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

Unger Enterprises, Inc.,
Petitioner,

MTT Docket No. 343303

v

Michigan Department of Treasury,
Respondent

Tribunal Judge Presiding
Cynthia J Knoll

FINAL OPINION AND JUDGMENT

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

1. Administrative Law Judge Thomas A. Halick issued a Proposed Opinion and Judgment on February 24, 2010. The Proposed Opinion and Judgment denies in part and grants in part Petitioner's Motion for Summary Disposition. It further denies in part and grants in part Respondent's Motion for Summary Disposition. The Proposed Opinion and Judgment also requires Petitioner to produce documentary evidence.

2. Administrative Law Judge Thomas A. Halick issued a subsequent Proposed Opinion and Judgment on May 12, 2010. The Proposed Opinion and Judgment grants Respondent's Motion for Summary Disposition and denies Petitioner's Motion for Summary Disposition. The Proposed Order states, in pertinent part, "[t]he parties have 20 days from date of entry of this Proposed Opinion and Judgment to file any written exceptions to the Proposed Opinion and Judgment."

3. Neither party has filed exceptions to the Proposed Opinion and Judgment.

4. The Administrative Law Judge considered the testimony and evidence submitted and made specific findings of fact and conclusions of law. The Administrative Law Judge's determination is supported by the testimony and evidence and applicable statutory and case law.

5. The Tribunal adopts the Proposed Opinion and Judgments as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgments in this Final Opinion and Judgment.

6. Assessment No. O867918 for tax of $25,432, penalty of $2,529 and statutory interest is affirmed.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the taxes, interest and penalties at issue are as indicated by this Final Opinion and Judgment.

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

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

MICHIGAN TAX TRIBUNAL

Entered: August 26, 2010 By: Cynthia J. Knoll

* * *

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

Unger Enterprises, Inc. Empty Keg Party Stores,
Petitioner,

v

Department of Treasury,
Respondent.

MICHIGAN TAX TRIBUNAL
MTT Docket No. 343303

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

PROPOSED ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER CANCELLING TELEPHONIC STATUS CONFERENCE

On June 18, 2009, Respondent filed a Motion for Summary Disposition and a brief in support.

On July 1, 2009, Petitioner filed "Petitioner's Answer to Respondent's Motion for Summary Disposition and Petitioner's Motion for Summary Disposition," and a "Brief in Support of. . . Answer to Respondent's Motion of Summary Disposition."

On February 24, 2010, the Tribunal entered a Proposed Order Denying in Part and Granting in Part Petitioner's Motion for Summary Disposition, Proposed Order Denying in Part and Granting in Part Respondent's Motion for Summary Disposition, and Order Requiring Petitioner to Produce Documentary Evidence, which is incorporated herein by reference.

The Order entered February 24, 2010, ruled in favor of Respondent on all issues, with the exception that the Order reserved judgment on the delivery fee issue. In light of the fact that Petitioner had provided invoices showing delivery fees charged during October and part of November of 2005, it was determined that Petitioner would be given the opportunity to present similar documentary evidence for periods prior to September 1, 2004. It was determined as a matter of law that Petitioner was not entitled to a reduction in tax for delivery fees charged after September 1, 2004, due to statutory amendments that took effect on that date. Petitioner was ordered to provide adequate documentary evidence on or before March 17, 2010.

On March 29, 2010, the Tribunal granted Petitioner's motion entitled "Proposed Order to Adjourn Order Requiring Petitioner to Produce Documentary Evidence," extending the deadline to file evidence to May 7, 2010. That Order further provided that "Failure to produce such evidence on or before May 7, 2010 shall subject Petitioner's case to dismissal."

On March 29, 2010, Respondent filed its "Motion and Brief for Summary Disposition" seeking judgment as a matter of law under MCR 2.116 and also under TTR 247 due to Petitioner's failure to respond to the Tribunal's February 24, 2010 Order.
On March 30, 2010, Respondent filed a "Response to Petitioner's 'Motion to Adjourn'" indicating that Petitioner had not properly served its Motion to Adjourn upon Respondent.
On May 6, 2010, Petitioner filed a "Motion and Brief for Summary Disposition" in response to the Tribunal's Orders entered February 24, 2010 and March 29, 2010, in which Petitioner admitted, "Again, as stated, the Petitioner did not have a key on the cash register for delivery services and therefore is being requested to provide financial records that were not in existence."

On May 11, 2010, Respondent filed its "Answer to Petitioner's Motion and Brief for Summary Disposition Dated May 6, 2010 and Respondent's Renewed Motion and Brief for Summary Disposition According to MCR 2.116(I)(2)."

Upon review of the above filings and the entire case file, and being fully advised of the premises, it is determined that Respondent's Motion for Summary Disposition shall be GRANTED and that Petitioner's appeal shall be dismissed. The Proposed Order entered February 24, 2010, resolved all issues, with the exception that it was determined that a genuine issue of fact existed as to whether Petitioner engaged in a delivery service during the periods prior to September 1, 2004, based on documentary evidence that it charged for delivery during October and early November 2005. Petitioner's Exhibit D. It was further determined that in order to create a genuine issue of fact for trial regarding relief to be granted, Petitioner must produce documentary evidence for periods prior to September 1, 2004, which it has failed to do. Therefore, even if Petitioner could prove that it engaged in a delivery service during the periods indicated, it is determined that there is no adequate evidentiary basis to establish that Petitioner would be entitled to relief in a sum certain. Petitioner has admitted that the documentary evidence requested does not exist. Petitioner claims that, "There is no way to extrapolate the delivery

charges with any accuracy other than to use some sort of mathematical method and apply it to the period in question." Petitioner had a legal duty to maintain adequate records to establish the proper tax liability. MCL 205.53(3). Also, failure to maintain adequate records authorizes the department to assess the amount of tax due based on information that is available, and the assessment is prima facie correct and the taxpayer has the burden of proof to refute the assessment. MCL 205.67. Petitioner cannot meet the burden of proof in this case.

IT IS ORDERED Respondent's Motion for Summary Disposition is GRANTED and this case shall be dismissed under MCL 2.116.

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

IT IS FURTHER ORDERED that this appeal shall be DISMISSED under TTR 247.

IT IS FURTHER ORDERED that the telephonic status conference scheduled for 10 a.m. on May 14, 2010, is ADJOURNED and CANCELLED.

IT IS FURTHER ORDERED that the parties shall have 20 days from date of entry of this Proposed Order to file exceptions and written arguments with the Tribunal. The exceptions and written arguments shall be limited to the issues raised in the motions. This Proposed Order, together with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act, MCL 205.726.

MICHIGAN TAX TRIBUNAL

Entered: May 12, 2010 By: Thomas A. Halick

* * *

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

Unger Enterprises, Inc.,
Petitioner,

v

Department of Treasury,
State of Michigan
Respondent.

MICHIGAN TAX TRIBUNAL
Entire Tribunal
MTT Docket No. 343303

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER DENYING IN PART AND GRANTING IN PART PETITIONER'S MOTION FOR SUMMARY DISPOSITION

PROPOSED ORDER DENYING IN PART AND GRANTING IN PART RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER REQUIRING PETITIONER TO PRODUCE DOCUMENTARY EVIDENCE

This case comes before the Tribunal on cross motions for summary disposition under MCR 2.116(C)(10).

Brief Statement of Judgment

Upon review of the motions, briefs in support, and documentary evidence, the motions shall be denied in part and granted in part, as indicated in paragraphs 1-3 below.

