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

EBI-Detroit, Inc.,
Petitioner,

v

MTT Docket No. 382224
Assessment No. Q340074

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

FINAL OPINION AND JUDGMENT

INTRODUCTION

EBI-Detroit, Inc. (Petitioner) appeals an assessment issued by the Michigan Department of Treasury (Respondent) of use tax in the amount of $20,870.00, plus interest. A hearing was held on September 1, 2011. The assessment is the result of Respondent's audit for the tax period January 1, 2003 through December 31, 2006, which found that Petitioner had not paid sales tax on certain purchases from Michigan vendors nor did it accrue use tax on certain direct expense purchases and fixed assets. Petitioner disagrees with Respondent, arguing that in some cases the tax was included in lump-sum contract prices or that the purchase was not taxable. The Tribunal finds Petitioner has partially met its burden to refute the prima facie correctness of the assessment, and the assessment is adjusted.

BACKGROUND

Petitioner is a general contractor construction company that performs work in the Detroit metropolitan area. Mr. Robert Schimmel is the president and represented Petitioner in this case. Petitioner's primary industry is in municipal

school construction, but it has constructed office buildings and performed work in hospitals, jails and other various types of construction. Respondent performed a use tax audit in August 2008. Respondent's auditor determined Petitioner had underpaid use tax based on the conclusion that certain of the invoices or other documentation did not show that tax was properly included in the purchase price and that Petitioner did not self-assess use tax. Respondent issued an Intent to Assess on August 28, 2008. Petitioner requested and was granted an informal conference with Respondent's Hearing Division, which was scheduled to be held on August 25, 2009. Although the record does not show whether an informal conference took place, the Hearing Referee nevertheless found Respondent's audit determination to be correct and recommended the Intent to Assess be assessed as originally issued. Accepting the Referee's recommendation, Respondent issued its Decision and Order of Determination on September 9, 2009, and on September 18, 2009, issued Final Bill for Taxes Due (Final Assessment) Q340074, for $20,870.00 tax, and $7,674.21 interest, as accrued through September 18, 2009. Petitioner filed this appeal on September 28, 2009.

PETITIONER'S CONTENTIONS:

Petitioner appeals the use tax assessment noting the following:

1. Petitioner has lost a 3 million dollar Arbitration.
2. Petitioner for intent and purpose [sic] is no longer in business.
3. Petitioner is a construction company.
4. Petitioner has not been awarded any new work since October 2008.
5. Petitioner has no assets as they have been disposed of or levied.
6. Petitioner cannot afford and does not have representation.
   (See Petitioner's Petition date July 26, 2010).

Petitioner's Exhibits-

1. Schedule of purchase transactions dated 8/29/11.

2. Letter from Curtis Glass Company dated 8/26/11.
3. Letter from CTS/Unitel Companies dated 8/29/11.
4. Letter from Conney Safety dated 8/29/11.
5. Purchase order issued by Petitioner to National Recreation Systems, Inc. dated 4/12/06.
6. Purchase order issued by Petitioner to Midwest Stainless Fabricating, Inc. dated 4/12/06.
7. Invoice from Canton Gardens Greenhouse dated 12/12/06.

Petitioner did not submit a trial brief; however, at hearing Petitioner's president, Robert Schimmel, represented Petitioner and testified in per se on its behalf. Mr. Schimmel presented various arguments and offered evidence to rebut Respondent's presumption of use tax due. Specifically, Petitioner contends the following:

1. Fixed asset purchase – CTS/Unitel Phone System
   Petitioner contends that this vendor originally installed the phone system in Petitioner's office in 1997, and the subject purchase was a 2003 up-grade. Mr. Schimmel provided evidence that the vendor collected sales tax on the original purchase, but testified that the invoice for this transaction has been lost. (Transcript [Trans], p 23) He contends that a letter provided by the vendor supports the assertion that the vendor collected the tax on this transaction. (See Petitioner's Exhibit 3)

