchased tax free under the resale exemption and sales tax was properly collected from customers.

II. If the Tribunal upholds the use tax assessment, Petitioner claims it is entitled to offset the assessment by an amount equal to the sales tax collected from customers and remitted to the state for the sale of the same shop supplies upon which Respondent assessed use tax.

III. Petitioner claims that it relied upon guidance provided by a department of treasury

employee when it determined that no tax was due on use of supplies in its service department. TR 12.

I. *Petitioner's Sales Tax Claim*

Petitioner claims that it properly collected *sales tax* on all property related to the *service department* and therefore, it is entitled to a reduction in the use tax assessment. Petitioner's witness quoted from the sales tax act, and stated that, "We don't think it ever gets down to a use tax issue because we think it's a sales tax issue." TR 10. Petitioner claims that there is a sale at retail regardless of whether the customer takes possession of the property. In other words, the assessment improperly includes use tax on property that was acquired for resale, and for which sales tax was properly collected, such that no use tax can be imposed.

Petitioner's repair shop charged a "miscellaneous charge" upon which it collected a 6% "tax" from its customers. Petitioner claims that it fulfilled its use tax obligations by collecting sales tax from customers on this miscellaneous charge. Petitioner claims that ownership of the property was transferred to customers within the meaning of the sales tax act (MCL 205.51), such that it properly collected and remitted 6% sales tax on the price that it charged to its customers for such property.

Petitioner claims that Respondent examined "each one of our invoices and has made a determination as to what is transferred to the customer and what is not transferred to the customer. For example, a bolt is transferred to the customer but sandpaper is not." TR 10.

Petitioner claims that it would be impossible to account for property that is transferred to the customer as distinguished from property that is not transferred, but consumed by Petitioner. Respondent credibly testified that it is possible to track the transactions. TR 34. The law requires Petitioner to keep adequate records of sales of tangible personal property, and to also account for its "use or consumption" of property subject to use tax. It is no defense to argue that compliance with tax laws is burdensome. Whether the record keeping requirements are burdensome is not a matter for the Tribunal to consider in determining whether use tax applies in this case. Rather, this raises a policy question for the legislature.

Petitioner's claim fails because it has failed to establish that there was a "transfer of ownership" of the property upon which Respondent assessed use tax. Ownership of such property did not transfer to Petitioner's customers. Therefore, there was no taxable "sale at retail" within the meaning of MCL 205.51(b) and the sales tax did not apply. Petitioner's legal claim is unconvincing. The facts establish that Petitioner became liable for use tax when it removed the property from inventory and consumed it. This liability cannot be extinguished by improperly collecting sales tax from customers on that same property. Petitioner's use tax obligation cannot be collected from the customer as a line item on the invoice. Petitioner has demonstrated no error with the use tax assessment.

Petitioner argues that the property is exempt from use tax under MCL 211.94(1)(c) because it was purchased for resale. Although the testimony establishes that the property was purchased "tax free," there is no direct evidence that the resale exemption lawfully applied to the purchase

of items that would be consumed by Petitioner. Mr. Wagner testified that upon examination of the internal invoices and general ledger it was immediately apparent that the items he identified would not be sold to customers, but rather consumed by Petitioner. Therefore, it is arguable that Petitioner should have paid sales tax at the time it purchased the property, in which case it would be relieved from use tax under MCL 205.94(1)(a). Nevertheless, it is a fact that no sales or use tax was paid at the time of purchase. When a person stores, consumes, or uses property within Michigan and no sales tax was paid on that property, use tax is due, in the absence of an exemption. If the taxing authority discovers untaxed tangible property in this state, it has a duty to assess tax on that property, without regard to the reason why no sales tax was paid, in the absence of an applicable exemption under Michigan law. For example, if property was purchased in another state and no sales tax was paid there, the reason why no sales tax was paid is irrelevant. It does not matter that the other state has not enacted a sales tax or whether that state has an exemption that is not available in Michigan. If no sales tax was paid, the use tax applies when the property is stored, used, or consumed in this state. Petitioner's claim is without merit because whether or not the resale exemption was properly claimed at the time of purchase, the property became subject to use tax when it was removed from inventory and converted to use by the repair shop or body shop. MCL 205.97.

