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

Bert Hazekamp & Son, Inc.,
Petitioner,

v

MTT Docket No. 330368

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION

ORDER DENYING PETITIONER'S MOTION FOR ORAL ARGUMENT

Administrative Law Judge Thomas A. Halick issued a Proposed Order Granting Respondent's Motion for Summary Disposition and Denying Petitioner's Motion for Summary Disposition on August 29, 2008 in the above-captioned case.

On September 17, 2008, Petitioner filed a Motion for Reconsideration and Objections to the Proposed Order Granting Respondent's Motion for Summary Disposition and Denying Petitioner's Motion for Summary Disposition. In support of its motion Petitioner states:

a. The standard for granting a motion for summary disposition is that "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." Petitioner asserts that while there are no genuine issues regarding any material fact, "the Proposed Opinion and Judgment failed to give due consideration to specific facts that have a direct bearing on the ultimate decision in this case."

b. Petitioner believes that although the proposed opinion "accurately framed the issue in this case simply as 'whether Petitioner sells tangible personal property who is entitled to apportion sales under MCL 208.51 and MCL 208.52' . . . the Administrative Law Judge "inappropriately expanded the issue. . . [t]herefore the over reliance on the activities of 'Swift is misplaced.'"

c. "The right answer in this case is found by looking at what Petitioner does. Petitioner sells and delivers tangible personal property in the form of case ready pre-packaged meat to customers located both within and without Michigan. . . The only thing 'Swift' provides is the raw unprocessed meat. Petitioner provided everything else including the packaging and delivery to the out of Michigan locations."

d. The Administrative Law Judge "referenced the Affidavit of David Hazekamp (Petitioner's President) . . . in the proposed opinion which described the unique nature of the relationship between 'Swift' and the Petitioner. However, the Administrative Law Judge['s] proposed opinion did not consider the relevant fact in this case that maybe both 'Swift' and Petitioner provided tangible personal property to the ultimate customer."

e. The labor cost associated with the cutting, processing and packaging of the meat is approximately 19 percent of the selling price; the cost of materials is approximately 26% (approximately 50% of the total charge to 'Swift') of the selling price and overhead is approximately 18% of the selling price. The raw unprocessed meat constitutes approximately 37 per cent of the selling price to the customer. The ALJ proposed opinion "did not take into consideration the significant tangible personal property element provided by the Petitioner."

f. Pursuant to "the agreement involving Swift . . . [t[he retail customer was purchasing from the Petitioner the processing of the meat and the packaging of the meat. . . . The packaging is tangible personal property."

g. In his affidavit, Donald Swick, CPA states that "Hazekamp has documented nexus created by regular and systematic business activity on an annual basis in the state of Colorado, Indiana and Virginia. . . David Hazekamp . . . and Matt Joppich. . . regularly call on customers to update them on sales activity, introduce them to new products, address meat quality issues and ascertain needed volume of meat. Petitioner solicits the sale of tangible personal property. The raw unprocessed meat is provided by Swift and financed by Swift for ultimate sale by Petitioner to customers located both within and outside of Michigan."

h. "The ALJ proposed opinion states 'Swift owned and sold the meat products to Swift's customers.' This statement is not totally true. In fact, the sales of meat which the Petitioner has apportioned out of Michigan are sold to both customers of Swift as well as Petitioner's customers."

i. Petitioner's sales of tangible personal property to out of Michigan customers consist of (1) sales to Swift customers processed with Swift financed meat, (2) sales to Petitioner's customers processed with Swift financed meat, and (3) sales to Petitioner's customers process with Petitioner purchased and financed meat."

j. "It is clear from the plain wording of the Co-Pack Agreement that it applies to only the meat, and not the packaging supplies, provided by Swift."

k. "The ALJ analysis of the case law is not accurate."

l. "The ALJ. . . completely ignores the packaging function and specifically the packaging material acquired only by the Petitioner and used to package the case ready meats. . . the fact that Petitioner solicits and sells tangible personal property to its own customers, in addition to Swift's customers, the fact that meat and poultry are acquired by the Petitioner from sources other than Swift, [and] ignored the substantial materials included in the packaging of the case ready pre-packaged meats. Because the facts are wrong, the conclusions are wrong."

Additionally, Petitioner filed a Motion for Oral Argument on September 17, 2008. Petitioner states:

a. "[T]he Proposed Opinion and Judgment failed to give due consideration to specific facts that have a direct bearing on the ultimate decision in this case."

b. "Petitioner requests, in accordance with the provisions of Section 81(1) of the Administrative Procedures Act (MCL 24.281), the [ALJ] hold oral arguments regarding the fact or, in the alternative, the Tax Tribunal hold oral arguments regarding the facts of this case."

Respondent filed a Reply to Petitioner's Motion for Reconsideration and Motion for Oral Argument on September 24, 2008. In its Reply, Respondent states:

a. "Respondent asks that the motions be denied. Neither reconsideration of the Tribunal Judge's thoroughly reasoned opinion, nor oral argument, is necessary."

b. "The Tribunal Judge meticulously examined all of the facts, including the contractual provisions and the sales transactions they governed. His examination and explanation of the law was exceedingly thorough, going beyond cases cited by the parties, and was carefully reasoned."

The Tribunal, having given due consideration to the motions, responses, and the case file, finds that Respondent filed a Motion for Summary Disposition in this matter on April 8, 2008. Petitioner filed a Motion for Summary Disposition on April 30, 2008. Petitioner filed a Reply to Respondent's Motion on May 16, 2008. Respondent filed a Reply Brief to Petitioner's Motion on May 29, 2008. A Proposed Order Granting Respondent's Motion for Summary Disposition and Denying Petitioner's Motion for Summary Disposition was entered by the Tribunal on August 29, 2008.