1. **Delivery Service**. Petitioner's motion is granted in part and Respondent's motion is denied on the issue of whether Petitioner engaged in a delivery service. See, *Natural Aggregates Corporation v Dep't of Treasury*, 133 Mich App 441; 350 NW2d 272 (1984). It is determined that Petitioner engaged in a delivery service during a portion of the audit sample period, based on invoices that show a delivery fee was charged. Petitioner's Exhibit D. There remain issues of fact pertaining to the total delivery charges, which must be established by accurate and complete documentary evidence for periods prior to September 1, 2004 only. If within 21 days of the entry of this Order, Petitioner files with the Tribunal and exchanges with Respondent adequate books and records of delivery charges, this case will proceed to a hearing where Petitioner will have the burden to prove that the subject assessment is in error due to inclusion of delivery charges in "gross proceeds." Respondent's motion to dismiss under MCL 2.11(C)(10) is denied. Any relief granted would apply only to delivery fees incurred prior to September 1, 2004.

   If Petitioner is unable to produce any further books and records of delivery charges within 21 days of entry of this Order, or if Respondent believes that any books or records produced pursuant to this Order are inadequate as a matter of law, Respondent may file a new motion for summary disposition on this sole remaining issue. Respondent's motion shall be filed within 35 days of entry of this Order.

   For periods after September 1, 2004, the law was amended to provide that "gross proceeds" (or "sales price") includes "Delivery charges incurred or to be incurred before the completion of the transfer of ownership of tangible personal property from the seller to the purchaser." MCL 205.51(1)(d)(iv). There are no specific facts that would prove that delivery charges were incurred after the completion of transfer of ownership, but rather all available evidence establishes that delivery fees were incurred at the time of the sale, and not prior to the transfer of ownership. Respondent is granted summary disposition on the issue of delivery fees incurred on or after September 1, 2004.

2. **Amount of Delivery Charges**. There remains a genuine issue of material fact regarding the amount of delivery charges, if any, that were included in the tax base calculation that gave rise to the subject assessment. Petitioner's burden is to prove delivery charges in a sum certain based on complete and accurate daily records of transactions where delivery fees were charged. Petitioner's evidence submitted with its motion (Petitioner's Exhibit D) creates an issue of fact, and tends to prove that Petitioner collected $250 in delivery charges during October and November 2005. It appears that Petitioner submitted these documents because they relate to the audit sample period in question and Petitioner may be able to produce delivery records for other periods at issue. Therefore, Petitioner has set forth specific facts to support its claim, and summary disposition against Petitioner is not appropriate at this time. Petitioner shall be given the opportunity to produce delivery records for the periods at issue (August 1, 2002 through August 31, 2004). Petitioner also has the burden to prove that delivery charges were improperly included in its tax base ("gross proceeds"). Under MCL 205.52(3), Petitioner is required to "keep books to show separately the transactions used in determining the tax levied by this act."

   If Petitioner is able to produce documents pertaining to delivery charges, there remains an issue of fact and law as to whether the documents constitute adequate "books" within the meaning of MCL 205.52(3). Respondent may file a Motion for Summary Disposition on this issue in response to any evidence that Petitioner produces in response to this Order.

3. **Rental Fees.** Petitioner is denied and Respondent is granted summary disposition on the issue of rental fees. Petitioner has produced documentary evidence of purchases from various vendors, but the evidence does not show that that tax was paid on specific rental property, nor does it prove that the property was in fact rented to customers. Petitioner's Exhibit C. Petitioner claims that Respondent prepared Exhibit C using invoices of specific purchases, which the auditors reviewed during the audit. The only actual invoice for a tap is Petitioner's Exhibit A, which is dated September 6, 2007, outside the audit period. (Petitioner's evidence is insufficient to create an issue for trial as whether it paid tax on its purchases of taps, tubs, and coolers). However, even assuming that Petitioner is able to introduce the purchase invoices at hearing, the claim fails because Petitioner has failed to produce any evidence that it actually rented taps, coolers, or tubs to customers. It can be concluded that there is no reasonable probability that Petitioner will be able to introduce adequate daily records to prove that Respondent erred in disallowing the claimed rental fees as a deduction. Assuming that Petitioner could produce records similar to its Exhibit C for the entire audit period, this would not meet Petitioner's burden of proof. Respondent is granted summary disposition on the issue of rental fees.

Standard of Review

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. The Tribunal must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists requiring trial. *Spiek v Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998). When determining whether there is a genuine issue of any material fact, the

admissible evidence must be viewed in the light most favorable to the non-moving party. *Heckman v Detroit Chief of Police*, 267 Mich App 480; 705 NW2d 689 (2005). If the "affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." MCR 2.116(I)(1). "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). "If 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." MCR 2.116(I)(2).

Procedural History

Respondent conducted an audit of Petitioner for the period August 1, 2002 to December 31, 2005 and issued a "Preliminary Audit Determination Letter" dated 2/21/2007, indicating that the auditor had determined that sales tax ($25,297.00), penalty ($2,529), and interest ($4,531), in the total amount of $32,357 was due. That letter states that the preliminary determination "is subject to review and approval by the Michigan Department of Treasury."

On April 4, 2007, Respondent issued assessment No. 0867918 to Petitioner, with tax due of $25,297.00, penalty of $2,529.00, and interest in the amount of $4,606.69, for a total amount of $32,432.69. Petitioner challenged the assessment through the department's "informal conference" process, and a conference was held on August 16, 2007.

On September 12, 2007, the taxpayer's accountant wrote to the department's hearing referee indicating that he was providing "additional information as requested" including a copy of an invoice for taps and "inventory of taps, tubs and coolers." (Respondent's Exhibit C). The letter also states that it included "a current invoice for rental taps-sales tax paid." (Petitioner's Exhibit A). At that time, the accountant was unable to located receipts for purchases of tubs and coolers, and explained that the taxpayer is not tax exempt and therefore always pays sales tax on these purchases from Wal-Mart and Meijer.

The department's referee issued a written recommendation that the assessment was valid as issued. The main issue at the conference was the "disallowed food deduction." The taxpayer presented three issues. The hearing referee determined that the taxpayer had failed to present adequate documentary evidence to support its claim that it was entitled to deduct rental fees charged for beer taps, coolers, and tubs. It was determined that the taxpayer had over one year to locate the necessary tax records and had failed to do so. Therefore, the taxpayer had failed to meet its burden of proof as required by MCL 205.67(1) [pertaining to record keeping] and case law [pertaining to the burden of proof and the rule of strict construction of exemptions]. As such, the referee found no error in the department's calculation of gross proceeds, and that the taxpayer failed to prove that it was entitled to an adjustment or deduction for rental fees.

On the second issue, the referee determined that Petitioner did not qualify to deduct **delivery charges** under RAB 2002-1 because "the Petitioner has not provided sufficient information to either the auditors or this Referee that would allow a determination of whether the Petitioner's delivery services met the four conditions set forth above" although "given the nature of the

business, it appears likely that the first condition would be met." Based on lack of information available at that time, the referee concluded that the assessment was proper.

On the third issue, the referee determined that it appeared that the department correctly applied a 45% mark up on grocery purchases, based on a "review of the file, including Mr. Storey's January 9, 2007, letter to Mr. Shoemaker… ."

On February 4, 2008, the department issued a final Decision and Order of Determination affirming the assessment. On March 31, 2008, Petitioner filed this appeal in the Tax Tribunal.

On June 9, 2009, the parties appeared before the Tribunal for a Prehearing Conference, at which time they each stated that they believed the case could be resolved after cross motions for summary disposition without the need for an evidentiary hearing.

On June 18, 2009, Respondent filed its motion for summary disposition under MCL 2.116(C)(10) and a brief in support. On July 2, 2009, Petitioner filed an answer to the motion and a brief in support, stating that the documentary evidence and undisputed facts prove that it is entitled to judgment in its favor as a matter of law.

