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

Sidney Frank Importing Co., Inc.,
Petitioner,

v

MTT Docket No. 383623

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J. Knoll

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

I. SUMMARY

Petitioner, Sidney Frank Importing Company, Inc., is appealing Respondent, Michigan Department of Treasury's Final Assessment No. R498688 for 2004 Single Business Tax ("SBT") in the amount of $858,914.00, plus $350,209.97 interest[1]. The parties filed motions for summary disposition and oral argument was held on July 7, 2011. At issue is Respondent's denial of Petitioner's claim that the apportionment formula should include the proceeds from the sale of its interest in the Grey Goose vodka product line. Respondent determined that the transaction was not a "sale" as that term is defined by statute and therefore was improperly included in the sales factor. Petitioner contends that the Grey Goose Transaction (herein defined) must be considered in the apportionment factor in order to "avoid the unconstitutional taxation by Michigan of a disproportionate share of the business income generated outside the State." Brief in Support of Petitioner's Motion (Pet Brief), pp. 18 & 19. The Tribunal disagrees. Respondent has adequately

[1] Interest continues to accrue per statute.

shown that the Grey Goose Transaction is not a "sale" under MCL 208.7(1) and Respondent's assessment is valid.

II. INTRODUCTION

Petitioner is appealing the SBT assessment issued by Respondent on January 19, 2010. The assessment was based on an audit conducted by Respondent for the tax periods which ended December 31, 2004, 2005, 2006, and 2007. Petitioner filed this appeal with the Tribunal on February 23, 2010, and has since agreed to and paid the assessments for 2005 through 2007. The assessment for 2004 is the only year remaining at issue.

During 2004, Petitioner sold the Grey Goose product line including all related tangible and intangible assets to Bacardi Limited for a gain of over $2.1 billion. Petitioner timely filed its 2004 SBT return and included the gain in the amount of $2,171,805,163 in its tax base. Petitioner also included the gain in the denominator of its sales factor resulting in an overall apportionment percentage of .8891% to Michigan. Respondent determined that Petitioner's sale of the intangible assets did not qualify as a "sale" under MCL 208.7(1) and therefore, could not be included in the calculation of Petitioner's sales factor for apportionment purposes. The result was an increase in Petitioner's overall apportionment factor to 4.8376% and the additional tax assessment of $858,914.

On June 3, 2011, the parties submitted a Joint Stipulation of Facts upon which they requested the Tribunal decide cross-motions for summary disposition, and on June 3, 2011, Petitioner filed a motion for summary disposition pursuant to MCL 2.116(C)(10). On June 21, 2011, Respondent filed a Brief in Opposition to Petitioner's Motion and a Request for Summary Disposition in its favor pursuant to MCL 2.116(C)(10) and MCL 2.116(I)(2). Petitioner filed its

Rebuttal Brief in Support of Petitioner's Motion for Summary Disposition on June 30, 2011. The Tribunal ordered oral argument which took place on July 7, 2011.

III. PETITIONER'S CONTENTIONS

Petitioner contends that it is entitled to include the sale proceeds of the Grey Goose assets in its entirety in the tax base and formulary apportionment to avoid the unconstitutional taxation by Michigan of a disproportionate share of the business income generated outside the State. Petitioner asserts that, as required by the SBT Act, it ". . . calculated a tax base of $2,273,646,000, as adjusted, including therein as part of the 'business income' just under $2.2 billion of gain on the Grey Goose vodka sale." Pet Brief, p. 2. Petitioner apportioned its "overall tax base from interstate business activity as required by Section 41 of the Act, and included the almost $2.2 billion of gain . . . in the denominator of the sales factor of the apportionment formula." *Id.*

Petitioner states that the business income was derived from a business activity both within and outside the state, and because it is taxed and is subject to tax in other states, its "tax base is subject to apportionment to Michigan as provided in Section 45a." Pet Brief, p. 7. Petitioner further looks to MCL 208.51(1), which provides that the apportionment equation is created by calculating a numerator which consists of the total sales of the taxpayer in Michigan during the tax year, and by calculating a denominator of the total sales of the taxpayer in the United States during the tax year. *Id.*

Petitioner argues that ". . . as a form of value-added tax, the SBT included capital gain from the sale of the Grey Goose vodka product line, including the portion of the transaction attributable to the sale of intellectual and other intangible property . . . as taxable business

activity under the Act, which is included in the taxable measure of Petitioner's 'tax base.'" Pet Brief, p. 10. Petitioner contends that,

> [b]ecause it is clear that the use and sale of intangible property constitutes "business activity" under Act Section 3(2), it follows that the Act requires that the remaining portion of the Grey Goose sale, namely the portion attributable to the sale of trademarks, intellectual property and other intangible property, must be included in the sales factor of the apportionment formula.

Id.