The Tribunal further finds that The Administrative Law Judge, in rendering his decision, fully and comprehensively considered the joint "Stipulation of Uncontroverted Facts" filed by the parties on December 28, 2007, as well as the evidence, motions, briefs, and reply briefs submitted by both parties. Contrary to Petitioner's assertion, the Administrative Law Judge did not "fail to give due consideration to specific facts that have a direct bearing on the ultimate decision in this case." More specifically, the Administrative Law Judge did look to the activities performed by Petitioner. Petitioner admits that it makes sales of meat within and without Michigan of raw unprocessed meat that it receives from Swift, packages pursuant to direction from Swift, and delivers to customers determined by Swift. In its brief in support of its motion for reconsideration Petitioner, for the first time, asserts that it sells tangible personal property to Swift in the form of the packaging materials and states that the Administrative Law Judge's opinion "did not take into consideration the significant tangible personal property element provided by Petitioner." However, Petitioner did not, in its brief in support of its motion for summary disposition nor in its brief in support of its motion for reconsideration, provide the

Tribunal with any specifics as to or evidence in support of this assertion. Petitioner offered vague, conclusory statements of its assertion that it had sales of tangible personal property to Swift. This issue was not included in the joint Stipulation of Uncontroverted Facts. The Michigan Supreme Court held that "[i]t is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

Petitioner states, in support of its motion for reconsideration, that it solicits the sale of tangible personally property. The Tribunal finds that Petitioner offered no evidence of such solicitation nor any substantiation, other than the broad and vague statement. Stating a position does not make it a fact. Further, Petitioner's broad and vague assertion, again without any evidence provided in support thereof in either its motion for summary disposition or motion for reconsideration, that "Hazekamp has documented nexus" based on sales activity in other states, is not sufficient to support Petitioner's underlying claim. Petitioner provides no reliable evidence or documentation to support its assertion as to nexus or the purported out of state sales activity. Petitioner simply states that it has nexus and has out of state activity. Even if Petitioner has nexus, that is not dispositive as to sales to customers in other states outside of the contractual relationship with Swift. Petitioner provides no contracts, invoices, orders, or other evidence related to the asserted activities. Petitioner asserts that "the sales of meat which the Petitioner has apportioned out of Michigan are sold to both customers of Swift as well as Petitioner's

customers." Even if Petitioner did solicit such sales, no contracts, invoices, orders, or other documentary evidence, showing these sales to non-Swift out of state companies was provided. Further, the Co-Pack agreement clearly and unequivocally states that the sales are by Swift. The Tribunal does not find persuasive Petitioner's argument that the Co-Pack agreement does not mean what it is clearly stated in the document. The Administrative Law Judge's determination that there was no such apportionment between Swift and other out of state customers is supported by the lack of any specific evidence provided by Petitioner.

In its motion for reconsideration, Petitioner asserts that pursuant to the Co-Pack agreement, Swift purchased the processing and packaging of meat. Swift provided the meat; Petitioner processed and packaged the meat. The Tribunal finds that this is completely consistent with the Administrative Law Judge's findings that Petitioner provided services to Swift pursuant to their written agreement. Petitioner asserts only now, for the first time and again without any evidence or documentation of these sales or other specifics to substantiate this assertion, that the packaging materials used constituted sales of tangible personal property. Contrary to Petitioner's assertion that the Administrative Law Judge "ignores the packaging function and specifically the packaging material acquired and . . . used to package, . . ." it was Petitioner who failed to assert and support this claim. The Administrative Law Judge did not have "the facts wrong," Petitioner simply did not present sufficient evidence to support its contention as to this issue.

The Tribunal finds that the Administrative Law Judge properly found that Petitioner partakes in the performance of services as provided under MCL 208.7(a)(ii). Therefore, the sales at issue are

within this state for purposes of Petitioner's apportionment calculation under the single business tax act.

Summary Disposition under MCR 2.116(C)(10) is appropriately granted when the documentary evidence provided demonstrates that no genuine issue of material fact exist, there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law." The Tribunal has carefully considered the Motions for Summary Disposition filed by both Petitioner and Respondent under the criteria for MCR 2.116(C)(10) and based on the pleadings and other documentary evidence filed, the Tribunal finds that Petitioner's motion for summary disposition should be denied. Further, the Tribunal finds that Respondent's motion for summary disposition should be granted.

The Tribunal finds that the Administrative Law Judge properly considered the evidence submitted in this case in the rendering of the Proposed Opinion and Judgment. The Tribunal, pursuant to section 26 of the Tax Tribunal Act, has given due consideration to the case file, briefs, motions, and responses, and adopts and incorporates by reference the findings of fact and conclusions of law in the Proposed Opinion and Judgment as the Final Opinion and Judgment of the Tribunal.

IT IS ORDERED.

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

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

IT IS FURTHER ORDERED that the taxes, interest, and penalties are as set forth in the Proposed Opinion and Judgment as adopted by this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Petitioner's Motion for Reconsideration is DENIED.

IT IS FURTHER ORDERED that Petitioner's Motion for Oral Argument is DENIED.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: July 13, 2009 By: Rachel J. Asbury

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

Bert Hazekamp & Son, Inc.,
Petitioner,

v

Michigan Department of Treasury,
Respondent.

MTT Docket No. 330368

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER

GRANTING RESPONDENT'S MOTION
FOR SUMMARY DISPOSITION

AND

DENYING PETITIONER'S MOTION
FOR SUMMARY DISPOSITION

Procedural History

On April 8, 2008, Respondent filed a Motion for Summary Disposition pursuant to TTR 230 and MCR 2.116(C)(8) or MCR 2.116(C)(10) and a supporting brief. Petitioner filed a responsive brief on May 16, 2008.

On April 30, 2008, Petitioner filed a Motion for Summary Disposition and a supporting brief asserting that there is no genuine issue of material fact and requesting judgment as a matter of law pursuant to MCR 2.116(C)(10). Respondent filed a Brief in Response on May 16, 2008.