Brief Statement of Issues

I. Whether Petitioner can prove that it rented certain equipment to its customers, paid sales tax when it purchased the equipment, and that the assessment includes non-taxable rental fees.

II. Whether Petitioner can prove that the assessment included sales tax on non-taxable delivery fees.

Summary of Facts

During the periods at issue, Petitioner operated a party store under the name "Empty Keg Party Store," in Mount Pleasant, Michigan. Petitioner's Brief, p. 3. Petitioner sold food, beer, wine, and liquor. Petitioner sometimes delivered the products that it sold to customers and charged a fee for this service. At the informal conference, Petitioner stated that the delivery fee was $15. Petitioner has presented documentary evidence with this motion that it charged a $25 fee for "delivery and set up" during the audit sample period (September and October 2005). The taxpayer's van included a written advertisement indicating that delivery is available. Petitioner's Brief, p. 3. The taxpayer does not account for its delivery income as a separate line item on the tax return or financial statements.

Petitioner's cash register does not have a key for delivery charges. Petitioner claims that delivery charges were rung up as nontaxable "grocery" items. (If this is true, Petitioner's cash register operator would have rung up the delivery charges as grocery sales and the delivery charges would not appear on any cash register tape). Petitioner has provided no documentary proof that delivery charges were accounted for (rung up on the cash register) as groceries. However, Petitioner's Exhibit D consists of 21 pages of documents identified generally as "Invoice /

Delivery Receipt" for the Empty Keg Party Store. Each invoice includes the following statement: "Beer, Liquor, Wine Kegs, Cigarettes, Wedding & Party Planning, Delivery Available." Several of the invoices show a delivery charge ("delivery and set up") in the amount of $25.00.

Petitioner's Exhibit D includes a two-page invoice which indicates that the sale was "Delivered to: "Suite A, Ron," "Date ordered: 10-12-05," and "Ordered by: Ron." The first page of the invoice indicates the item description, quantity, and price. The total amount of the sale is $239.87. The last item on page two is a charge in the amount of $25 for "delivery and set up." A handwritten notation states, "Paid 10-14-05 Credit Card." Petitioner's Exhibit D includes several other invoices that include a charge of $25.00 for delivery. The invoices include dates in October and early November 2005, although some are not dated.

Petitioner offers evidence of a blank "Tap Deposit Contract," as evidence of the manner in which Petitioner rents taps to customers. Petitioner's Exhibit F. The amount is stated to be a "deposit" of $40.00 for "rental" of the tap. The Tap Deposit Contract customer agrees to return the tap in working condition and will receive a refund of $30, which leaves a "rental" charge of $10 retained by Petitioner. If the tap is not returned or is destroyed, the customer agrees to *purchase* the tap for $40, in which case Petitioner retains the $40 deposit. Petitioner does not claim that it "sold" any of the taps due to a customer's failure to return a tap. There is no documentary evidence, such as a completed (executed) Tap Deposit Contract, showing that Petitioner ever collected a rental fee for a tap.

The facts are less clear regarding how the rental of "coolers and tubs" were handled. There is no evidence of a "deposit contract" for coolers or tubs. There is no documentary evidence to show that coolers or tubs were rented to customers.

Respondent's Exhibit B is a fax sent by the department's auditor to Petitioner's accountant (which appears to have been sent February 9, 2007) requesting that Petitioner provide evidence of invoices in order to prove that Petitioner paid sales tax on purchases of taps, tubs, and coolers. (Petitioner was given additional time to produce such records after the informal conference in August 2007, and failed to provide invoices that would prove that it paid tax on purchases or rented taps, coolers or tubs to customers.) Based on Petitioner's claim that it only accounted for rental fees as "grocery sales" on its cash register, it appears that complete and accurate records of rental fees were not maintained as required by MCL 205.67. As such, Petitioner cannot avoid summary disposition on the rental fee issue, because it has failed to set forth specific facts, supported by documentary evidence, showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Also, see MCR 2.116(G)(3) and (4).

The auditor cites RAB 1988-39, indicating that the taxpayer may pay sales tax at the time that it purchases the property, or may charge sales tax to the customer on the rental fees. Respondent's Exhibit B also indicates that the "delivery charges" are taxable based on RAB 2002-11.

On February 21, 2007, the department's auditor wrote to Petitioner's accountant that "you did not respond by deadline of 2/21/07" and that Petitioner had failed to provide invoices of

purchases of taps, coolers, and tubs. (Respondent's Exhibit B). The auditor assumed that all of these fees are taxable and subtracted them from the "Other Deductions" in the work papers.

Petitioner's Exhibit A is an invoice dated September 6, 2007 (*outside the audit period*) for a "tap" that Petitioner purchased. The invoice appears to have been electronically generated and shows a sale of "Merchandise Taps" in the total amount of $120.00. Below that description is a line with the words "sales tax" printed in the same type that appears on the rest of the invoice. However, the amount of the sales tax is hand printed in the amount of "$7.20." In the box for "total charges" the number $120 is printed, but is obliterated by a handwritten mark and above it is written "$127.20."

Petitioner's Exhibit C is seven pages entitled "State of Michigan Department of Treasury Vendor Invoices by Code by Envelope Sept. and Oct. 2005" which includes the vendor name, date, amount, and description of purchases that Petitioner made from various vendors. In some cases the item was merely described as "taxable" without describing the type of property purchased. The purchases occurred during September and October 2005. The items purchased include liquor, beer, wine, cigarettes, ice, pop, juice, chips, snacks, food, prepared food, news, and magazines. The document appears to have been created by the department of treasury. The source of the information reported thereon is unknown, although presumably it was compiled from an examination of actual vendor invoices kept by Petitioner. Therefore, while it appears possible that Petitioner could produce the underlying purchase invoices for trial, this would not meet its ultimate burden to prove that it actually collected rental fees in a sum certain, and that it would be entitled to deduct rental fees in calculating its taxable gross proceeds.

Petitioner's Exhibit E, page 1, is a "Michigan Department of Treasury Audit Determination Letter – Sales Tax" dated June 27, 2006, for the audit period August 1, 2002 to December 31, 2005, with tax, penalty, and interest in the total amount of $19,718. It is unsigned and undated. Petitioner's Exhibit E, page 2, is a "Michigan Department of Treasury Audit Determination Letter – Sales Tax" dated January 9, 2007, for the audit period August 1, 2002 to December 31, 2005, with tax, penalty, and interest in the total amount of $19,429. It is signed by a department auditor and dated January 9, 2007.

Petitioner's Exhibit E, page 3, is a "Michigan Department of Treasury Audit Determination Letter – Sales Tax" dated February 21, 2007, for the audit period August 1, 2002 to December 31, 2005, with tax, penalty, and interest in the total amount of $32,357. It is signed by the same department auditor and dated February 21, 2007.

Petitioner's Exhibit F, is a letter from Petitioner's accountant dated **January 5, 2007**, to the department's auditor, including the following subjects:

1) The auditor did not "address the grocery mark up adjustments." The audit report showed grocery cost for September and October 2005, which if extrapolated for the entire year amounts to $43,586.16; and that the report allowed grocery costs of $44,226, which is a mark up of 1.446%. The accountant indicates that a mark up of 45% on grocery items is typical for the industry.