2. Materials and supplies expense exceptions – Petitioner contends that tax is included in quotations from subcontractors on all bids, plans and specifications and Mr. Schimmel testified that the "documents say they're to provide, per the plans, specifications and so on, and that . . . sales taxes are included and charged." (Trans, p 12)
   a. National Recreation Systems, Ft Wayne, IN – Petitioner offered evidence in the form of a purchase order which Mr. Schimmel testified includes "boilerplate" language that says "sales tax included." (See Petitioner's Exhibit 5) He further testified that "[w]e included it as a lump sum to this vendor. . . [T]hey signed this document . . . on the face value that our contract with them is lump sum all inclusive. . ." (Trans, pp 13-14)

b. Midwest Stainless Fabricating, Livonia, MI – Petitioner offered evidence in the form of a purchase order issued to this vendor which states "tax included." (See Petitioner's Exhibit 6)
c. Gibson, Inc., Englewood, CO – Mr. Schimmel testified that " . . . although our orders to our people to buy out [sic] is lump sum and so on, that this may be something that we have some obligation for." (Trans, p 32)
d. Curtis Glass Company, Troy, MI – Petitioner submitted evidence in the form of a letter provided by the vendor that states "It is the general policy of Curtis Glass Company to pay state sales tax unless the project is tax exempt." (See Petitioner's Exhibit 2) Mr. Schimmel testified that the purchase order issued by Petitioner did not indicate whether or not tax was included in the purchase price. However, he contends that the letter shows the "normal manner of business to collect and pay tax" by this vendor supports a finding that tax was paid. (Trans, p 15)

3. General administrative expense exceptions -

a. Various periodicals – Petitioner contends that periodicals are not subject to tax.
b. Direct Safety, Madison, WI – Mr. Schimmel testified that Petitioner has no records for this item and he was informed that this vendor is no longer in business having been purchased in 2008. (Trans, p 24) Petitioner offered a letter dated August 29, 2011, from the successor company stating that the company currently collects Michigan taxes. (See Petitioner's Exhibit 4)
c. Great Lakes Graphics, Southgate, MI – Mr. Schimmel testified that he does not "have a position that there was or was not" tax included. (Trans, p 30)
d. Canton Gardens Greenhouse, Canton, MI – Petitioner offered evidence in the form of an invoice for 25 poinsettia plants at a per unit cost of $25.00. (See Petitioner's Exhibit 7) Petitioner asserts that this was a lump sum purchase and that sales tax was included in the unit price. Mr. Schimmel testified that there is nothing on the invoice document that indicates sales tax was charged. (Trans, pp 32-33)

RESPONDENT'S CONTENTIONS

Respondent contends that the audit assessment is correct and that Petitioner owes use tax on purchases from Michigan vendors where sales tax was not charged by the vendors and out-of-state purchases where use tax was not accrued.

Respondent's evidence-

R-1 Intent to Assess Q340074 issued 8/28/08.
R-2 Final Assessment Q340074 issued 9/18/09.
R-3 Audit Report of Findings, not dated.
R-4 Informal Conference Recommendation, not dated.
R-5 Final Audit Determination Letter, dated 9/8/2009.
R-6 Correspondence sent by EBI to Respondent, dated 9/24/09.
R-7 EBI Detroit – Use Tax Audit Schedules 2003-2006.

As a result of its audit, Respondent's auditor determined the following exceptions:

1. Fixed asset purchase – purchase of $5,175 for a CTS/Unitel Phone System was found to be in error as an untaxed transaction. An invoice could not be found to review proper compliance.

2. Materials and supplies expense exceptions – total $15,618
    a. National Recreation Systems, Ft Wayne, IN – auditor made no notes.
    b. Midwest Stainless Fabricating, Livonia, MI – auditor's note indicates vendor was contacted and that no installation was performed.
    c. Gibson, Inc., Englewood, CO – auditor's note indicates vendor was contacted and that no tax was billed or included in price.
    d. Curtis Glass Company, Troy, MI – auditor's note indicates vendor was contacted and that no taxes were included and no installation was performed.

3. General administrative expense exceptions - $1,859
    a. Various periodicals.
    b. Direct Safety, Madison, WI – Safety signage.

c. Seton Identification Products, Chicago, IL – Danger signs
d. National Geographical Society, Washington, DC – Holiday cards
e. Great Lakes Graphics, Southgate, MI - Signage
f. Canton Gardens Greenhouse, Canton, MI – Poinsettia plants
g. National City Bank Credit Card - Frontgate Catalog

Respondent contends that Petitioner was not registered for use tax and found that Petitioner had no procedures in place for accrual and remittance of use tax. (See Respondent's Exhibit R-3) Therefore, Respondent's auditor reviewed "accounts of interest" for 2006, and based on the exceptions found, used a monthly average projection method and a percentage of error calculation applied to the expenditures during the entire audit period, resulting in the asserted underpayment of tax.