In addition, this matter comes before the Tribunal on stipulated facts under MCR 2.116(A)(1) based on a "Stipulation of Uncontroverted Facts" entered into between the parties on December 28, 2007.

The issue is whether Petitioner engaged in sales of tangible personal property within the meaning of MCL 208.7 such that its Single Business Tax base must be apportioned under MCL 208.52; or, whether Petitioner engaged in the performance of services, in which case its tax base must be

apportioned under MCL 208.53. This proceeding is original, independent, and *de novo*. MCL 205.735(1).

The Tribunal rules that Respondent's Motion is GRANTED. The Tribunal further rules that Petitioner's Motion is DENIED. The assessments at issue are AFFIRMED.

Stipulated Facts

The following constitutes a "concise, separate, statement of facts" within the meaning of MCL 205.751; and, unless stated otherwise, the matters stated are "findings of fact" within the meaning of 1969 PA 306, MCL 24.285. The parties stipulated to the veracity and admissibility of the following facts[1] and exhibits:

1. Petitioner, Bert Hazekamp & Son, Inc., ["Hazekamp"] is a Michigan Corporation (identification number 058694).

2. Hazekamp was founded in 1905.

3. Hazekamp was incorporated in January of 1966 under Public Act 327 of 1931.

4. Hazekamp is engaged in the processing and packaging of meat and in the wholesale and delivery of the processed meats.

5. Hazekamp delivers processed and packaged meats to distribution centers for grocery store retail customers located in Michigan and surrounding states.

6. Hazekamp operates its business activity from a meat processing facility located at 3933 S. Brooks Road in Muskegon, Michigan 49444.

7. The registered office of Hazekamp Corporation is 3933 S. Brooks Road in Muskegon, Michigan 49444.

1 The stipulated facts appear here as submitted by the parties, with the exception of nonsubstantive editorial changes. The paragraph numbers correspond with the stipulation submitted by the parties.

8. The Registered Agent for Hazekamp is David Hazekamp.

9. Hazekamp operates under the assumed name "Hazekamp Meats," Certificate of Assumed Name – September 29, 2000.

10. Approximately 50% of Hazekamp's revenue comes from the purchasing, processing, sale, and delivery of meat to primarily Michigan customers.

11. Approximately 50% of the Hazekamp revenue relates to meat acquired from primarily Swift & Company (Swift), which is processed, sold and delivered to non Michigan customers.

12. The raw meat products, either purchased by Hazekamp or acquired from Swift, are processed in the same manner.

13. The same machinery and equipment is used to process the meat purchased by Hazekamp or acquired from Swift.

14. Employees of Hazekamp work on both the Swift meat as well as purchased meat.

15. Hazekamp apportioned its tax base on the 2002, 2003, and 2004 Single Business Tax returns by excluding from the numerator of the sales factor sales derived from the delivery of tangible personal property into states other than Michigan.

16. The numerator of the sales factor only included sales derived from the delivery of tangible personal property to a purchaser within Michigan.

17. Treasury completed a Single Business Tax audit of Hazekamp's business activities covering the calendar years 2001, 2002, 2003 and 2004.

18. The Treasury audit resulted in the disallowance of apportionment of tax base on the 2002, 2003, and 2004 Single Business Tax returns.

19. The disallowance of apportionment resulted in additional tax and interest as follows:

	2002	**2003**	**2004**	**TOTAL**
Tax	6,487.00	13,997.00	20,449.00	40,933.00
Interest	1,483.77	2453.41	2,550.29	6,487.47
Total	**7,970.77**	**16,450.41**	**22,999.29**	**47,420.47**

20. Hazekamp Corporation requested and was granted an Informal Conference with the Office of Hearings. The Informal Conference was held on November 2, 2006 before Patricia M. Snow, Hearing Referee.

21. Treasury issued its DECISION AND ORDER OF DETERMINATION dated, February 12, 2007.

In addition to the above stipulated facts, it is undisputed that the following documents are genuine and admissible:

1. "Co-Pack Agreement" [a.k.a., the "Agreement"] executed August 6, 2001, between Swift Company and Bert Hazekamp and Son, Inc. (25 pages – attached to Petition as Exhibit II).

2. Final Bill for Taxes Due (Final Assessment) N929525, issued 2/21/07, for taxable period ending 12/04.

3. Final Bill for Taxes Due (Final Assessment) N929525, issued 2/21/07, for taxable periods ending 12/02 and 12/03.

4. Affidavit of Donald E. Swick (4 pages) with "Calculation of Apportionment Sales" (1 page) and "RAB 1998-1" (2 pages).

5. Affidavit of David Hazekamp (5 pages) ("Hazekamp Affidavit").

6. Stipulation of Uncontroverted Facts ("Stip.").

Summary of Petitioner's Motion

At page 11 of Petitioner's Brief in Support, Petitioner frames the dispositive issue as follows: "The real issue in this case is whether Hazekamp was selling tangible personal property or was Hazekamp merely selling a service?"

Petitioner delivers tangible personal property (processed meat) to customers located outside of Michigan. Stip. 5. Petitioner purchases or acquires raw, unprocessed meat, which it trims, cuts, packages, boxes, labels and ships to retail grocery store customers located in Michigan and outside Michigan. Petitioner claims it has "full management, control, and possession of the

meat" and that it "assumes all risk of ownership during processing up to delivery to customers in Michigan and outside Michigan." Petitioner processes the meat under the Hazekamp United States Department of Agriculture (USDA) license and all shipped property bears the Hazekamp USDA number.

