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

Pars Ice Cream Company, Inc.,
Petitioner,

v

MTT Docket No. 332949

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Patricia L. Halm

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

ORDER DENYING PETITIONER'S MOTION FOR ORAL ARGUMENT

The issue in this case is whether Pars Ice Cream Company, Inc. (Petitioner) may be held liable for sales tax assessed by the Michigan Department of Treasury (Respondent) for "Ice Cream[1]" products it sold in bulk to mobile vendors for the period April 1, 2000, through June 30, 2003. Respondent argues that these sales are sales for resale and, as such, Petitioner was required under MCL 205.67[2] to keep records of these sales, including completed exemption certificates. Respondent also argues that Petitioner knowingly sold Ice Cream to mobile vendors that were not licensed under the General Sales Tax Act (GSTA). In response, Petitioner argues that it was not required to keep the records required under MCL 205.67 as Article IX, Section 8 of Michigan's Constitution exempts from sales tax food for human consumption and that it did not knowingly sell Ice Cream to unlicensed mobile vendors.

[1] Specifically, ice cream, ice cream bars, popsicles, and other frozen, ice cream-related food products.
[2] MCL 205.67 was repealed on January 9, 2009.

On April 16, 2007, Respondent issued Assessment No. M566947, which included $775,042 in tax, $278,174.10 in interest, and $77,504 in penalty[3]. For the reasons set forth herein, the Tribunal finds that while Petitioner did not maintain the records it was required to maintain under MCL 205.67, it did not knowingly sell Ice Cream to unlicensed mobile vendors. As such, Petitioner is not liable for sales tax on the transactions at issue. Petitioner's Motion for Summary Disposition is granted and Assessment No. M566947 is cancelled.

PETITIONER'S MOTION FOR SUMMARY DISPOSITION

Petitioner filed this Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Petitioner asserts that there are no material facts in dispute and that it is entitled to Summary Disposition as a matter of law. In support of this Motion, Petitioner filed an affidavit of Ms. Shelley Traywick, who was employed by Petitioner and who was also an officer of Petitioner during the time period at issue. Petitioner requests that Assessment No. M566947 be cancelled in its entirety. Petitioner also requests oral argument on its Motion.

Petitioner is a Michigan corporation engaged in the sale and delivery of Ice Cream. Petitioner also makes retail sales of non-food items, including dry ice, for which it remits sales tax. (Petitioner's Brief, p6) Petitioner's principal place of business is 17853 Conant, Detroit, Michigan. At issue in this case are the Ice Cream sales made from the "Cash-and-Carry" area of Petitioner's facility located at 12900 Greenfield Road in Detroit, Michigan. From this location, "[Petitioner] sold boxes of Ice Cream containing multiple servings, often in bulk quantities. . .to many types of customers from the general public, including retail stores, restaurants, convenience stores, churches, schools, businesses, individuals, and independent contractors who operated ice cream vendor trucks in the city of Detroit." Petitioner asserts that these sales were

[3] Interest continues to accrue pursuant to MCL 205.23.

indisputably sales of food for human consumption and not sales of prepared food for immediate consumption as defined in MCL 205.54g. While Respondent agrees with this statement (see Stipulation of Facts, #6 and #8), Respondent asserts that, pursuant to MCL 205.67, Petitioner was required to collect and maintain resale exemption certificates from its mobile vendor customers. MCL 205.67 provides, in pertinent part:

> (1) A person liable for any tax imposed under this act shall keep accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires. If an exemption from sales tax is claimed because the sale is for resale or for any of the other exemptions or deductions granted under this act, a record shall be kept of the name and address of the person to whom the sale is made, the date of the sale, the article purchased, the type of exemption claimed, the amount of the sale, and if that person has a sales tax license, the sales tax license number. . .A person *knowingly* making a sale of tangible personal property for the purpose of resale at retail to another person not licensed under this act is liable for the tax imposed under this act unless the transaction is exempt under the provisions of section 4k . . . If the taxpayer fails to file a return or to maintain or preserve proper records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the department may assess the amount of the tax due from the taxpayer based on the information that is available or that may become available to the department. (Emphasis added.)

Petitioner does not agree that it was required to maintain the records required under MCL 205.67 for the Ice Cream sales at issue.