In support of its position, Respondent called Kyle Thelen, tax auditor, as its witness. Mr. Thelen testified that the "provisional auditor" on this case is no longer employed by Respondent and that Mr. Thelen was assigned the case approximately one month prior to hearing. He stated that his normal duties include adjusting audits that are being litigated. Mr. Thelen testified that he had been working with Petitioner, reviewing additional documentation provided, and determined that there was nothing that warranted an adjustment to the assessment. Mr. Thelen could not confirm or deny whether any of the vendors had been subjected to a sales tax audit by Respondent for the tax period at issue. (Trans, pp 36-39)

FINDINGS OF FACT

The Tribunal finds the following facts:

1. Petitioner is engaged in business as a general construction contractor.

2. Petitioner was not registered for use tax and did not file or pay use tax during the audit period.
3. The phone system upgrade purchased from CTS/Unitel Companies was installed in Petitioner's offices and properly recorded as a fixed asset. An invoice was not produced by either party.
4. CTS/Unitel has collected and remitted sales tax to Respondent in the past.
5. Petitioner submitted two purchase orders that indicate "tax included" in the purchase price. Invoices were not produced by either party.
6. Petitioner stipulated at trial that the purchase from Gibson, Inc. was taxable and that tax was not included in the purchase price. (Trans, p 32)
7. Curtis Glass Company collected sales tax on a transaction with Petitioner on February 15, 2006. Respondent did not include that transaction in the exceptions.
8. Respondent stipulated at trial that certain periodicals qualified as tax exempt.
9. Petitioner submitted only one invoice as evidence, which was issued by Canton Gardens Greenhouse, and sales tax was not included on the face of the document.
10. None of Petitioner's construction jobs at issue were tax exempt projects.
11. Respondent did not produce the original auditor to testify as to the audit procedures followed and work papers prepared.

CONCLUSIONS OF LAW

Michigan law imposes both a sales and use tax for the privilege of engaging in certain business transactions. MCL 205.52; MCL 205.93. The General Sales Tax Act (STA) levies a tax equal to 6 percent of the gross proceeds of the business on persons making sales at retail where tangible personal property is transferred for consideration. MCL 205.52(1). A sale at retail is defined as a sale, lease, or rental of tangible personal property for any purpose other than for resale, sublease, or sub-rent. MCL 205.51(1)(b). Similarly, the Use Tax Act (UTA) imposes a tax on persons in Michigan for the "privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property or services . . . ." MCL 205.93(1). The taxes are not meant to be duplicative. Rather, the UTA applies in situations where the purchase is not subjected to sales tax.

MCL 205.94(1)(a). In other words, the UTA exists to collect the amount of tax that would otherwise be collectible under the STA.

Respondent based its audit conclusions on what it believed to be the best information available, as is consistent with MCL 205.67. (Repealed by 2008 PA 438, § 1, Imd Eff Jan. 9, 2009). MCL 205.67 establishes that the ". . . assessment is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer." See *Vomvolakis v Department of Treasury*, 145 Mich App 238; 377 NW2d 309 (1984). The Tribunal in *Summerville v Department of Treasury*, MTT Docket No. 149724 (1994), stated that the "taxpayer must show that the assessments are improper, unlawful or inappropriate and what, if any, is the correct and proper tax liability."

Respondent's auditor was not available to testify and therefore defend the completeness and accuracy of his or her findings. Respondent offered testimony of an alternate auditor who was unpersuasive in his attempt to disprove the evidence brought forth by Petitioner. Specifically, Petitioner offered evidence and testimony of its president to show that some of the transactions were either not taxable or that tax was included in the purchase price. For example, the fixed asset phone system upgrade purchased from CTS/Unitel was a sales taxable transaction. Petitioner contends that the vendor collected tax but the invoice could not be located to support its claim. Petitioner's evidence shows that the vendor has a history of properly collecting tax. Respondent stipulated that the vendor collected tax on a prior purchase made by Petitioner (Trans, p 22), and offered no reason to believe the vendor did not collect it on this transaction. The parties simply could not find a copy of the invoice. The Tribunal finds sufficient evidence that the vendor was required to collect sales tax and has, in fact, collected tax on purchases by Petitioner in the past.