The Affidavit of David Hazekamp (Petitioner's President) states that in 2000, Petitioner required "additional working capital" in order to take advantage of a business opportunity that "would have greatly expanded the size and scope of Hazekamp." The affidavit further states that Petitioner has "shared a long successful business relationship" with JBS Swift company (Swift), a large multistate wholesaler of meat and other products, and characterizes the relationship between Petitioner and Swift as follows:

> Swift agreed to finance the acquisition of raw unprocessed meat thus freeing up working capital needed to acquire equipment and employ workers. Hazekamp would be exclusively responsible for all aspects of the processing and packaging of the meat from the time the meat is received to the ultimate delivery to customers both in Michigan and in other states. Hazekamp Affidavit, page 2, paragraph 8.

The affidavit further indicates that the above-described arrangement was memorialized in an agreement executed in April of 2002 (effective August 6, 2001) and a second "Co-Pack" agreement executed in December 2006 (effective November 29, 2006), which Mr. Hazekamp describes as, "…boilerplate type agreements required by Swift to protect Swift." Hazekamp Affidavit page 3, paragraph 11.[2]

Mr. Hazekamp describes his view of the "true nature" of the Co-Pack Agreement as the delivery

2 The provisions that are relevant to the issues in this case are materially identical in the two Co-Pack Agreements.

of meat to Hazekamp from Swift, at which point Hazekamp has "complete management and control over the meat," processes the meat, bears the risk of loss of the meat, controls the quality of the meat, and affixes the Hazekamp USDA license number to the packaging. This is true from the time Hazekamp receives the meat at its dock to the time it is delivered to the customer.

In essence, Mr. Hazekamp claims that Swift financed the acquisition of meat by purchasing it and delivering it to Petitioner for processing. Under this view, this amounts to a loan to Petitioner to finance the acquisition of the meat, which is repaid upon sale of the finished product. As such, Petitioner claims that it sells the meat.

Donald E. Swick is an accountant who provided accounting and tax services to Petitioner during the periods in question, including the preparation of SBT returns. In his affidavit, Mr. Swick states that, "…Hazekamp delivered processed and packaged meat to customers located outside the state of Michigan." Therefore, such destination sales were excluded from the sales factor numerator.

Summary of Respondent's Motion

Respondent's Brief in Support of Motion for Summary Disposition summarizes the sole legal issue as follows:

> …whether Petitioner Bert Hazekamp & Son, Inc. ("Hazekamp"), with respect to meat delivered to Hazekamp's Michigan plant by Swift & Company ("Swift") and that is later sold to customers both inside and outside Michigan, is (a) seller of the meat, in which case Hazekamp is entitled to apportion its sales between Michigan and other states, or (b) a processor of meat that is ultimately sold by Swift….

If Petitioner is held to be a processor of meat (as a service) and not a seller of tangible personal property, then its entire tax base is apportioned to Michigan under MCL 208.53. Respondent focuses upon the terms of the Co-Pack Agreement in order to demonstrate that the parties themselves dictated that Petitioner performs services for Swift as an independent contractor and is compensated by a Processing Fee. The Agreement further indicates that the Product remains the property of Swift at all times until Swift sells the Product to its customers.

The Tribunal's Analysis and Conclusions of Law

The dispositive legal issue is whether Petitioner engaged in sales of tangible personal property within the meaning of MCL 208.52 during the tax years at issue. If so, proceeds of those sales would be included in the numerator of the sales factor if the property is shipped or delivered to any purchaser within this state regardless of the conditions of the sale. MCL 208.51 and MCL 208.52. Conversely, property that is shipped or delivered to any purchaser outside this state is not a Michigan sale (not included in the sales factor numerator), as long as Petitioner was taxable in that state. There is no dispute that Petitioner had nexus in a state other than Michigan and was thereby entitled to apportion its tax base under chapter 3 of the Single Business Tax Act ("SBTA"). MCL 208.41; MCL 208.42.

The Single Business Tax

The Single Business Tax has been variously described in case law and the tax law literature as a "consumption-type value added tax" or a "modified value added tax." *Trinova* v *Michigan Department of Treasury*, 498 US 358 (1991); Haughey, The Economic Logic of The Single

Business Tax, 22 Wayne L Rev 1017, 1021-1022 (1976). The SBT is not an income tax. The tax base calculation uses an additive method whereby the taxpayer starts with federal taxable income then adds and subtracts certain amounts.

Under the SBTA, a firm's labor, capital, and profit (entrepreneurial skill), are elements of "value added" that are included in the tax base. Whereas an income tax imposes tax on profits derived from the economy, the SBT is based upon a resources consumed principle. The rationale being that a firm engaged in business activity consumes scarce resources and government services regardless of whether it earns a profit. Examples of "value added" attributable to the firm's use of capital are: depreciation expense, dividends paid, interest expense, and all royalties paid. MCL 208.9 [definition of "tax base"].

The SBT is imposed upon "the adjusted tax base of every person with business activity in this state that is allocated or apportioned to this state…." MCL 211.31(1). For businesses whose entire business activity occurs within Michigan, the entire tax base is "allocated" to Michigan and subject to tax. For a business with activity both in Michigan and outside Michigan, the tax base is subject to apportionment under Chapter 3 of the SBTA. MCL 208.40, et seq. For the years in question, the tax base of a multi-state business was apportioned using a weighted formula consisting of three factors: sales, property, and payroll ("wages"). MCL 208.45a(1). For the years in question the sales factor was weighted 90%, and the property and payroll factors were each weighted 5%. The sales factor is a fraction, the numerator of which is the taxpayer's "sales" within this state and denominator of which is the taxpayer's "sales" everywhere. MCL

208.51. The term "sales" includes the proceeds received by the taxpayer for the performance of services and from sales of property. The SBT defines "sales" to mean "…the amount received by the taxpayer as consideration from: (i) the transfer of title to, or possession of, property that is stock in trade or other property of a kind which would be included in the inventory of the taxpayer…or property held by the taxpayer primarily for sale to customers in the ordinary course of trade or business." MCL 208.7. The distinction between the performance of a service and a sale of property often has a significant impact upon the SBT liability.