> There is no authority to support [Respondent's] assertion that [Petitioner] must provide additional statutory exemption claims, such as resale exemption claims, for its sales of food. In fact, [Respondent's] own administrative guidance clearly provides that exemption certificate provisions do not apply to transactions for the sale of food that is not prepared food intended for immediate consumption. Revenue Administrative Bulletin ("RAB") 2002-15 (06/10/2002). (Petitioner's Brief in Support of it Motion for Summary Disposition[4], p11)

> [Respondent's] misguided efforts to shift tax collection responsibility onto [Petitioner] in this case [violates] the Michigan Constitution and should not be

[4] Hereinafter, Petitioner's Brief in Support of its Motion for Summary Disposition will be denoted as "Petitioner's Brief."

> allowed. If Ice Cream sold by [Petitioner] ultimately is resold by one of its customers in a taxable manner, the seller in the taxable transaction would be responsible to collect any applicable sales tax and [Respondent's] sole remedy for assessment of sales tax is against such seller. MCL 205.52. (Petitioner's Brief, p13)

Even if it were found to be subject to MCL 205.67, Petitioner argues that it did not "knowingly" sell to a person not licensed under the GSTA. According to Petitioner, the term "knowingly" is not defined in the GSTA.

> In cases in which a term is not defined in the statute, the term is given its plain and common meaning and a court may use dictionary definitions to ascertain that meaning. The commonly understood meaning for the term "knowingly" is:
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> > With knowledge; consciously, intelligently, willfully, intentionally, purposefully. (*Black's Law Dictionary*, (6th ed 1990))
> >
> > In a knowing manner; with awareness, deliberateness, or intention. (*Webster's Third New International Dictionary of the English Language* (Unabridged 1967)) (Citations omitted.) (Petitioner's Brief, p16)

Petitioner also argues that "[t]o impose liability under MCL 205.67, the statute specifically requires the seller to have knowledge both that (1) the sale is for purposes of resale, and (2) the sale is made to an unlicensed entity or person." (Petitioner's Brief, p16) Petitioner relies on *Arbor Sales v Department of Treasury*, 104 Mich App 181; 304 NW2d 522 (1981), in support of this argument.

> As it pertains to the facts of this case, Petitioner states that:
>
> > To the extent that any particular sale was made to an Ice Cream vendor, [Petitioner] did not know it was making, and certainly did not intend to make, a sale for purposes of resale to a person who did not have a Michigan sales tax license. To the contrary, [Petitioner] knew that any Ice Cream vendor operating in the City of Detroit was required to possess both a Detroit vendor's license and a Michigan sales tax license to operate in the City. . .Under the City of Detroit's well-documented and longstanding licensing ordinance for ice cream vendors, all such vendors were required to possess a valid Michigan sales tax licenses before they could obtain the Detroit vendor's license, and [Petitioner] knew about this requirement. (Petitioner's Brief, pp17-18)

In support of these assertions, Petitioner relies on the affidavit submitted by Ms. Traywick.

Petitioner's next argument concerns statutory interpretation. In that regard, Petitioner argues that its "sales of food for human consumption represent a different category of sales that are not subject to the provisions of the Michigan Sales Tax Act." (Petitioner's Brief, p6) According to Petitioner:

> The Michigan Constitution expressly prohibits [Respondent] from charging or collecting sales or use tax on sales of food for human consumption, except sales of prepared food intended for immediate consumption. Const 1963, Art IX, §8. This Constitutional prohibition against taxing food sales does not distinguish between retail and wholesale sales of food for human consumption. The Constitutional provision contains no exception to the nontaxability of sales of food for human consumption other than the exception for sales of prepared food intended for immediate consumption.
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> Food sales transactions constitute one of the only two specific types of sales (food and drugs) that qualify for total exclusion from the Michigan Sales and Use Tax Acts. The Michigan Court of Appeals considered this Constitutional prohibition and held that it applies based on the nature of the product (i.e., the nature of the prescription drug or food that is not prepared food intended for immediate consumption) being sold and not the nature of the sale or the intended use of the product. *Syntex Laboratories, Inc v Department of Treasury*, 188 Mich App 383; 470 NW2d 665 (1991). (Petitioner's Brief, pp7-8)