Petitioner contends that the transaction constituted a sale under MCL 208.7(1) because selling the Grey Goose line was a "business income" or "capital gain" that resulted from ordinary business operations and should be included in its tax base for the 2004 tax year. Pet Brief, p. 9. Petitioner argues that "[t]he broad definition of 'business income,' as modified by the value-adding items of business activity are consistent with the characterization of the SBT as a form of value-added tax imposed for the privilege of conducting business activity within the State." *Id.,* citing *Trinova Corp v Michigan Department of Treasury,* 498 US 358; 111 S Ct 818 (1991); *Mobil Oil Corp v Department of Treasury,* 422 Mich 473; 373 NW2d 730 (1985). Petitioner also contends that the sale represented "business activity" under MCL 208.7(1)(a)(iii), which states that: "sales include 'the rental, lease, licensing, or use of tangible or intangible property which constitutes business activity.'" (Emphasis added by Petitioner.) Pet Brief, p. 10. Petitioner states that, under this definition of business activity, it is clear that "the sale of trademarks, intellectual property, and other intangible property must be included in the sales factor of the apportionment formula." *Id.*

Alternatively, Petitioner contends that it may gain relief under MCL 208.69, which comes into play if the apportionment formula does not fairly represent the extent of the taxpayer's business activity in the state and the taxpayer petitions for relief or the commissioner requires the following:

a. Separate accounting.
b. The exclusion of 1 or more of the factors.
c. The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state.
d. The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base.

The statute goes on to state that the alternative method must be approved by the commissioner and it must be demonstrated that the current formula leads to a grossly distorted result. Pet Brief, pp. 12-13, quoting MCL 208.69(1)-(3).

Petitioner contends that "[t]he gain, a portion of which is taxed in Michigan, resulted from the sale of an intangible asset created by Sidney Frank, Petitioner's majority shareholder, decades ago in New York that related to a tangible product that was developed and manufactured in France." Pet Brief, p. 14. Additionally, other than routine sales and the maintenance of a small inventory at a broker location in Michigan, Petitioner contends that it had little connection with Michigan. Therefore, Petitioner contends that the inclusion of the Grey Goose gain in the denominator attributed a fair share of the gain to the State. Petitioner further contends that "Respondent is excluding the very 'sale' that contributed to the entirety of Petitioner's tax base, and which produced proceeds that were at least six times larger than Petitioner's entire 2004 product sales." Pet Brief, p. 15.

Finally, Petitioner contends that "[f]ailure to grant apportionment relief under Section 69 to Petitioner violates Commerce Clause and Due Process protections." Pet Brief, p. 16. Petitioner argues that "[i]t is fundamental that a state tax on corporate income or business activities must be 'fair.'" *Container Corp of America v Franchise Tax Bd,* 463 US 159; 103 S Ct 2933 (1983). Petitioner further argues that "two requirements [ ] must be met if a state is to tax interstate business activity: there must be some connection between a state and the corporation's activities producing the income . . . and a state may only tax the portion of the corporation's income that is

fairly attributable to the income-producing activity in this state." *Id*., citing *Mobil Oil Corp v Comm'r of Taxes of Vermont,* 445 US 425; 100 S Ct 1223 (1980).

Petitioner also states that *Complete Auto Transit, Inc v Brady*, 430 US 274; 97 S Ct 1076 (1977), sets forth "a four-part test to define constitutional limitations on a state tax on interstate commerce. The prong most relevant to the instant case is the one of 'fair apportionment.'" *Id*. Petitioner argues that the apportionment must fairly represent the activities conducted within Michigan. Petitioner states that "the SBT liability asserted by Respondent fails the external consistency test since the gain on the sale of Grey Goose intangibles does not have its source in Michigan, but is attributable to activities outside the State." Pet Brief, p. 17. Petitioner argues that "[t]he tax assessed by Respondent clearly 'taxes value earned outside [Michigan] boarders.'" *Id.*, citing *ASARCO Inc v Idaho State Tax Comm,* 458 US 307; 102 S Ct 3103 (1982).

Petitioner asserts that "[t]he 700% distortion in tax base occasioned by Respondent's audit adjustment and assessment, and the 540% distortion on the taxable adjusted tax base, greatly exceeds measures of distortion sanctioned by the U.S. Supreme Court in cases reviewed by it." Pet Brief, pp. 17-18. Petitioner further asserts that the tax "in the instant case far exceeds the four-fold distortion present in *Hans Rees' Sons, Inc v North Carolina*, 283 US 123; 51 S Ct 385 (1931)." Pet Brief, p. 18.

IV. RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner's gain from the Grey Goose Transaction "can not be included in the denominator of the sales factor because the gain on disposition fails to meet the statutory definition of sales." Respondent's Motion (Resp Brief), p. 2. Respondent further contends that the apportionment factor is calculated using a numerator that includes the total

sales of the taxpayer in Michigan during the tax year, and a denominator that includes the total sales of the taxpayer everywhere during the tax year. Resp Brief, p. 5, citing MCL 208.51(1).