At issue in this case is whether Petitioner sells tangible personal property who is entitled to apportion sales under MCL 208.51 and MCL 208.52, which turns upon a determination of whether Petitioner is the seller of the meat products at issue, or whether "Swift" is the seller. Under MCL 208.51 the sales factor consists of "total *sales of the taxpayer*…." Stated simply, sales *of the taxpayer* are included in that taxpayer's sales factor. "Sales" means amounts received by the taxpayer as consideration for sales by that taxpayer. MCL 208.7. In this case, if it is determined that Petitioner was engaged in the performance of services (as a processor of meat for Swift), then 100% of the tax base is subject to the SBT, because all of its business activity was attributable to this state (based on "cost of performance") pursuant to MCL 208.53. If however, it is determined that Petitioner was engaged in the sale of tangible personal property, the tax base would be apportioned by the sales factor consisting of the percentage of sales to customers located in Michigan. (The sales factor would consist of sales to customers in Michigan / sales to customers everywhere.) MCL 208.52. The apportionment formula also would include the property factor and payroll factor, which are not at issue in this case.

In this case, the tangible personal property at issue is the meat products that Petitioner processed for Swift pursuant to the Co-Pack Agreement between Petitioner and Swift. For reasons stated hereafter, it is concluded that Petitioner is not a seller of tangible personal property within the meaning of MCL 208.52.

Respondent correctly asserts that Petitioner could not include proceeds from sales in its sales factor unless the proceeds were consideration that Petitioner received from a transaction in which Petitioner was the seller. Respondent argues that Petitioner does not own the meat products and reasons that Petitioner cannot sell property that it does not own. An examination of the terms of the Co-Pack Agreement is required to determine whether Petitioner engaged in "sales of tangible personal property" within the meaning of MCL 208.52.

The Co-Pack Agreement identifies Petitioner as the "Contractor" that produces "case ready fresh meat products" for Swift "for distribution in the Retail Supermarket, Military Commissary & Club Store channels…." Co-Pack Agreement, page 1. "JBS Swift and Company" ("Swift") is a multistate wholesaler of meat and other products. Hazekamp Affidavit, paragraph 6. There is no indication that Hazekamp is affiliated with or related to Swift in any capacity other than an independent contractor, as stated in the Co-Pack Agreement.

The Agreement provides that Petitioner (the "Contractor") shall, "process, pack, code, store, handle, ship and perform such other services as may be reasonably required by Company to produce and package the Product" in accordance with Swift's specifications. Swift may change

the specifications at will upon written notice. The Agreement does not state that Petitioner solicited sales or entered contracts for the sale of meat products to customers in any capacity. Rather, Petitioner performed "services" related to production, packaging, and delivery of the meat products. Petitioner does not allege or offer any admissible, particularized facts to support a conclusion that it engaged in sales of tangible personal property.

Petitioner's assertion regarding the extent of "management, control and possession" of the product is irrelevant to the dispositive issue. A person who performs a service for another may exercise substantial "management, control, and possession" of another person's property, yet this does not mean that the service provider has the power to transfer title to that property or otherwise engage in a "sale" of that property. Petitioner's brief cites the stipulated facts (e.g., Stip. paragraphs 11 and 12) in support of the allegation regarding "control" of the meat, but those stipulated facts merely indicate that approximately 50% of Petitioner's revenue is from purchasing, processing, sale and delivery of meat to Michigan customers and 50% of the revenue relates to "meat acquired from primarily Swift & Company (Swift) which is processed, sold and delivered to non Michigan customers." Some of Petitioner's revenue was from the "sale and delivery of meat," but there is no stipulated fact or contractual provision that Petitioner was the seller of that property. It is clear from the contractual provision that Petitioner received compensation for the performance of services and did not receive consideration from the sale of property.

Furthermore, the Co-Pack Agreement places numerous restrictions and duties upon the manner

in which Petitioner controlled and possessed the meat. For example, paragraph 1.1 requires, "strict compliance with the specifications, formulas, manufacturing processes, quality control standards, coding requirements and any other standards or guidelines agreed to by Company and Contractor…." There is no indication that Petitioner purchased meat from Swift (financed by Swift or otherwise) and decided what to make of it or who to sell it to. Rather, Petitioner was required to process the meat (whether acquired from Swift or other sources) as specified in the Agreement for the satisfaction of Swift and Swift's customers. Petitioner was required to submit quality control records "acceptable to Company," Co-Pack Agreement, paragraph 1.2; and, was required to allow Swift to conduct on site inspections. Co-Pack Agreement, paragraph 1.3. The Co-Pack Agreement provides that Petitioner "shall have exclusive control over production, packaging and storage of Product…;" however, Petitioner did so subject to the restrictions set forth above and discussed further below.

Swift owned and sold the meat products to Swift's customers. The Co-Pack Agreement requires Petitioner to ship the finished product, "pursuant to shipping orders submitted by Company, [Swift] which shipping orders shall specify the dates by which the Product ordered must be delivered to locations designated by Company." Co-Pack Agreement paragraph 3.1. Swift controlled the time and place of shipment of the product. The Agreement dictates precisely the particular type, quantity, brand, and quality of meat products to be produced. Co-Pack Agreement, Exhibit 1.

It is stipulated that Petitioner purchased approximately 50% of the meat product from sources

other that Swift. However, the facts presented by the parties indicate that Petitioner "commingles" all the meat it processes, such that it is impossible to determine the destination of Petitioner's meat versus Swift's meat, after it is processed into finished product. Furthermore, by operation of the Co-Pack Agreement, all meat acquired by Petitioner becomes the property of Swift. Co-Pack Agreement, paragraph 5.2. The Co-Pack Agreement provides that the finished Product remains the "property of Company [Swift] until Company sells or otherwise disposes of such Product." In other words, regardless of the source of the unprocessed meat, Swift owned and sold the final product.