2) The accountant did not address the "tap deposit fee" because he did not think it was an audit issue. The company charges a $30 deposit on taps and reports that item under "bottle deposit." During September and October 2005, the company purchased 114 kegs, which when applied to the year would amount to a total annual deposit on taps of $20,520. Petitioner refers to its Exhibit C to support its claim that it purchased 114 kegs in September and October 2005, based on invoices from "Chippewa" and "Fabiano." The deposit on 114 kegs would be $3,420 for September and October (114 x $30 = $3,420), which extrapolated for the 2005 year equals $20,520.
3) Delivery and rental fees are not in the deposit number, but are non-taxable items included in the grocery sales number. (Petitioner's Exhibit F indicates a total charge or deposit of $40 for the tap, and that the rental fee is $10 after refund of the $30 initially deposited).
4) Attached to the letter is a "Tap Deposit Contract" (Petitioner's Exhibit F) which indicates that the customer agrees to "deposit the sum of $40.00 for the rental of" a tap. The customer agrees to return the tap within 48 hours, and upon return, will receive $30 as a refund of the deposit. (Petitioner retains $10.) If the tap is not returned, or returned in non-working condition, the $40.00 deposit is forfeited. The Tap Deposit Contract is a blank form. From the face of the document it cannot be determined that this contract was used during the years at issue.

Petitioner's Exhibit I is a letter dated **January 3, 2007**, from Petitioner's accountant to Respondent's auditor, including 10 pages of schedules, indicating that the "correct total audit adjustment for all four years is $4,063" for 2002, 2003, 2004 and 2005, summarized as follows:

1) "Delivery and rentals are included in the grocery number." These deductions were based on charges for tub rental, delivery and non refundable tap fee. There were 114 kegs for the sample period and there were four CMU football games "at $125.00 per game." The accountant also estimated "around 2 deliveries per day" involving a $15 fee for each delivery. These numbers were "carried out for the year."
2) Grocery Mark up. Per the audit, the grocery mark up was $7,307.00 for a total of $43,842 for the year. The average grocery mark up was 45%. The correct 2005 grocery sales are $104,889. The reported grocery amount of $142,696 is an overstatement of 26.49%, which was applied to the other audit years for a corrected sales amount, resulting in a recalculated sales tax amount.

Based upon the above letter, it appears that Petitioner admits that it originally reported grocery sales of $142,696, which was an overstatement.

Petitioner's Exhibit G is a letter from the department auditor to Petitioner's accountant, dated **January 9, 2007**, addressing four issues summarized as follows:

1) Food Deduction – The auditor agrees that "keg fees" are non-taxable, but should not be categorized under food, but should be with other items under "Other Deduction." The auditor indicated that the keg fees were disallowed as a food deduction and credited as an "Other deduction." Also, "Your food deduction was calculated as you wanted it" based on a mark-up of 45% on non-taxable items.

2) Other Deduction – The auditor addresses the treatment of bottle deposits, lottery sales, periodicals, commissions ("cigarettes paid category"), keg fees, and that "keg fees…assume delivery fees, tap rentals, and tub rentals on every keg sold. We both know this is not accurate." A deduction was allowed for bottle deposits (which would include deposits on taps). The auditor adjusted the deduction for keg fees related to CMU home football games during October and November, which cannot be extrapolated for the entire year.
3) Deduction Adjustments – adjustments to various deductions on "Schedule C."
4) Net tax due - $19,429.
5) The letter states: "…I have addressed every concern that you have brought to my attention. Every adjustment you have requested has been made…the overall effect on the tax due was minimal."

Respondent's Exhibit B is a fax from the auditor to Petitioner, indicating that further adjustments were made after the letter dated January 9, 2007. It appears that during the audit, Respondent had accepted as fact that Petitioner had received certain amounts for rental fees and delivery fees, and initially allowed a deduction. The auditor appears to have decided to disallow a deduction for "delivery charges of $15 per delivery" based on RAB 2002-11.

With regard to the rental fees, the auditor stated that no deduction would be allowed unless Petitioner could present documentary evidence that tax had been paid at the time of purchase. A subsequent letter dated February 21, 2007, from the auditor indicates that the rental fee deduction was disallowed because Petitioner had failed to document payment of taxes on the purchases. Respondent's Exhibit B. Petitioner alleges that invoices exist to show that tax was paid on property that it rented to others, and that Respondent reviewed these invoices. It would appear based on Exhibit B that the sole reason for disallowing the deduction for rental fees was lack of evidence that tax had been paid at the time of purchase. Petitioner has produced no documentary evidence whatsoever to prove that it actually collected rental fees from its customers, and therefore, summary disposition in favor of Respondent is appropriate on this issue.

Petitioner's Exhibit H is entitled "Keys on Cash Register" and states: 1) Liquor, 2) Wine, 3) Beer, 4) Grocery, 5) Taxable, 6) Cigarettes, 7) Pop, 8) Case Beer, 9) Magazines, 10) Deposit, 11) Daily Lottery 12) Pizza, 13) Instant Lottery, 14) Candy, 15) ATM, 16) Deposit Refund, 17) Lottery Paid, 18) Cigarette Carton, 19) Kegs.

Respondent's Documentary Evidence

Exhibit A – Intent to Assess
Exhibit B – Fax from Justin Storey, 2/9/07; Letter from Justin Storey, 2/21/07
Exhibit C – Letter from Petitioner's accountant to Respondent's hearing officer, 9/12/07
Exhibit D – Informal Conference Recommendation
Exhibit E – Decision and Order of Determination, 2/4/08
Exhibit F – Final Assessment
Exhibit G – General Sales and Use Tax Rules
Exhibit H – Fax from Petitioner's accountant to Respondent's auditor
Exhibit I – RAB 2002-11

Exhibit J – Webster's New Universal Unabridged Dictionary, 2d Ed, p 997

Summary of Petitioner's Argument

The auditor determined that there was no evidence that Petitioner made any purchases that would be subject to use tax; and therefore, sales tax must have been paid on such purchases. Rental fees, deposits on kegs and equipment, and delivery charges were rung up on the grocery key, such that receipts for those items were included with grocery sales.

The documentary evidence shows that Petitioner's invoices included a separate delivery fee and that Petitioner was engaged in a profitable delivery service business.

The original audit determined a tax liability based on "food sales numbers," which Respondent later conceded were incorrect after which time, "the entire issue of the audit changed and the issue of the final audit became the delivery and rental fees." Petitioner's Exhibit I.

Petitioner's records indicate that it charged a delivery fee, which is sufficient evidence upon which the delivery charges can be determined. Petitioner's cash register does not have a key for rental charges, but the rental charges and delivery charges were rung under the grocery key. Deposits on kegs and equipment are rung up on the deposit key (not the grocery key).

Petitioner claims that the undisputed facts entitle it to judgment as a matter of law cancelling the assessment in its entirety. It appears that Petitioner's as-filed returns were accurate because the food deduction also included non-taxable amounts for rental and delivery charges. Presumably "deposits" were not included in gross proceeds and not taxed, as reported by Petitioner.

Petitioner claims that there is sufficient documentary evidence that it charged nontaxable delivery charges, despite the fact that delivery charges were "rung up" using the grocery key. Also, the rentals are documented and are not taxable. Although the taxpayer argues that it is entitled to judgment as a matter of law, it also states that it "should be allowed to use sampling to explain" its position and that it has been denied the opportunity to discuss the assessment with Respondent. This appeal seems to have been precipitated in part by Petitioner's claim that "there were three audit reports issued…." Petitioner's Brief, page 2. The first and second audit reports focused on the food deduction, which was later resolved by Respondent agreeing to use the 45% mark up on grocery purchases to calculate the amount of non-taxable food sales that should be allowed as a deduction from "gross sales[1]." The food mark up issue was resolved by Respondent adopting Petitioner's 45% estimate.