Petitioner claims that the property was sold to customers, but cites no facts to support its contention that ownership of the property transferred to the customer. The facts indicate that the customers did not take possession of the property at issue. There is no contract or other documentary evidence showing that title or possession of the property transferred to the

customer. For example, Respondent imposed use tax on "jersey gloves" that Petitioner's employees used in rendering a service. Petitioner has not demonstrated that the ownership of the gloves transferred to its customers. Therefore, sales tax does not apply to that property. To the extent that the gloves were purchased tax free under the resale exemptions set forth at MCL 205.94(1)(c) and MCL 205.51(1)(b), those exemptions were lost when the property was converted to a taxable use.

Betten Auto, supra, does not support Petitioner's position on this issue. The Supreme Court affirmed that portion of the Court of Appeals decision that held that the resale exemption applied to the vehicles at issue in that case. The Court of Appeals relied heavily upon the fact that "all the vehicles were, in fact, resold. Therefore, the resale exemption applies to all the vehicles in question." *Betten Auto Center, Inc v Dep't of Treasury*, 272 Mich App 14; 723 NW2d 914 (2006). It is reasonable to conclude that, had the vehicles not been resold, there would have been a question of fact regarding the purpose for which the vehicles had been purchased – that is, whether they were purchased for resale, or for use by the taxpayer's employees. In the present case, it is concluded that the property that was subjected to use tax was not purchased for resale. Even if it was, it was later converted to a taxable use.

Also, *People v Rodriguez*, 463 Mich 466; 620 NW2d 13 (2000), does not stand for the proposition that property is exempt from use tax based upon the taxpayer's mere assertion that the property was purchased for resale. In that case, the Supreme Court held that the defendant was entitled to a jury instruction that the resale exemption might apply, contrary to the

department's view that the resale exemption was only available to a licensed Michigan automobile dealer. The vehicles would have been exempt from use tax, if the jury believed that the taxpayer had purchased them for purposes of resale, rather than for his business or personal use. The taxpayer argued to the jury that several of the vehicles in question were ultimately resold. If the taxpayer in that case had used the vehicles for his own purposes and never resold them, the jury could have concluded that the vehicles were not purchased for resale, but were subject to use tax. In our present case, Petitioner did not prove that ownership of the consumable supplies transferred to the customer, and Respondent has credibly testified that Petitioner consumed them.

Petitioner further argues that Respondent has impermissibly apportioned an exemption, citing *Michigan Bell Telephone Co v Dep't of Treasury*, 229 Mich App 200; 581 NW2d 770 (1998). There is no merit to this claim. This case does not involve apportionment of the resale exemption.

In summary on this issue, Respondent properly concluded that Petitioner was subject to a use tax liability which accrued when the supplies were removed from the parts department inventory and used. Petitioner's contentions that it collected sales tax from its customers on this same property does not alter the conclusion that use tax was due and payable when the property was converted from tax-free inventory to use.

II. *Sales Tax – "Offset Claim"*

Petitioner argues that if the Tribunal "fails to recognize the resale exemption," the state will receive both the use tax that Respondent assessed, and the sales tax that Petitioner collected from customers as indicated on invoices. Post Hearing Brief, page 7. It has been concluded that the resale exemption does not apply, so there is no legal defense to the use tax assessment. A taxpayer is not entitled to ignore a statutorily mandated tax obligation and argue as a defense that it complied with that obligation by collecting an unauthorized exaction from its customers and remitted that amount to the state. Petitioner essentially argues that it may pass its use tax obligation through to its customers in the form of a 6% charge on the invoice. The law does not permit the taxpayer to collect the use tax from its customer as a line item on an invoice in this manner as it may do for sales tax. MCL 205.73(1).