The Agreement provides that Petitioner performed services for Swift and that the revenues received pursuant to the Agreement were consideration for the performance of such services and not for the sale of tangible property. Swift paid Petitioner a "Processing Fee" for Product which was produced and packaged by the Contractor (Petitioner) in compliance with the terms and conditions of the Agreement. Co-Pack Agreement, page 5, paragraph 4.1. Therefore, Petitioner earned its Processing Fee by properly producing and packaging the product for Swift. Petitioner was required to send a Bill of Lading with shipment of the product to customers (retail supermarkets, etc.). *Swift invoiced the product and was responsible for collection of payment from the customers.* Co-Pack Agreement, page 5, paragraph 4.2. The Agreement explicitly provides that, "All Product derived in whole or in part from Product Supplies furnished by Company shall be and remain the property of Company *until Company sells* or otherwise disposes of such Product." Co-Pack Agreement, page 5, paragraph 5.2 [Emphasis Added]. It is quite clear that Swift sold the Product and therefore the amounts that Swift received from such

sales would not be included in Petitioner's sales factor as a sale of tangible personal property.

In summary of the above discussion, the Co-Pack Agreement indicates that Petitioner did not receive any amounts as consideration for "transfer of title to, or possession of, property…" within the meaning of MCL 208.7. The amounts that Petitioner received are expressly stated to be consideration for the performance of services (a Processing Fee). *Swift* invoiced its customers and collects the payment for the meat products. There is no allegation that the property at issue was Petitioner's "stock in trade" or other property included in the inventory of the taxpayer [Petitioner]. Petitioner does not hold the property primarily for sale to its customers in the ordinary course of trade or business, within the meaning of MCL 208.7(1)(a)(i). Petitioner "holds" the property and it was sold to customers by Swift -- Petitioner did not receive the amounts paid as consideration from the sale of such property.

Therefore, the crucial point is not merely that Petitioner cannot sell meat that it does not "own" – but that Petitioner received no "amount" as "consideration from" the transfer of property within the meaning of MCL 208.7(1)(a)(i). Petitioner received amounts for the "performance of services." While it is conceivable that a taxpayer could be engaged in the sale of tangible personal property that it does not hold legal title to, it is clear in this case that Petitioner does not engage in sales of tangible personal property.

Petitioner argues that the Tribunal should look to the actual *substance* of the transactions in question rather than the terms of the Co-Pack Agreement. It is concluded that there is no basis

for invoking a "substance over form" doctrine in this case, where the transactions are governed by an unambiguous contract. There is no persuasive evidence that the transactions in question are anything other than as described in the Agreement – the performance of services as an independent contractor. There is no reason to question the manner in which the parties have characterized Petitioner's business activity in the Agreement. This is not a case where the parties attempted to draft contractual language with a motivation to avoid a tax and there is no reason to look beyond the four corners of the Agreement.

In *VJ Foods v Dep't of Treasury*, MTT Docket No. 295871, the Tribunal rejected the taxpayer's argument that the explicit terms of a contract should be disregarded and that the Tribunal should look to the economic reality of the transaction. In that case, the taxpayer argued that certain payments were compensation for services and not royalties, notwithstanding that the parties expressly designated such amounts as royalties under an unambiguous contract. The Court of Appeals upheld the Tax Tribunal, ruling that the Tribunal had no duty to look beyond the express terms of a clear and unambiguous contract. *VJ Foods v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided May 23, 2006 (Docket No. 259460).

In *VJ Foods*, the taxpayer cited *Mourad Bros, Inc v Dep't of Treasury*, 171 Mich App 792, 794, 431 NW2d 98, 100 (1988), for the proposition that the Tribunal must consider evidence of the intent of the parties with respect to payments of royalties, even if such evidence contradicted or supplemented a franchise agreement at issue in that case.

> The *sine qua non* of the parol evidence rule is a finding that the parties intended the writing to be a complete expression of their agreement as to the matters covered. Extrinsic evidence is admissible to resolve this threshold question. *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich 407; 285 NW2d 770 (1979). Furthermore, the rule does not preclude admitting extrinsic evidence to resolve an ambiguity which is proven to exist and, therefore, to determine the actual intent of the parties. *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195; 220 NW2d 664 (1974). This is consistent with the rule that contract construction is ordinarily a question of law for the court. When the language is ambiguous or incomplete, or circumstances unusual, then the substance of the parties' agreement is a factual question. *Zinchook v Turkewycz*, 128 Mich App 513; 340 NW2d 844 (1983). *Mid America Management Corp* v *Department of Treasury*, 153 Mich App 446, 459-460; 395 NW2d 702, 707 (1986). *Mourad Bros, Inc v Dep't of Treasury*, 171 Mich App 792, 794, 431 NW2d 98, 100 (1988).

In our present case, the Co-Pack Agreement is a complete expression of the agreement of the parties. See, Co-Pack Agreement, paragraph 19.9. Furthermore, there is no ambiguity in the Co-Pack Agreement regarding ownership of the product, who has the right to sell the product, or the nature of the services performed by Petitioner.

There is no indication that the Co-Pack Agreement is not supported by tax-independent considerations or that it is shaped solely by tax-avoidance features. *Connors & Mack Hamburgers, Inc v Dep't of Treasury*, 129 Mich App 627; 341 NW2d 846 (1983); *Frank Lyon Co v United States*, 435 US 561; 583-584 (1978).