[1] The Annual Return for Sales, Use, and Withholding Tax, form 165, line 1, uses the term "Gross sales," which is not defined in the Sales Tax Act. It is apparent that the form calls for "Gross sales" to include all revenues, including items that are not included within the defined term "Gross proceeds" under MCL 205.51(1)(i). The form requires the taxpayer to subtract "allowable deductions" from "gross sales" to arrive at the "taxable balance." While this produces an accurate tax base, it implies that items that are not included in "gross proceeds," such as amounts received for services are a deduction from "gross proceeds." Most service charges are not included in "gross proceeds," and no "deduction" is called for, whereas the form includes service charges in "gross sales" and requires a deduction. While this may seem insignificant, it has implications regarding the burden of proof and rules of construction.

Summary of Respondent's Argument

Respondent argues that the issue of sales tax on rentals of equipment turns upon whether Petitioner has provided sufficient evidence that it paid sales tax at the time of purchase and whether it maintained adequate records to show how much of its sales were rentals. Respondent claims that the absence of such evidence requires judgment in its favor as a matter of law. Respondent's Brief in Support, page 1, 2. Petitioner's failure to produce records that sales tax was paid at the time it purchased the rental equipment is fatal to its claim that the rental receipts are not taxable.

Respondent claims that Petitioner does not meet the requirements for a "separate delivery service" under Revenue Administrative Bulletin 2002-11, and, that Petitioner has failed to produce adequate records to prove the dollar amount of its deliveries.

"Thus, Petitioner is arguing that because of rentals and delivery fees, it has a higher exemption from gross sales than Treasury allowed. Notably, this is not a case where Petitioner's books show that Petitioner's rental and delivery receipts are a certain amount and Treasury subjected those amounts to sales tax. Instead Petitioner is arguing based primarily on estimates that some of its gross proceeds are attributable to rentals and delivery fees." Respondent's Brief, page 5. (Respondent's Exhibit B is a February 21, 2007 letter, which states that the auditor subtracted the rental fees from the allowed "Other Deduction.")

Respondent cites MCL 205.94a, which was amended by 2004, Act 172, Eff. Sept. 1, 2004, for the proposition that rental receipts are exempt from sales tax only if the taxpayer paid sales tax on the rented property at the time of purchase. While section 94a was in effect for periods after September 1, 2004, that same principle has been recognized in Michigan law prior to the amendment. Respondent cites Revenue Administrative Bulletin ("RAB") 1988-39.

Law and Analysis

This case applies to audit periods covering August 1, 2002 to December 31, 2005. The legislature amended the sales tax act for periods on and after September 1, 2004. Therefore, assessments related to tax imposed from September 1, 2004 through December 31, 2005 are subject to the provisions of 2004 PA 173.

Respondent argues, "In general, petitioner's gross proceeds, less deductions if certain requirements are met, are subject to 6% sales tax." Respondent's Brief, p 2, citing MCL 205.52(1). For periods relevant to this case, the following provisions were in effect:

> (1) Except as provided in section 2a, there 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 penalty and interest if applicable as provided by law, less deductions allowed by this act.

> (2) Any person engaged in the business of making sales at retail who is at the same time engaged in some other kind of business, occupation, or profession not taxable under this act, shall keep books to show separately the transactions used in determining the tax levied by this act. If the person fails to keep separate books, there shall be levied upon him or her the tax provided for in subsection (1) equal to 6% of the entire gross proceeds of both or all his or her businesses. The taxes levied by this section are a personal obligation of the taxpayer. MCL 205.52(1) and (2).

Public Act 173 of 2004 added language to MCL 205.51, but did not amend the above provisions, except that subsection (2) [pertaining to failure to keep separate records] was renumbered as subsection (3).

The following definitions were in effect for periods on and after September 1, 2004:

> As used in this act:
>
> ***
>
> (b) "Sale at retail" or "retail sale" means a sale, *lease, or rental* of tangible personal property for any purpose other than for resale, sublease, or subrent.
>
> (c) "Gross proceeds" means sales price.
>
> (d) "Sales price" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, *leased, or rented*, valued in money, whether received in money or otherwise, and applies to the measure subject to sales tax. Sales price includes the following subparagraphs (i) through (vii) and excludes subparagraphs (viii) through (x):
>
> (i) Seller's cost of the property sold.
>
> (ii) Cost of materials used, labor or service cost, interest, losses, costs of transportation to the seller, taxes imposed on the seller other than taxes imposed by this act, and any other expense of the seller.
>
> (iii) Charges by the seller for any services necessary to complete the sale, other than the following:
>
> (A) An amount received or billed by the taxpayer for remittance to the employee as a gratuity or tip, if the gratuity or tip is separately identified and itemized on the guest check or billed to the customer.
>
> (B) Labor or service charges involved in maintenance and repair work on tangible personal property of others if separately itemized.

> **(iv) *Delivery charges* incurred or to be incurred before the completion of the transfer of ownership of tangible personal property subject to the tax levied under this act from the seller to the purchaser. A seller is not liable under this act for delivery charges allocated to the delivery of exempt property. MCL 205.51.** [Emphasis added.]

2004 PA 173 also added section 94a, which provides that rental receipts are included within the definition of "gross proceeds" but are exempt if the lessor paid sales tax on the property at the time of purchase. This has the effect of placing the burden of proof on the taxpayer to establish that the sales tax was indeed paid in order to claim the *exemption*.

The following definition was in effect for periods before September 1, 2004:

> "(b) 'Sale at retail' means 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, or for lease, if the rental receipts are taxable under the use tax act, 1937 PA 94, MCL 205.91 to 205.111, in the form of tangible personal property to a person licensed under this act, or for demonstration purposes or lending or leasing to a public or parochial school offering a course in automobile driving. However, a vehicle purchased by the school shall be certified for driver education and shall not be reassigned for personal use of the school's administrative personnel. For a dealer selling a new car or truck, the exemption for demonstration purposes shall be determined by the number of new cars and trucks sold during the current calendar year or the immediately preceding year without regard to specific make or style in accordance with the following schedule of 0 to 25, 2 units; 26 to 100, 7 units; 101 to 500, 20 units; 501 or more, 25 units; but not to exceed 25 cars and trucks in a calendar year for demonstration purposes. MCL 205.51(1)(b)

Petitioner is "engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration." Therefore, Petitioner is subject to an "annual tax" upon the "gross proceeds of the business" at the rate of 6% of the annual gross proceeds. MCL 205.51.

All retail sellers are required to file an annual return (Treasury form 165), in addition to monthly or quarterly returns. The annual return requires the taxpayer to report total "gross sales" (line 1), rentals of tangible personal property (line 2), and deductions, including nontaxable food sales (line 5 f), and "other" deductions allowed by law (line 5 i) – "other deductions" must be specifically identified. The lines on the annual return correspond with the lines on the monthly worksheets (Treasury form 78, Monthly Sales and Use Tax Worksheet).

For periods on or after September 1, 2004, "Sale at retail" means "a sale, lease, *or rental* of tangible personal property for any purpose other than for resale, sublease, or subrent." MCL 205.51(1)(b) [Italics added]. Therefore, it is clear that the proceeds from the "sale, lease, or

rental" of tangible personal property are included in the tax base, and may only be deducted if certain conditions are met.