Because the Constitution "excludes" these sales, "[t]his is not a case in which [it] is claiming an exemption from the Sales Tax Act; [Petitioner] is not required to claim a statutory exemption for its sales of food because no sales tax can be charged or collected on such sales under the Michigan Constitution." (Petitioner's Brief, p9) Moreover, because there is no claim of exemption, Petitioner argues that the GSTA "must be interpreted strictly against the taxing jurisdiction and in favor of the taxpayer." In support of this argument, Petitioner cites *Stege v Department of Treasury*, 252 Mich App 183; 651 NW2d 164 (2002), and *In re Dodge Brothers*, 241 Mich 665; 217 NW 77 (1928), wherein the Michigan Supreme Court held:

> Tax exactions. . .must rest upon legislative enactment, and collecting officers can only act within express authority conferred by law. Tax collectors must be able to point to such express authority so that it may be read when it is questioned in court. The scope of tax laws may not be extended by implication or forced construction. Such laws may be made plain, and the language thereof, if dubious, is not resolved against the taxpayer. (*Id.*, p669)

Petitioner's final argument is that Respondent is precluded from asserting a theory of liability in its Answer to the Petition that it did not make during the assessment process. "Throughout the audit and assessment process, the Department's basis for assessing sales tax on [Petitioner's] sales of food for human consumption consistently and exclusively has been MCL 205.67." (Petitioner's Brief, p19) However, as an affirmative defense, Respondent asserts that: "Petitioner is further liable for the taxes assessed for the sales by the unlicensed retail vendors pursuant to the terms of MCL 205.51(2)." Petitioner argues that, in asserting this affirmative defense, its right to have notice of the reason for the assessment process was violated. This right to notice is found in MCL 205.21(2)(b). "These requirements are intended to protect taxpayers from the type of late assertion of alternative arguments that [Respondent] is attempting to make with its purported 'Affirmative Defense' in this case." (Petitioner's Brief, pp19-20)

Petitioner submitted the following exhibits in support of its Motion for Summary Disposition:

A. A copy of the parties' "First Stipulation of Facts."

B. A copy of the Informal Conference Recommendation issued by Respondent's Office of Hearings.

C. An affidavit of Shelley Traywick.

D. Copies of pages from *Black's Law Dictionary*, (6th ed rev), containing the definition of "knowingly."

E. Copies of pages from *Webster's Third International Dictionary*, containing the definition of "knowingly."

RESPONDENT'S POSITION

Respondent's Answer to Petitioner's Motion for Summary Disposition was not filed within the time allotted under TTR 230. As such, it is not considered in determining the outcome of Petitioner's Motion. However, the Tribunal will consider, as necessary, information presented in Respondent's Informal Conference Recommendation.

STIPULATION OF FACTS

The parties filed a Stipulation of Facts in which they agreed upon the following facts:

1. Petitioner, Pars, is a Michigan corporation with its principal place of business located at 17853 Conant, Detroit, Michigan.

2. [Petitioner] is wholly owned by Mr. Davoud Sadeghi.

3. Defendant, the Michigan Department of Treasury. . , is an administrative department of the State of Michigan that is statutorily charged with responsibility for the collection of taxes, MCL 205.1, which includes the responsibility for the administration and enforcement of the Michigan General Sales Tax act, MCL 205.54 et seq. (the "Sales Tax Act").

4. [Petitioner] sells and often delivers ice cream, ice cream bars, popsicles and other frozen, ice cream-related food products (collectively "Ice Cream") to distributors, grocery stores, gas stations, convenience stores, wholesale clubs and other wholesale and retail sellers of Ice Cream and to the general public.

5. [Respondent] conducted a sales tax audit of [Petitioner] covering the audit period beginning April 1, 2000 through June 30, 2003 (the "Audit Period").

6. During the Audit Period, [Petitioner] was engaged in the sale, in bulk, of Ice Cream for consumption off premises.

7. During the Audit Period, [Petitioner] sold boxes of Ice Cream containing multiple servings, often in bulk quantities, on a cash-and-carry basis in one separate area of its Detroit facility at 12900 Greenfield Road, Detroit, Michigan (the "Cash-and-Carry" area) to many types of customers from the general public, including retail stores, restaurants, convenience stores, churches, schools, businesses, individuals, and independent contractors who operated ice cream vendor trucks in the city of Detroit.