The property that was not transferred to customers did not constitute a sale at retail and therefore, no sales tax applied. Therefore, Petitioner was not entitled as a matter of law to collect 6% of the price of such property from its customers. Sales tax is imposed upon the "gross proceeds of the business" of a person engaged in sales at retail. MCL 205.52. The retailer *may* reimburse "himself or herself by adding to the sale price any tax levied by this act." MCL 205.73(1).

Assuming that Petitioner erroneously collected sales tax related to "shop supplies" from its customers and remitted it to the state, the tax would be held in trust for the benefit of the customers. The remedy in this situation is not to reduce the use tax assessment by an amount equal to the improperly collected sales tax, but rather the taxpayer could have pursued a claim for

a refund of the improperly collected sales tax. In such cases, a refund could not be lawfully paid to the taxpayer (Petitioner), unless Petitioner first refunded any improperly collected sales tax to its customers, in order to avoid unjust enrichment. MCL 205.73(3). There is no evidence that any such claim has been made. The law does not permit a taxpayer to apply amounts unlawfully collected from customers to the taxpayer's use tax liability. Similarly, the state may not apply such sales tax revenues to satisfy Petitioner's use tax liability.

Petitioner has not proven the necessary facts, and has provided no legal authority to support its claim that it has a right to a credit or offset for any such amounts collected from its customers. Petitioner's claim in this regard fails to rebut the prima facie validity of the assessment. MCL 205.104.

III. *Petitioner's Detrimental Reliance or Estoppel Claim*

Petitioner has cited no authority to support its claim that it is entitled to relief based on its alleged reliance upon guidance provided a departmental business tax specialist. This claim is not based upon written guidance, but upon statements allegedly made in response to a question during a break at a seminar presented by the Michigan Department of Treasury. The evidence of exactly what Respondent's employee said is not well established. Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts and the other party justifiably relies and acts on this belief and would be prejudiced if the first party is permitted to deny the existence of the facts. *Clarkson v Judges' Retirement System*, 173 Mich App 1, 14; 433 NW2d 368 (1988). For estoppel to apply against the state, the

acts or conduct of an officer must be within the scope of the officer's authority. *State Treasurer v American Surety Co of New York,* 264 Mich 516, 518; 250 NW 295 (1933). There is no persuasive evidence to establish that Petitioner justifiably relied on any such statements by an employee or that any such statements were within the scope of the employee's official duties.

Other Michigan cases have rejected the notion that the state can be estopped from collecting taxes that are found to lawfully due, notwithstanding contrary advice from government employees. *Lovett v City Treasurer of Detroit,* 286 Mich 159; 281 NW 576 (1938), and *Langford v Auditor General,* 325 Mich 585; 39 NW2d 82 (1949). These cases involved situations in which collecting officers informed the taxpayer that no taxes were due when it later turned out that taxes were due. In neither case was estoppel allowed. In *Lovett,* the Court stated: "The collection of duly levied taxes for governmental purposes is a governmental function and the collection officer cannot, by mistake or misinformation, work an estoppel, enforceable in a court of equity. The fact, and not the misinformation, controls." *Lovett, supra,* pp 161-162.

JUDGMENT

IT IS ORDERED that assessment No. L814824 is AFFIRMED in part, as set forth in the Proposed Judgment section of this Opinion, which amount excludes the portion of the assessment related to use tax imposed upon exempt demonstration vehicles consistent with *Betten Auto Center, Inc v Dep't of Treasury,* 478 Mich 864; 731 NW2d 424 (2007).

IT IS FURTHER ORDERED that the parties shall have 20 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) and TTR 348. The exceptions and written arguments shall be limited to the evidence and legal argument presented to the administrative law judge. The opposing party may file a response to exceptions within 14 days after service of the exceptions. 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: May 27, 2010 By: Thomas A. Halick