The Tribunal finds that the purchases from National Recreation Systems and Midwest Stainless Fabricating, made through the issuance of purchase orders, were lump-sum purchases that included tax. The terms of the purchases were not made evident, however, the statement on the purchase order, "tax included," is sufficient to show that Petitioner intended for the vendor to include sales tax in the sale price and assumed it was so. Respondent provided nothing to refute this assumption. Respondent's auditor included a notation in the work papers indicating that the Michigan vendor, Midwest Stainless Fabricating, Inc., reported that there was no installation; however, there is nothing regarding sales tax. The auditor did not make any notes regarding the purchase from National Recreation Systems, Inc.

The parties agree that the periodicals are not taxable, except for one, i.e., Supervisors Safety Bulletin, published by Progressive Business Systems. Respondent stipulated at trial that the others should not be included in the exceptions. In summary, the Tribunal finds that Petitioner has met its burden of proof that Respondent improperly included the above purchases as exceptions and assessed tax thereon.

Regarding the purchase from Curtis Glass Company, the audit work papers indicate an inconsistent treatment by this vendor. In one case, tax was apparently included in the amount billed. This particular invoice, however, did not include tax for an unexplained reason other than a note made by the auditor that installation was not performed. Petitioner's only evidence to rebut the assumption that tax was not paid was a letter from the vendor stating its general policy is to pay state sales tax unless the project is exempt. Petitioner provided nothing specific to this transaction and Mr. Schimmel testified that none of the projects were exempt. The Tribunal finds that Petitioner failed to prove that tax was paid.

The Tribunal further finds that Petitioner failed to meet its burden of proof that tax was paid on the purchases made from Direct Safety, Canton Gardens Greenhouse, and Great Lakes Graphics. The letter from Conney Safety is only evidence that the vendor **currently** collects Michigan tax but there is nothing to indicate that its predecessor did so. Petitioner's argument that Canton Gardens Greenhouse included the tax in the unit price is unsubstantiated and holds no merit. And finally, Petitioner offered no evidence to support a position that Great Lakes Graphics paid tax.

This Tribunal, upon due, careful, and deliberate consideration of the entire record in this matter, finds that the Assessment is incorrect and shall be adjusted to reflect the removal of the purchases from the following: CTS/Unitel Companies, Midwest Stainless Fabricating, Inc., National Recreation Systems, Inc., Architectural Digest, McGraw Hill Construction Eng, www.travelandleisure.com, Robb Report, and Fast Company. The Tribunal finds that the correct amount of tax is $14,115, which shall be assessed with interest calculated as set forth below.

JUDGMENT

IT IS ORDERED that Assessment No. Q340074 shall be adjusted.

IT IS FURTHER ORDERED that the officer charged with collecting the affected taxes, interest, and penalties shall collect the taxes, interest, and penalties as required by this Order within 28 days of the entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment.

Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 1999, at the rate of 5.49% for calendar year 2000, (ii) after December 31, 2000, at the rate of 6.56% for calendar year 2001, (iii) after December 31, 2001, at the rate of 5.56% for calendar year 2002, (iv) after December 31, 2002 at the rate of 2.78% for calendar year 2003, (v) after December 31, 2003, at the rate of 2.16% for calendar year 2004, (vi) after December 31, 2004, at the rate of 2.07% for calendar year 2005, (vii) after December 31, 2006, at the rate of 3.66% for calendar year 2007, (viii) after December 31, 2007, at the rate of 5.81% for calendar year 2008, (ix) after December 31, 2008, at the rate of 3.31% for calendar year 2009, (x) after December 31, 2009, at the rate of 1.23% for calendar year 2010, and (xi) after December 31, 2010 at the rate of 1.12% for calendar year 2011.

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

MICHIGAN TAX TRIBUNAL

Entered: November 16, 2011 By: Cynthia J Knoll