8. All Ice Cream sold by [Petitioner] from the Cash-and-Carry area of [Petitioner's] Detroit facility on Greenfield Road during the Audit Period was food for human consumption.

9. After completing its audit of [Petitioner], [Respondent] determined that [Petitioner] owed Michigan sales tax on a specified amount of its sales of Ice Cream from the Cash-and-Carry area.

10. All sales of Ice Cream that [Respondent] determined to be taxable during the Audit Period were made by [Petitioner] from the Cash-and-Carry area of [Petitioner's] Detroit facility on Greenfield Road.

11. The Department's stated basis for the assessment was that, under MCL 205.67, [Petitioner] was liable for sales tax on its sales of Ice Cream from the Cash-and-Carry area because [Petitioner] failed to obtain resale exemption certificates for such sales of Ice Cream that the Department determined were made to independent contractors who operated ice cream vendor trucks in the city of Detroit.

FINDINGS OF FACT

The Tribunal adopts the facts stipulated to by the parties. Additionally, the Tribunal finds that Petitioner is licensed under the GSTA. Petitioner sells non-food tangible personal property, including dry ice, for which it remits sales tax. Finally, the assessment at issue is known as Assessment No. M566947 and is for the period April 1, 2000, through June 30, 2003. Respondent issued the Final Bill for Taxes Due on April 16, 2007. The amount at issue includes $775,042.00 in sales tax, $77,504 in penalty, and $278,174.10 in interest, which continues to accrue pursuant to MCL 205.23, for a total of $1,130,720.10 as of the date of the Final Bill.

MOTIONS FOR SUMMARY DISPOSITION

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

pursuant to TTR 111(4), the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such a motion.

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

> MCR 2.116 is modeled in part on Rule 56(e) of the Federal Rules of Civil Procedure. . .[T]he initial burden of production is on the moving party, and the moving party may satisfy the burden in one of two ways.
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> First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. (Citations omitted.) *(Id*., pp361-363)

In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991). On the other hand, under MCR 2.116(I)(2), "[i]f it appears to

the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

CONCLUSIONS OF LAW

The authority to levy sales and use taxes is established in Article IX, Section 8 of Michigan's Constitution, which states:

> Except as provided in this section, the Legislature shall not impose a sales tax on retailers at a rate of more than 4% of their gross taxable sales of tangible personal property.
>
> Beginning May 1, 1994, the sales tax shall be imposed on retailers at an additional rate of 2% of their gross taxable sales of tangible personal property not exempt by law and the use tax at an additional rate of 2%. The proceeds of the sales and use taxes imposed at the additional rate of 2% shall be deposited in the state school aid fund established in section 11 of this article. The allocation of sales tax revenue required or authorized by sections 9 and 10 of this article does not apply to the revenue from the sales tax imposed at the additional rate of 2%.
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> *No sales tax or use tax shall be charged or collected from and after January 1, 1975 on the sale or use of prescription drugs for human use, or on the sale or use of food for human consumption except in the case of prepared food intended for immediate consumption as defined by law*. This provision shall not apply to alcoholic beverages. (Emphasis added.) (Const 1963, art 9, §8).

The Legislature implemented this Constitutional provision through enactment of the General Sales Tax Act (GSTA), being MCL 205.51 *et seq*, and the Use Tax Act (UTA), being MCL 205.94 *et seq*. During the tax years at issue, the GSTA mandated that:

> [T]here is levied upon and there shall be collected from all persons engaged *in the business of making sales at retail*, as defined in *section 1*, an annual tax for the privilege of engaging in that business equal to 6% of the *gross proceeds* of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act. (Emphasis added.) (MCL 205.52(1))

Thus, the tax base of a person in the business of making retail sales is that person's gross proceeds.

Section 1 contains several definitions of "sales at retail." In this case, the applicable definition is:

> [A] transaction by which the ownership of tangible personal property is transferred for consideration, if the transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any purpose *other than for resale*. . . . (Emphasis added.) (MCL 205.51(1)(b))

There is no dispute that Petitioner is in the business of making sales at retail as defined in MCL 205.51(1)(b). Some of these sales are sales of dry ice, while other sales are sales of Ice Cream. It is also undisputed that most of Petitioner's Ice Cream sales are sales for resale. Therefore, Petitioner's tax base includes all of its retail sales made for any purpose other than for resale.