The definitions in effect for the years 2002 through September 1, 2004, are as follows:

> (1) As used in this act:
>
> "(a) 'Person' means an individual, firm, partnership, joint venture, association, social club, fraternal organization, municipal or private corporation whether organized for profit or not, company, estate, trust, receiver, trustee, syndicate, the United States, this state, county, or any other group or combination acting as a unit, and includes the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.
>
> "(b) 'Sale at retail' means 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, or for lease, if the rental receipts are taxable under the use tax act, 1937 PA 94, MCL 205.91 to 205.111, in the form of tangible personal property to a person licensed under this act, or for demonstration purposes or lending or leasing to a public or parochial school offering a course in automobile driving… .
>
> "(i) 'Gross proceeds' means the amount received in money, credits, subsidies, property, or other money's worth in consideration of a sale at retail within this state, without a deduction for the cost of the property sold, the cost of material used, the cost of labor or service purchased, an amount paid for interest or a discount, a tax paid on cigarettes or tobacco products at the time of purchase, a tax paid on beer or liquor at the time of purchase or other expenses…. . MCL 205.51.

Petitioner cannot prevail on its claim regarding rentals, unless there is documentary proof that the tax was paid upon purchase. The taxpayer has a duty to prove every deduction. Assuming that the documents show that Petitioner paid tax on the purchase of a tap, it must prove that it collected rental fees in a sum certain in order to prove that it can deduct that amount from gross sales. If it did not pay tax on the purchase, then the rental fees are subject to tax.

If Petitioner did pay tax on the purchase, then it can only deduct the actual, documented rental fees that it collected. If there is such evidence, it must prove that the rental fees were actually included in gross proceeds.

RAB 1988-39 indicates that complete and accurate records must be kept documenting the leasing history of the tangible personal property. Records must be available to track the acquisition and leasing activity of each item of personal property. It is not sufficient to merely present evidence that tax was paid upon the purchase of a certain tap, it must be further demonstrated that the tap upon which tax was paid was rented to a customer in a non-taxable transaction.

> Any person engaged in the business of making sales at retail who is at the same time engaged in some other kind of business, occupation, or profession not taxable under this act, shall keep books to show separately the transactions used in determining the tax levied by this act. If the person fails to keep separate books, there shall be levied upon him or her the tax provided for in subsection (1) equal to 6% of the entire gross proceeds of both or all his or her businesses. The taxes levied by this section are a personal obligation of the taxpayer. MCL 205.52(2).

Under the above section, Petitioner is a person engaged in both "sales at retail" and allegedly engaged in "some other kind" of business: leasing property. Under the definition of "sale at retail" in effect prior to September 1, 2004, "leasing" was not included as a "sale at retail" because the former definition applied only to a transaction in which the "ownership of tangible personal property is transferred for consideration." A transfer of ownership did not include leasing under former section 51(1)(b).

Nevertheless, the specific record keeping requirements for persons engaged in retail sales and "some other kind of business" applies for all periods at issue. Failure to do so means that Petitioner would be entitled to no deductions and subject to tax on 100% of its gross proceeds.

In addition to the record keeping requirements of MCL 205.52, the law requires the retail seller to keep accurate and complete "daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires." MCL 205.67(1). The act specifically requires that in order to claim any deduction, "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…." MCL 205.67(1).

The law further provides that "if the taxpayer fails…to maintain or preserve proper records…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 information that is available or that may become available to the department." MCL 205.67(1).

The law authorizes the department to calculate an assessment, which would include the right to disallow a claimed deduction where insufficient documentation exists to support the deduction. (The law does not allow a taxpayer to file a return based on "information that is available" but rather requires the return to be based on specifically documented transactions. There is no statutory support for Petitioner's claim that it may calculate a deduction for the entire audit period based on a conjectural estimate of the number of tap rentals that it made during the fall of 2005.)

In this case, the department disallowed the deduction for alleged rental fees for taps and other property, which led, in part, to the issuance of the assessment at issue. That assessment is "prima

facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer." MCL 205.67(1) [this section was in effect for the tax years at issue].

Respondent argues that the only available documentary evidence to prove tax was paid on the purchase of taps is an "illegible invoice for purchase of taps." The copy included with Respondent's Exhibit C is partially illegible. However, attached to Petitioner's motion is Exhibit A, a copy of that same invoice dated September 6, 2007 (*outside the audit period*) for "merchandise taps" that Petitioner purchased. The invoice appears to have been electronically generated and shows a sale of "Merchandise Taps" in the total amount of $120.00. Below that description is a line with the "sales tax" printed in the same type that appears on the rest of the invoice. However, the amount of the sales tax is hand printed in the amount of "$7.20." In the box for "total charges" the number $120 is printed, but was crossed out and above it is written "$127.20." This is not the type of "complete and accurate" records that the law requires. This single invoice fails to prove that Petitioner paid tax on the purchase of taps during the audit period. The "amount" of the sales tax is handwritten whereas the rest of the document was typed or electronically generated (not handwritten). This raises doubts as to the reliability of the document. The fact that the invoice date is 9/06/07 – nearly two years after the close of the audit period – renders it of no relevance. The documentary evidence presented for this motion fails to meet Petitioner's burden to prove that it paid sales tax on the purchase of the taps. None of Petitioner's invoices included with Exhibit D include a charge for rental of taps or other property. Summary disposition is appropriate on the issue of whether Petitioner is entitled to a deduction from gross proceeds of amounts related to alleged rental of taps, coolers, or tubs.

The only direct evidence that Petitioner charged a rental fee on any property is a blank "Tap Deposit Contract." Petitioner's Exhibit F. The amount is stated to be a "deposit" of $40.00 for rental of the tap. The Tap Deposit Contract customer agrees to return the tap in working condition and will receive a refund of $30, which leaves a "rental" charge of $10 retained by Petitioner. If the tap is not returned, the customer agrees to purchase the tap for $40, in which case Petitioner retains the $40 deposit (in such case none of the $40 "deposit" would be a rental fee, but rather would be consideration for the purchase of the tap, according to the express terms of the contract). Petitioner has not presented any evidence of executed Tap Deposit Contracts.

The facts are less clear regarding how the rental of "coolers and tubs" were handled. There is no evidence of a "deposit contract" for coolers or tubs. Petitioner claims that it accounted for rentals and delivery charges "under the grocery key" on the cash register. Deposits on kegs and equipment were allegedly "rung up" under the deposit key, which allowed Petitioner to "review the cash register tapes to make sure the employees are ringing up the correct amount." Petitioner's Brief, page 3. It would appear that including rental fees and delivery fees under "grocery" would not allow for Petitioner, or a department auditor, to determine the amount of nontaxable delivery or rental fees, if any, were included in the "food deduction" when calculating the tax base. In any event, Petitioner has not met its statutory record keeping requirements (MCL 205.52; MCL 205.67) by this method.

Even assuming that sales tax was paid when Petitioner purchased the taps, coolers, and tubs, Petitioner has failed to come forward with documentary evidence to prove that property was actually rented to customers. Even if the items were rented to customers, Petitioner has failed to

establish a sum certain for each year at issue or each month at issue, so as to prove the amount to be deducted from gross proceeds. The entire gross proceeds of the business are subject to tax, unless Petitioner can show by statutorily required documentary proofs that it is entitled to allowable deductions. Petitioner has failed to establish a genuine issue of material fact regarding its claim for a deduction for amounts from rental of tangible personal property. This conclusion is also supported by the legal authority and argument in Respondent's Brief in Support.

Delivery Fees

Periods On or After September 1, 2004.

Under 2004 PA 173, for periods on or after September 1, 2004, the law was amended to provide that "Gross Proceeds" (or "sales price") subject to tax includes, "Delivery charges incurred or to be incurred before the completion of the transfer of ownership of tangible personal property from the seller to the purchaser." MCL 205.51(1)(d)(iv). This appears to be modeled after the language of Respondent's administrative rule 74, 1999 AC, R 205.124. This makes it clear that a "delivery fee" that meets the statutory criteria is part of the "sales price" paid for the tangible personal property, and hence included in "gross proceeds."