In general, the Tribunal will not consider extrinsic evidence to vary or contradict the language of a written instrument, unambiguous on its face. *Gardner v Bank & Trust Co*, 267 Mich 270; 255 NW 587, 590 (1934). "The legal effect of this Agreement, complete in itself and unambiguous in its terms, cannot be changed by parol evidence." *Dunham v W Steele Packing & Provision Co*,

100 Mich 75; 58 NW 627 (1894). In this case, Petitioner has presented an authentic copy of the Co-Pack Agreement, which states that it represents the complete agreement of Petitioner and Swift. In contrast to the terms of the Agreement, Petitioner presents an affidavit of David Hazekamp, which states that, "The Co-Pack Agreement does not accurately reflect the true nature of the relationship between Swift and Hazekamp." Hazekamp Affidavit, paragraph 15. Mr. Hazekamp states that Swift "agreed to finance the acquisition of raw unprocessed meat…." Hazekamp Affidavit, paragraph 8. The affidavit refers to the Co-Pack Agreement as a "boilerplate" agreement drafted by Swift's lawyers for the benefit of Swift. If the language is truly boilerplate, this suggests that Swift follows this business model with other meat processors in its multistate operations. In any event, Petitioner agreed to this "boilerplate" language. The Agreement bears no resemblance to a contract for the sale of meat from Swift to Petitioner (or to Swift's customers), nor does it involve a loan from Swift to Petitioner to finance the purchase of meat. In every respect, the unambiguous Co-Pack Agreement constitutes a contract for the provision of meat processing services by Petitioner for Swift. There is no legal basis for giving consideration to an affidavit that contradicts an unambiguous contract.

Analysis of Case Law Cited by Petitioner

In the Matter of Tradearbed, Inc., Tax Appeals Tribunal, State of New York, File No. 802706; 1989 WL 127144, it was found that the taxpayer entered contracts for the sale of steel with its customers that were solicited through the taxpayer's personnel. The taxpayer purchased steel from both affiliated and unaffiliated steel mills and resold it to others. It was found that the taxpayer assumed title and ownership risks when the steel was loaded for shipment. The New York Tax Appeals Tribunal overruled the ALJ's opinion that the taxpayer was merely a selling

agent for its parent corporation, and therefore, had no sales of its own for purposes of apportioning the tax base. That case included detailed findings of fact to support a conclusion that the taxpayer *acquired title* to the steel that it purchased from the steel mills and subsequently sold the steel to its own customers. The taxpayer sold the product at market prices (as determined by the taxpayer and its customers) and the amounts received from such transactions were consideration from the sale of the taxpayer's tangible personal property. This is quite distinguishable from our present case where Petitioner does not hold title to the property at issue and where the Co-Pack Agreement specifies that Swift sells the products.

In *State of Alaska v The Parsons Corporation, et al*, 843 P2d 1238 (1992), it was held that the taxpayer's contractual business activities constituted a sale of tangible personal property and not the performance of services. In that case, the taxpayer was engaged in "design, engineering, procurement, and construction services to private and governmental clients" worldwide, including the design and construction of oil and gas facilities for Prudhoe Bay. Under the contracts in that case, the taxpayer ("Parsons") held title to the property at issue until it transferred title to the customer (ARCO) upon delivery in Alaska. The taxpayer manufactured the property in the lower 48 states and shipped it to ARCO in Alaska. The taxpayer sought to characterize its business activities as the performance of services, the preponderance of which occurred outside the State of Alaska, and argued that receipts from such "services" were not included in the numerator of the sales factor. The taxpayer claimed to be an agent of ARCO, that purchased "oil field modules" on behalf of ARCO, and thus Parsons claimed it made no sales of tangible personal property. The Alaska Department of Revenue and the Court placed significance

on the fact that Parsons held title to the property under the terms of the contract until delivery to ARCO in Alaska. Under Alaskan law, like Michigan, the place where title is transferred does not control the situs of the sale, but the court found this fact significant to the conclusion that the taxpayer sold its property to ARCO).

Parsons does not support Petitioner's position. The taxpayer in *Parsons* cited two cases that are on point with our present case. In *Mark IV Metal Products*, CCH Cal Rptr. Sec. 400-268, the California State Board of Equalization held that the taxpayer was engaged in the performance of services and not sales of tangible property. The facts of that case are as follows:

> Appellant is a small California manufacturing corporation which makes tables and chairs from metal. One of its principal customers during the appeal years was a company located in Texas ("the Texas company"). The Texas company shipped unfinished steel to appellant which fabricated the metal into seat parts at its facilities in California. The finished parts were then shipped by common carrier back to the Texas company, which incorporated them into metal seats for sale to its own customers. Appellant never held title to the metal or the metal products. *In the Matter of the Appeal of Mark IV Metal Products*, 1982 WL 11858, 1 (CalStBdEq).

That case held that the income was from the taxpayer's provision of services --"this material was [the Texas company's] own material" and appellant acted merely as "a sub-contractor to fabricate the metal by the use of [its] own labor and machinery." Because the taxpayer performed services upon materials supplied and owned by another entity, the taxpayer was not allowed to include the proceeds from such services in the sales factor as destination sales to Texas. This is similar to our case in that Petitioner does not hold title to the meat products at issue.

Another case cited in the *Parsons* case also does not support Petitioner's position. In *Lone Star*

Steel v Dolan, 668 P2d 916 (1983), a manufacturer of pipe (Lone Star) shipped its product to an in-state business which applied coating and wrapping to the pipe, then the pipe was shipped to customers of the manufacturer located out of state. Many of Lone Star's customers used the pipe underground to carry oil and gas and wanted the pipe coated and wrapped with tar and paper to prevent rust. The coating and wrapping was performed by the Gaido-Lingle Company, an unaffiliated company located near Lone Star's Colorado plant. Lone Star employees delivered the pipe to Gaido-Lingle using Lone Star equipment; and if the pipe was damaged through the fault of Gaido-Lingle, Lone Star replaced the pipe. At the time of delivery to Gaido-Lingle, Lone Star billed its customer for the price of the pipe sold. Gaido-Lingle or the customer arranged for delivery to the customer. Gaido-Lingle directly billed the customer for the services of coating and wrapping the pipe. (This fact distinguishes Lone Star from our present case because Swift pays Petitioner for its services, not Swift's customers.) The key holding was that sale of pipe by Lone Star to its customers was not "shipped" to the customer in Colorado upon delivery to Gaido-Lingle, but rather was considered to be shipped to the customer outside Colorado. The fact that the product passed through Gaido-Lingle for further processing prior to delivery to the customer outside Colorado did not make the sale a Colorado sale.