Like most other taxes, there are things that may be deducted or excluded from a person's sales tax base. As it pertains to the GSTA for the 2003 tax year, these deductions and exclusions are found in Sections 4 through 4aa, being MCL 205.54 through MCL 205.54aa. Of significance in this case is Section 4g, which implements Article IX, Section 8. Section 4g states, in pertinent part:

> (1) *A person subject to tax* under this act may *exclude* from the amount of the *gross proceeds* used for the computation of the tax 1 or more of the following:
>
> ***
>
> (3) "*Food for human consumption*" means all food and drink items, including bottled water, intended primarily for human consumption except beverages with an alcohol content of ½ of 1% or more by volume, tobacco and tobacco products, and prepared food intended for immediate consumption. Food for human consumption includes live animals purchased with the intent to be slaughtered for human consumption.
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> (4) "*Prepared food intended for immediate consumption*" means a *retail sale* of 1 or more of the following:
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> ***
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> (e) Food or drink heated or cooled mechanically, electrically, or by other artificial means to an average temperature above 75 degrees Fahrenheit or

> below 65 degrees Fahrenheit before sale and *sold from a mobile facility* or vending machine, except milk, nonalcoholic beverages in a sealed container and fresh fruit. (Emphasis added.) (MCL 205.54g)

As previously stated, the parties have agreed that Ice Cream is food for human consumption. (Stipulation of Facts, #8) The parties have also agreed that Petitioner sells Ice Cream in bulk for consumption somewhere other than Petitioner's premises; in other words, not for immediate consumption. (Stipulation of Facts, #6) Therefore, pursuant to MCL 205.54g(1) and (3), Petitioner may exclude from its gross proceeds revenue it receives from sales of Ice Cream.

While Petitioner agrees that its sales of Ice Cream are not subject to tax, Petitioner arrives at that conclusion through a different means. According to Petitioner, sales of food for human consumption "represent a different category of sales" not subject to the GSTA as these sales are *excluded* from tax pursuant to Michigan's Constitution. (Petitioner's Brief, p6) In other words, it is Petitioner's position that because the Constitution *excludes* sales of food for human consumption from sales tax, they are never included in the sales tax base and should not be considered as a tax exemption.

While Petitioner's argument is novel, the Tribunal must disagree. The Tribunal finds Petitioner's characterization of the treatment of food for human consumption as an "exclusion" versus an "exemption" to be nothing more than form over substance. Both terms have the same result; something is removed from the tax base. Furthermore, to be excluded from something, such as sales tax, there has to be "something" to be excluded from. The GSTA has been in existence since 1933 (1933 PA 167). Food for human consumption was subject to tax until 1974, when Article IX, Section 8 of Michigan's 1963 Constitution was amended to exempt prescription drugs for human use and food for human consumption, except prepared food

intended for immediate consumption, from tax. This constitutional amendment required a statutory amendment, which, as previously discussed, is found in MCL 205.54g. Thus, the GSTA was in place long before the exemption for food for human consumption.

Moreover, the fact that a tax exemption is granted in the Constitution and is subsequently enacted into law does not elevate the exemption into a "super exemption" category. For example, Article IX, Section 4 of Michigan's Constitution exempts religious and educational nonprofit organizations from real and personal property taxes. These exemptions are found in Sections 7n and 7o of the General Property Tax Act, being MCL 211.7n and MCL 211.7o. These exemptions have not been treated any differently by Michigan courts than have the multitude of property tax exemptions that have the "misfortune" of being mere statutory exemptions, such as the exemption of property used for clinics, hospitals, or public health purposes found in MCL 211.7r.