This statutory amendment substantively changes the law set forth in *Natural Aggregates, infra,* which held that certain delivery fees were <u>not</u> included in gross proceeds, and were not subject to sales tax. The statute now expressly includes certain delivery charges in the tax base. Neither party has pointed to a specific statutory deduction or exemption for delivery charges.

However, for all periods relevant to this case, the act has provided as follows:

> (3) Any person engaged in the business of making sales at retail who is at the same time engaged in some other kind of business, occupation, or profession not taxable under this act shall keep books to show separately the transactions used in determining the tax levied by this act. If the person fails to keep separate books, there shall be levied upon him or her the tax provided for in subsection (1) equal to 6% of the entire gross proceeds of both or all of his or her businesses. The taxes levied by this section are a personal obligation of the taxpayer. MCL 205.52(3) [formerly MCL 205.52(2)].

For periods after September 1, 2004, under MCL 205.51(d)(iv), delivery charges <u>incurred in conjunction with the sale of tangible property</u> are expressly defined by law to be part of the "sales price" of that property. As such, sales price with the delivery charges included "applies to the measure subject to sales tax." See, MCL 205.51(d). It follows that the "delivery charges" at issue in this case have been removed from the scope of the above section 52(3) where they were "incurred before the completion of the transfer of ownership." A delivery service performed in conjunction with a sale of tangible personal property is no longer "some other kind of business, occupation, or profession not taxable under this act." The delivery charges are expressly stated to be included in the tax base. An amount included in "sales price" is included in the "measure subject to sales tax." MCL 205.51(d). In the absence of a specific exemption or deduction, there

is no statutory support for excluding or deducting a delivery fee from "sales price" or "gross proceeds" subject to tax.

The continued viability of MCL 205.52(3) does not change the above analysis. That provision merely states that a person engaged in sales at retail and also engaged in a non-taxable business (i.e., a service business) shall keep "books" to show separately the transactions used in determining the sales tax. As amended by 2004 PA 173, the "transactions used in determining the tax levied by this act" now include delivery charges incurred in relation to the sale of tangible personal property. Section 52(3) presumes the taxpayer is engaged taxable sales of tangible personal property and non-taxable services, in which case separate books must be kept to demonstrate the amounts properly included in gross proceeds.

In this case, Petitioner has provided copies of invoices for sales of tangible personal property, which indicate that a delivery charge was incurred at the time of the sale during the audit sample period. Whether the transfer of ownership of the property occurred at the cash register, at the time the invoice was created, or at the time the product was delivered, it is clear that the delivery charge was incurred before the transfer of ownership. This is not a case where a sale was closed, title transferred, and then a separate contract for a delivery service was negotiated and entered into. This is the type of retail transaction with accompanying delivery that is contemplated by MCL 205.51(1)(d)(iv). Therefore, Petitioner is not entitled to deduct any delivery charges incurred on or after September 1, 2004 through December 31, 2005. Respondent is entitled to summary disposition on the issue pertaining to delivery charges for those periods.

Periods Before September 1, 2004.

The law in effect for periods before September 1, 2004 is discussed in a factually similar case, *Natural Aggregates, infra*., administrative rule (1979 AC, R 205.124), and the department's RAB 2002-11. The Tribunal is bound by the published decision in *Natural Aggregates, which applied the law in effect for the periods at issue in that case (October 1, 1974 through April 30, 1979).* That case is applicable to the periods before September 1, 2004, involved in this case.

In *Natural Aggregates Corporation v Dep't of Treasury*, 133 Mich App 441; 350 NW2d 272 (1984), the taxpayer sold sand and gravel at retail and also delivered the sand and gravel to its customers in its own trucks. The taxpayer issued separate invoices and charged a separate fee for the delivery charges. The price of gravel was 30 cents per ton, and the delivery charge was $1.55 per ton. There was no dispute regarding the amount of the delivery charges.

The issue was whether the delivery charges were subject to sales tax. The court did not treat the case as a "deduction" from the tax base, but rather the issue was whether the delivery charges were included in gross proceeds as part of a sale at retail. The court held that the delivery charges were consideration for a service and not for the transfer of ownership of tangible personal property, and therefore were <u>not included in gross proceeds</u> (and thereby not subject to tax). The case involved a question as to imposition of the tax rather than a deduction or exemption.

The question was one of statutory construction. *Id*., p 444. The court construed the language of MCL 205.52, which is now contained in MCL 205.52(3):

> (3) Any person engaged in the business of making sales at retail who is at the same time engaged in *some other kind of business, occupation, or profession not taxable under this act* shall keep books to show separately the transactions used in determining the tax levied by this act. If the person fails to keep separate books, there shall be levied upon him or her the tax provided for in subsection (1) equal to 6% of the entire gross proceeds of both or all of his or her businesses. The taxes levied by this section are a personal obligation of the taxpayer. MCL 205.52(3) [Italics added].

The court rejected the department's interpretation that the taxpayer must be engaged in a business "totally unrelated to the transfer of ownership of personal property" in order for proceeds from that business to fall outside the reach of the sales tax. The court cited the Supreme Court's ruling in *Sims v Firestone Tire & Rubber Co*, 397 Mich 469; 245 NW2d 13 (1976), which considered the same language now found in section 52(3). That case is factually distinguishable in that it did not involve delivery charges, but rather the taxpayer sold tires and charged a service fee for wheel rotation and balancing. The Supreme Court majority held that the amounts that Firestone collected from its customers and remitted to the state (4% of service charges) were actually a penalty under 52(3) that was imposed for failure to comply with the record keeping requirements of that section. The Court of Appeals cited *Sims* for the proposition that the services constituted "some other business" (a service) to which sales tax did not apply. The court reasoned that "some relationship between the service and the transfer of ownership will not *ipso facto* render the service taxable." *Id*., p 445.

It is undisputed that Petitioner sells tangible personal property. The documentary evidence presented with this motion indicates that Petitioner also held itself out to the public that it offered delivery services during the fall of 2005. Petitioner's Exhibit M is a photograph of a van with an advertisement on the side window, which states: "Empty Keg Party Store, Beer, Liquor, Wine, Kegs, Cigarettes, Delivery Available." [Emphasis added.] Petitioner's Exhibit K is a copy of an advertisement for the Empty Keg party store stating: "Let us help you plan your party! We can help you plan your beverage and bar needs!" and "We deliver and Set Up." Although there is no direct evidence regarding whether or how this advertisement was published, this at minimum creates an issue of fact. Respondent has not set forth any specific facts or documentary evidence to refute Petitioner's claim that it offered delivery services related to its sales. (Respondent's informal conference recommendation indicates that Petitioner made deliveries and that the customer had the option to pay for delivery or pick up the merchandise.)

Petitioner's Exhibit D consists of 20 pages of invoices with the heading "Empty Keg Party Store, Invoice/Delivery Receipt," which also indicate "Delivery Available." For example, Petitioner's Exhibit D includes a two-page invoice that indicates that the sale was "Delivered to: "Suite A, Ron," "Date ordered: 10-12-05", and "Ordered by: Ron." The first page of the invoice indicates the item description, quantity, and price. The total amount of the sale is $239.87. The last item on page two is a charge in the amount of $25 for "delivery and set up." A handwritten notation states, "Paid 10-14-05 Credit Card."

Exhibit D includes several other invoices that include a charge of $25.00 for delivery and set up. The invoices show dates in October and early November 2005, although some are not dated.

It is apparent that the customer could either pick up the goods at Petitioner's business location, or may pay a $25 fee for "delivery and set up." The decision in *Natural Aggregates* was driven by the fact that the customer opted for the delivery service, contracted separately for the service, and paid a separate price. *Id*., p 446. The cost of trucking charges was not a cost "figured in calculating the gross price of the product." The same is true in this case, where the customers may either pick up the goods themselves or may pay an additional fee for delivery and set up.