> The pipe is delivered to Gaido-Lingle, which is not a purchaser, but is instead merely an intermediary, much as a common carrier is. The difference is that Gaido-Lingle transforms the pipe physically, while a carrier transports it spatially. There seems little reason in policy to treat the two kinds of transactions differently. In neither case has the purchaser actually taken delivery of the pipe. Moreover, there is no suggestion that the procedure is used in an attempt to evade Colorado tax. Consequently, we hold that when the pipe is delivered to Gaido-Lingle for wrapping and then shipped by common carrier to an out-of-state purchaser there is no Colorado sale for income tax purposes. *Lone Star Steel Co v Dolan*, 668 P2d 916, 920 (1983).

The above case does not support Petitioner's position. Petitioner performs services upon the property of Swift, similar to the services that Gaido-Lingle performed for Lone Star. The court also considered the ownership of the pipe, which never transferred to Gaido-Lingle, and also found no attempt to evade tax.

Northwest Textbook Depository v Oregon Department of Revenue, 11 Or Tax 280 (1989), does not support Petitioner's position. In that case, the taxpayer was engaged in business as a "book depository" in the state of Oregon. Under Oregon law, publishers of approved school textbooks must maintain a supply of books in the state of Oregon. This is accomplished by shipping the books to a "book depository" where the books are held on consignment and stored prior to sale to school districts. The publishers retained title to the books until they were sold. The employees of Northwest Textbook Depository (the taxpayer) were involved in marketing, sale, and delivery, of the books and also resolved customer complaints. The books were sold to school districts in the state of Oregon and Washington. The taxpayer earned its income from commissions paid for the sale of the publisher's books. The taxpayer collected payment from the customers and forwarded the proceeds to the publisher, less its commission, on a quarterly basis. In some cases, the taxpayer paid the publisher before the books were sold to customers. The taxpayer bore the risk of nonpayment. The court noted that the taxpayer received no compensation for "storing, packaging, labeling or handling textbooks." *Id.*, p 284. The taxpayer earned income solely from commissions for books that were sold through its efforts. The court held that the taxpayer was engaged in the sale of tangible personal property, that it received proceeds from such sales to the customers, and that its tax base must be apportioned based on the destination sales. The court

found it irrelevant that the goods were held on consignment rather than owned in fee, because the taxpayer's business activity fundamentally involved the sale of tangible personal property and not a service. In our present case, there are no facts to indicate that Petitioner is involved in making sales to customers or that it receives proceeds from such sales, as did the taxpayer in *Northwest Textbook Depository*. Furthermore, the taxpayer in that case was not compensated for any services related to the sales, whereas in our present case, Petitioner is expressly compensated by a fee for the processing services that it performs.

Petitioner cites an unpublished opinion of the Michigan Court of Appeals, *EmbossingPrinters, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided July 12, 2005 (Docket No. 252894). In that case the taxpayer's business activity included both the sale of property and the performance of services related to the sale of property. The court concluded that the taxpayer was engaged in the performance of services and not the sale of tangible personal property for purposes of apportionment of the tax base for an assessment of SBT for tax years 1995 through 1996, prior to repeal of the "throw-back" rule by 1998 PA 225, eff. July 1, 1998. At that time, a sale of property that was delivered to another state was considered a "Michigan sale" if the taxpayer was not taxable in the destination state. The Court of Appeals concluded that the taxpayer had failed to establish a substantial nexus in another state and therefore "the out-of-state transfers were properly subject to the SBT." The sales to customers in another state were included in the sales factor numerator by operation of the throw-back rule. That is, the sales were considered "Michigan sales" because the taxpayer was not taxable in the other state, as provided by MCL 208.52(c). Having so ruled, it did not matter

whether the taxpayer was engaged in sales of property or the performance of services, as all its tax base would be apportioned to Michigan under either scenario. The Tribunal finds that the non-binding unpublished case is not factually on point and is unpersuasive. In denying leave to appeal, the Michigan Supreme Court indicated that it vacated that portion of the Court of Appeals decision that rejects the "incidental to service test" adopted in *Catalina Marketing v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004). Petitioner correctly argues that the "incidental to services test" applies for SBT purposes. However, the test would be used to determine whether a taxpayer is engaged in the sale of property or the performance of services, *in cases where it is clear that the taxpayer does both*. In this case, it cannot be held that the taxpayer sells any tangible personal property at all, but is solely engaged in the performance of services. Therefore, there is no need to consider whether any sales are incidental to any services.

In conclusion, the Tribunal rules that Petitioner is not engaged in the sale of tangible personal property and therefore, the proceeds received under the Co-Pack Agreement with Swift are not amounts received as consideration from the sale of property under MCL 208.7(a)(i). The amounts in question are consideration for the performance of services under MCL 208.7(a)(ii) and therefore are sourced as "sales other than sales of tangible personal property" under MCL 208.53(a) and/or (b), based on the cost of performance.

JUDGMENT

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

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

IT IS FURTHER ORDERED that final assessments K037719 and K106645 are AFFIRMED; and, Respondent's denial of Petitioner's request for a penalty waiver is AFFIRMED. No costs awarded to either party.

IT IS FURTHER ORDERED that the parties shall have 21 days from date of entry of this Proposed Opinion and Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). Exceptions and written arguments shall be limited to the evidence presented to the administrative law judge. This Proposed Opinion 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; MSA 7.650(26)].

MICHIGAN TAX TRIBUNAL

Entered: August 29, 2008 By: Thomas A. Halick