The Tribunal finds Petitioner's reliance on *Syntex, supra*, misplaced. In *Syntex*, the sole issue was whether sample drugs given to physicians were subject to use tax. The Department of Treasury argued that they were because these drugs were, in turn, given to the physicians' patients without a *prescription* and, as such, were not exempt from tax. The court disagreed, holding that a written prescription was not required for the drugs to be considered prescription drugs. Of importance to this case are two statements made by the court's conclusion. First, in discussing art 9, §8, the court stated: "The *exemption* apparently was adopted to eliminate the burden and inequity a regressive tax on food and drugs impose on low-income and elderly persons." (*Id.*, p390) The court's second pertinent statement is found it in its conclusion. The court stated: "In conclusion, the art 9, §8 sales and use tax *exemption* for 'prescription drugs' applies to petitioner's use of drug samples in its solicitation process." (Emphasis added.) (*Id.*,

p391) Thus, the Court of Appeals recognized that Article 9, Section 8 *exempted* prescription drugs for humans and food for immediate consumption from sales and use tax.

Finally, the Tribunal's conclusion that an "exclusion" from tax means the same as an "exemption" from tax is supported by the fact that in 2004 the Legislature amended MCL 205.54g to read:

> (1) The following are exempt from the tax under this act:
>
> (a) Sales of drugs for human use that can only be legally dispensed by prescription or food or food ingredients, except prepared food intended for immediate human consumption. (2004 PA 173)

It appears that there are two reasons why Petitioner makes the argument that sales of food for human consumption "represent a different category of sales" and should not be considered a tax exemption: (1) to bolster its position that it is not subject to MCL 205.67, and (2) to require the statute to be construed in its favor. Petitioner does not wish to be subject to MCL 205.67 because, if it were, it would be subject to specific record keeping requirements, including records involving sales for resale, and could be held liable for the tax. In pertinent part, MCL 205.67 provides:

> (1) A person liable for *any tax imposed under this act* shall keep accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires. *If an exemption from sales tax is claimed because the sale is for resale or for any of the other exemptions or deductions granted under this act*, a record shall be kept of the name and address of the person to whom the sale is made, the date of the sale, the article purchased, the type of exemption claimed, the amount of the sale, and if that person has a sales tax license, the sales tax license number. . .A person *knowingly* making a sale of tangible personal property for the purpose of resale at retail to another person not licensed under this act is liable for the tax imposed under this act unless the transaction is exempt under the provisions of section 4k . . .If the taxpayer fails to file a return or to maintain or preserve proper records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, *the department may assess the amount of the tax due from the taxpayer*

> *based on the information that is available or that may become available to the department.* (Emphasis added.)

Even if Petitioner's claim that revenue from sales of food for human consumption is excluded, not exempted, from the GSTA was found to have merit, it is undisputed that Petitioner is liable for tax imposed under the GSTA. Therefore, given the plain meaning of the first sentence of the statute, Petitioner is required to keep the records specified in MCL 205.67.

Assuming, for example, that Petitioner was not liable for any tax imposed under the GSTA, would Petitioner still be subject to the requirements of MCL 205.67? The answer is clearly "yes." The second sentence of MCL 205.67 provides that if an exemption is claimed because of a sale for resale, or for any other exemption or deduction, a record must be kept. In this case, it could be argued both that Petitioner's sales to the mobile vendors were sales for resale under MCL 205.51(1)(b), and that food for human consumption is an exemption or deduction under MCL 205.54g. As such, even if Petitioner was not required to maintain the records specified in the first sentence of MCL 205.67, it was required to maintain the records required under the second sentence. This conclusion is supported by the Court of Appeals decision in *Arbor Sales, Inc v Department of Treasury*, 104 Mich App 181; 304 NW2d 522 (1981).

Petitioner's second reason for arguing that sales of food for human consumption "represent a different category of sales" and are an "exclusion" from tax, not an "exemption" also fails. In making this argument, Petitioner is attempting to have the GSTA construed in its favor. This is due to the fact that the manner in which an issue involving a tax statute is construed is the opposite of that in which a tax exemption claim is construed. As summarized by Justice Cooley:

> [I]t is a well-settled principle that, when a specific privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and **an alleged grant of exemption will be strictly construed** and cannot be made out by inference or implication but **must be beyond reasonable doubt.** In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant. *Michigan Bell Telephone Company v Department of Treasury*, 229 Mich App 200, 207; 582 NW2d 770 (1998), quoting *Detroit v Detroit Commercial College*, 322 Mich 142, 149; 33 NW2d 737 (1948), quoting 2 Cooley, Taxation (4th ed), §672, p 1403.