Respondent cites its administrative rule, which states that "no deduction is allowable on account of…delivery charges incurred or to be incurred on tangible personal property prior to completion of transfer of ownership of such property from the seller to the purchaser for use or consumption. It is immaterial whether such transportation charges are billed separately or whether they are paid by the seller or the purchaser." 1979 AC, R 205.124 ["Rule 74"].

Rule 74 was in effect during the tax years involved in *Natural Aggregates*, but it was not cited in that case. *Natural Aggregates* held that the delivery charges were not a "deduction" as the rule presumes, but rather that proceeds from services were not subject to a tax imposed on gross proceeds from sales of tangible personal property. The sales tax does not apply to services, and therefore, it is not a question of whether Petitioner can prove that it is entitled to deduct an amount from gross proceeds, but the amounts are never included in gross proceeds in the first instance.

RAB 2002-11 (approved March 28, 2002) is the department's interpretation of *Natural Aggregates* and its effect upon the taxation of delivery charges. The RAB also discusses an unpublished court of appeals opinion, *Margaret H James Ltd v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 1992 (Docket No. 132896).

RAB 2002-11 is contrary to the published case of *Natural Aggregates.* There is no indication from that case that the taxpayer must engage in separate accounting as if the delivery service were a division of the company. There is no indication from *Natural Aggregate* or the statutes interpreted thereby, that the taxpayer has a burden to prove that its separate delivery service operates at a profit. The RAB mistakenly draws this requirement from *Margaret H James Ltd v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 1992 (Docket No. 132896).

The department has devised a four factor test for determining whether a taxpayer engages in non-taxable delivery service, which factors are cited from the RAB at page 10 of Respondent's Brief. The documentary evidence tends to establish that factors one and two are met, because 1) the customer has the option to pick up the property or have it delivered, and 2) the delivery charge is separately negotiated and is not a cost in calculating the merchandise price. The second factor would be met if Petitioner's records show that the $25 fee is separately stated as appears on several invoices. Petitioner's Exhibit D.

Factor 3 from RAB 2002-11 requires that the "taxpayer's books and records separately identify the transactions used to determine the tax on the sale at retail…." This factor finds support from MCL 205.52 and MCL 205.67 (in effect for the tax years at issue). The known facts at this time

indicate that Petitioner's cash register records included delivery charges under the "grocery key." This does not meet the requirement of MCL 205.52 that the taxpayer shall keep separate "books to show separately the transactions used in determining the tax levied by this act." Although apparently not presented during the audit, the taxpayer maintained some invoices of transactions where delivery charges are documented. Petitioner's Exhibit D.

In addition to the record keeping requirements of MCL 205.52, the law requires the retail seller to keep accurate and complete "daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires."

The act requires that in order to claim any *deduction*, "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…." MCL 205.67(1). Although Petitioner had a duty to keep proper records, the delivery charges incurred prior to September 1, 2004, did not involve a claimed *deduction*. See, *Natural Aggregates, supra.* As stated above, there remains an issue of fact as to whether Petitioner can produce records similar to those included with its Exhibit D sufficient to establish a sum certain for delivery fees for the entire audit period.

As to the fourth factor in RAB 2002-11, Respondent has failed to provide legal support for the requirement that "delivery service records show a net profit (thus the delivery service has evidence of a separate competitive, commercial endeavor)." This interpretation finds no support in the published case *Natural Aggregates* or in the statutes. The RAB contains scant discussion of *Margaret H James Ltd v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 1992 (Docket No. 132896). Respondent does not cite or discuss that case in its brief. According to the RAB 2002-11, that case also held that the delivery charges must be at a market rate. In this case, the delivery charge is at market rate because the customer can choose to pay it or not pay it. If it was not at a reasonable market rate, the customer would not opt for delivery. There is no indication that the price of the goods or the delivery charges are not at market rate.

In *Margaret H James Ltd*, the Court of Appeals affirmed the decision of the Court of Claims to refund taxes paid on delivery charges. In that case, the taxpayer sold and delivered furniture to its customers. Treasury assessed sales tax for failure to include delivery charges in the tax base. The Court of Appeals held that the delivery charges were not part of gross proceeds of a sale at retail. The parties had stipulated that, "delivery is not required, that it is separately invoiced and paid for, that delivery charges are competitive, and *that the delivery service produces a net profit*." The court held that "it is clear that 'delivery is a separate conceptual and temporal transaction' from the sale of retail furniture," citing *Natural Aggregates*. The court did not impose a bright line rule to be applied in all cases that the delivery service must produce a net profit. The court cited the stipulated facts, and ruled that the delivery charges were not taxable. The delivery of furniture was a "different kind of business" the revenues of which are not part of "gross proceeds" of "sales at retail" and was therefore not subject to the sales tax. There is no meaningful distinction between the delivery of sand and gravel in *Natural Aggregates*, the delivery of furniture in *Margaret H James Ltd*, and the delivery of Petitioner's products.

In *Viviano Flower Shop, Inc v Department of Treasury*, MTT Docket No. 252577, the Tribunal rejected the department's position that a non-taxable delivery service must be proven to operate at a profit. In that case, the Tribunal found that "Petitioner kept books and records to identify the transactions used in determining the tax owed on sales at retail." The Tribunal did not expressly rule on what type of "books and records" would satisfy the statutory requirement under MCL 205.52. In our present case, there is an issue of law and fact as to whether any evidence that Petitioner may produce in response to this Order is sufficient to meet the statutory requirement to keep "books" to separately record sales of tangible personal property and delivery charges.

Petitioner has presented documentary evidence tending to prove that it collected specific delivery charges during the audit sample period, which indicates that it maintained records of specific transactions involving delivery charges. It is fair to allow Petitioner the opportunity to present documentary evidence of delivery charges that it may have collected prior to September 1, 2004.

Proposed Judgment

IT IS ORDERED that Petitioner's Motion for Summary Disposition is DENIED on the issue of rental fees.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is GRANTED with regard to Petitioner's claims pertaining to rental fees.

IT IS FURTHER ORDERED that Petitioner's Motion for Summary Disposition is partially GRANTED to the extent that it shall be allowed to produce evidence that it engaged in a delivery service for which it received fees that are not subject to sales tax, *subject to the conditions set forth herein*.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is DENIED with regard to Petitioner's claim pertaining to delivery charges for periods prior to September 1, 2004, *subject to the conditions stated herein.*

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is GRANTED with regard to delivery fees incurred after September 1, 2004.

IT IS FURTHER ORDERED that within 21 days from the date of this Order, Petitioner shall exchange with Petitioner and file with the Tax Tribunal complete, accurate, books and records that would be admissible at a hearing as necessary to establish that the assessment imposes tax on delivery fees in a sum certain for delivery services performed from August 1, 2002, through August 31, 2004. Failure to produce such evidence shall subject Petitioner's case to dismissal upon a proper motion for summary disposition filed by Respondent pursuant to this Order.

IT IS FURTHER ORDERED, that Respondent may file a new motion for summary disposition within 35 days of entry of this Order.

Date Signed: February 24, 2010 By: Thomas A. Halick

Date Entered by Tribunal: February 24, 2010

This Proposed Order does not resolve all pending claims and therefore the parties do not have the right to file written exceptions under MCL 24.281 or MCL 205.726 at this time. A final proposed order shall be issued after further proceedings and the parties shall have the right to file written exceptions at that time prior to entry of a final order or judgment by the Michigan Tax Tribunal.