As previously discussed, the Tribunal finds that food for human consumption is an exemption, not an exclusion, from tax. Therefore, because this case involves a tax exemption, the GSTA shall be construed strictly against Petitioner and in favor of Respondent.

Having determined that sales of food for human consumption do not represent a different category of sales and that Petitioner did not comply with the recordkeeping requirements of MCL 205.67, it must next be determined whether Petitioner *knowingly* sold Ice Cream to mobile vendors who were not licensed under the GSTA. Petitioner asserts that it did not. In support of this statement, Petitioner relies on the affidavit of Ms. Traywick. According to Ms. Traywick:

- During the Audit Period, I knew, and [Petitioner] knew, that customers purchasing Ice Cream from the Cash-and-Carry Area who might resell some of the Ice cream in a taxable manner in Detroit would have been required to possess both a Detroit vendor's license and a Michigan sales tax license.

- During the Audit Period, I knew, and [Petitioner] knew, that Ice Cream truck vendors who purchased Ice Cream from the Cash-and-Carry Area for resale in Detroit were subject to Detroit city licensing requirements, which were public information and required all Ice Cream vendors to provide proof of both a current health department inspection and a current and valid Michigan sales tax license; I knew about the Detroit city vendor license requirements set forth in the Detroit License Requirements publications.

- During the Audit Period, [Petitioner] did not knowingly make any sales for purposes of resale to any Ice Cream truck vendors who did not possess a Michigan sales tax license.

Submitted with Ms. Traywick's affidavit was a copy of the City of Detroit's "Requirements for Securing/Renewal of Vendor License." This document clearly requires a vendor to bring a copy of the vendor's Michigan sales tax license when applying for a license. In addition, a separate document lists eight items which are required to obtain a vendor's license from the City of Detroit, one of which is the vendor's Michigan sales tax license.

From the Informal Conference Recommendation, it appears that Respondent's position is that "[t]he standard of 'knowingly' making sales to unlicensed vendors is met because the Petitioner had knowledge that the items would be resold as food for immediate consumption." (Recommendation, p8) Petitioner disagrees, asserting that for it to "knowingly" make these sales, it would also have to have known that the sale was made to an unlicensed person. Petitioner relies on *Arbor Sales, supra*, in support of this argument.

Having reviewed the applicable statutory language, the Tribunal finds that it is not enough, as Respondent argues, to only have knowledge that the item would be resold as food for immediate consumption. MCL 205.67 also requires knowledge that the sale is made to a person not licensed under the GSTA. In this case, the Tribunal finds Petitioner's reliance on the City of Detroit's licensing requirements as an indication that the mobile vendors who purchased the Ice Cream from Petitioner were licensed under the GSTA to be reasonable. As such, the Tribunal

finds that Petitioner did not knowingly make sales to persons not licensed under the GSTA. Because Petitioner did not knowingly make sales to unlicensed persons, Petitioner is not liable for the tax imposed under the GSTA.

The next issue to be resolved is whether Petitioner has shown reasonable cause to waive the penalty assessed by Respondent. Pursuant to MCL 205.59(1): "The tax imposed by this act shall be administered by the commissioner pursuant to 1941 PA 122, MCL 205.1 to 205.31, and this act." MCL 205.1 *et seq* is known as The Revenue Act. It is this Act, specifically MCL 205.23, in which Respondent is authorized to assess the penalty at issue. MCL 205.23 provides, in pertinent part:

> [I]f any part of the deficiency or an excessive claim for credit is due to negligence, but without intent to defraud, a penalty of $10.00 or 10% of the total amount of the deficiency in the tax, whichever is greater, plus interest as provided in subsection (2), shall be added. The penalty becomes due and payable after notice and informal conference as provided in this act. If a taxpayer subject to a penalty under this subsection demonstrates to the satisfaction of the department that the deficiency or excess claim for credit was due to reasonable cause, the department shall waive the penalty. MCL 205.23(3).

Thus, the statute provides an opportunity for the penalty to be waived if reasonable cause is shown. Pursuant to Rule 205.1012:

> (1) Negligence is the lack of due care in failing to do what a reasonable and ordinarily prudent person would have done under the particular circumstances. The standard for determining negligence is whether the taxpayer exercised ordinary care and prudence in preparing and filing a return and paying the applicable tax in accordance with the statute. The facts and circumstances of each case will be considered.
>
> (2) When the department imposes a negligence penalty, the department bears the burden of establishing facts to support a finding of negligence and the taxpayer bears the burden of establishing facts that will negate a finding of negligence. The taxpayer shall file a written statement that explains, in detail, the facts which are relied upon to defeat the penalty and which constitute reasonable cause. 1999 AC, R 205.1012(2).

According to the Informal Conference Recommendation, Respondent imposed the penalty because Petitioner did not obtain exemption certificates. The affidavit of Ms. Traywick explains, in detail, the facts it relied upon in not obtaining the exemption certificates. The Tribunal finds that these facts present reasonable cause for not obtaining the exemption certificates. Moreover, the Tribunal finds that Petitioner did not fail to do what a reasonable and ordinarily prudent person would have done under the circumstances. Petitioner knew of the licensing requirements of the City of Detroit, which require a Michigan sales tax license. It was reasonable for Petitioner to believe that the mobile vendors at issue, who operated in the City of Detroit, were licensed. For these reasons, the Tribunal finds that the negligence penalty assessed against Petitioner is waived.

The final issue to be resolved is whether Respondent's Affirmative Defense under MCL 205.52(2) may be considered given Petitioner's claim that it did not have notice of this argument in the proceedings below. In *Montgomery Ward*, the petitioner was assessed for a single business tax liability. The petitioner appealed this assessment to the Court of Claims wherein the respondent filed "an amended answer and counterclaim, in which it presented a new and alternate theory of liability." (*Id*., p677) The petitioner filed a motion for summary disposition, arguing that:

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

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

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

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

> In reaching this decision, the court reasoned that pursuant to *Bechtel Power Corp v Dep't of Treasury*, 128 Mich App 324, 340 NW2d 297 (1983), revenue statutes must be construed against the taxing authority, that the mandatory directives of the Single Business Tax Act and the revenue act required defendant to grant these procedural rights to plaintiff, and that the Court of Claims Act and the revenue act, because they deal with the same subject matter, must be construed in the event of a conflict to preserve the meaning and intent of each other so that neither denies the effectiveness of the other.
>
> This reasoning is especially persuasive because otherwise defendant could "counterclaim" any amount on any theory for the tax years in question. Defendant argues that there is no problem with lack of notice because the counterclaim deals with the same set of "operative facts." This is not much assurance to a taxpayer if any liability alleged to have accrued within a given tax year is considered to have arisen from the same set of "operative facts." Under such circumstances, a taxpayer could be ambushed at the appellate level with an entirely new theory of tax liability and be forced to defend against a much larger tax liability than that from which it originally appealed.
>
> The procedural situations of taxpayer appeal cases are not analogous to the situation in which the typical "counterclaim" arises. In taxpayer appeal cases, the plaintiff's or taxpayer's claim is for relief from a tax assessment imposed by the treasury. If counterclaims are allowed, the defendant would be allowed to assert additional claims against the plaintiff, and the plaintiff would be forced to defend itself without the procedural safeguards considered necessary in the revenue act for imposing tax assessments. (Citation omitted.) (*Id*., pp683-684)

A review of Respondent's Informal Conference Recommendation reveals no discussion regarding Respondent's MCL 205.51(2) argument. As such, it cannot be said that Respondent

provided Petitioner with the requisite notice of its position that Petitioner was liable for sales tax under MCL 205.21(2), an opportunity to have this issue considered at an informal conference, and a written decision as to Respondent's position. Given this, the Tribunal finds that Respondent's claim of Affirmative Defense under MCL 205.21(2) will not be considered.

With its Motion for Summary Disposition, Petitioner filed a request for oral argument. The Tribunal finds that sufficient information has been provided and that oral argument is not necessary.

Therefore,

IT IS ORDERED that Petitioner's Motion for Summary Disposition under MCR 2.116(C)(10) is GRANTED.

IT IS FURTHER ORDERED that the tax, interest, and penalty assessed against Petitioner under Assessment No. M566947 is CANCELLED.

IT IS FURTHER ORDERED that Petitioner's request for oral argument is DENIED.

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

MICHIGAN TAX TRIBUNAL

Entered: June 28, 2011 By: Patricia L. Halm