Respondent contends that that the Grey Goose Transaction does not qualify as a "sale" under any of the three types of activities set forth under MCL 208.7(a)(i)-(iii). Resp Brief, p. 7. Respondent argues that the Grey Goose Transaction is not a sale under the first type as Petitioner "is not in the business of selling entire product lines that it owned directly or through intermediates." *Id*. Respondent further contends that the second type of activity which is considered a sale does not apply because "[t]he disposition of a business is not the performance of a service and does not meet this definition of sales for apportionment purposes." *Id.* Respondent also asserts that the third type of activity that is considered a sale does not apply because of the express language in the statute referring to ". . . rental, lease, license or use . . ." and ". . . does not meet this definition of sales for apportionment purposes." Resp Brief, p. 9.

Next, Respondent contends that MCL 208.69 does not apply because Petitioner failed to seek Respondent's permission on such relief. *Id*. Respondent contends that Petitioner attempted to bypass this step by appealing directly to the Tribunal, and therefore,

> [t]he Tribunal should reject [Petitioner's] request as the Tribunal had to [in] a similar request in the case of *Amoco Production Company v Department of Treasury*, MTT Docket 249475, 2000 Mich Tax Lexis 15, 9-12. . . . The Tribunal recognized that §69 was established by the Legislature to afford Treasury the opportunity to apply a constitutional circuit breaker to a claim that the SBTA taxed income not attributable to business activities in Michigan. Because the Petitioner in that case failed to utilize the statutory framework of petitioning Treasury, the Tribunal determined that it would not supplant that statutory procedure where Petitioner failed to exhaust its administrative remedies.

Resp Brief, p. 10. Additionally, Respondent contends that even if Petitioner did submit a petition, MCL 208.69 would not apply because not including the Grey Goose Transaction does not result in a distorted tax base. Respondent cites *Corning Inc v Department of Treasury*, 212

Mich App 1; 537 NW2d 466 (1995), where the Court rejected Corning's argument that it should receive relief under MCL 208.69, where its apportioned Michigan compensation exceeded its actual Michigan compensation by 470%, and its apportioned depreciation exceeded actual depreciation by 4,958% and noted that the *Trinova* Court rejected Trinova's requested relief under MCL 208.69, where the asserted distortion which was 4,000% for compensation and 100,000% for depreciation. Resp Brief, p. 10. Respondent also states that Petitioner

> reported for 2004 an apportionment percentage of .8891%; for 2005 it reported 4.8237%; for 2006 it was 4.2821%; and 2007 it was reported as 4.1869%. . . . Treasury adjusted only the 2004 reported apportionment percentage to properly exclude the gain from sales and determined that it should be 4.1869%.

Resp Brief, p. 13 citing Stipulation of Facts, Schedule A1, p. 1 - X, p. 1.

Respondent argues that Petitioner has "not 'demonstrate[d] that the business activity attributed to [Petitioner] in this state is out of all appropriate proportion to the actual business transacted in this state' and would lead 'to a grossly distorted result' as is required by MCL 208.69(3)." Resp Brief, p. 12. Respondent further argues that "[i]t is improper to grant section 69 relief just because a taxpayer could reduce the proper tax liability by avoiding to file a return under statutory construct." Resp Brief, p. 12-13. Therefore, Respondent contends that Petitioner cannot be granted MCL 208.69 relief.

Respondent contends that SBT liability imposed on Petitioner does not violate the Due Process Clause or the Commerce Clause of the United States Constitution. Respondent cites *Corning*, which sets forth the three factors in *Trinova* by which activity is generated (payroll, property, and sales). In addition, *Corning* sets forth the exception in MCL 208.69. Resp Brief, pp. 14-15. Respondent argues that,

> [i]f every state applied the same apportionment formula used by Michigan then no more than all of [Petitioner's] income would be taxed. It is not relevant what

> [Petitioner's] shareholders pay in tax to other jurisdictions and whether or not they on an individual basis receive credit for any taxes they pay.

Resp Brief, p. 15.

Respondent further contends that the three prong apportionment formula, mentioned above, meets constitutional standards under *Corning*. *Id*. Respondent argues that Petitioner benefited from Michigan's market and the formula provides a reasonable measure of how much of the tax base Respondent is entitled to tax. *Id.*

Respondent concludes that,

> …proceeds from the Grey Goose Transaction were properly included in the SBTA tax base; however, the SBTA unambiguously defines "sales" and precludes including the Grey Goose Transaction in the denominator of the sales apportionment factor. The transaction by which [Petitioner] sold the product line is not stock in trade or inventory, it was not for performance of services, and it was not for the rental, lease, license, or use of intangible property.

Resp Brief, p. 16.

V. STIPULATED FINDINGS OF FACT

The parties stipulated to the following findings of fact and the Tribunal finds:

THE PARTIES

1. Petitioner is a New York corporation whose principal office is located at 20 Cedar Street, Suite 203, New Rochelle, New York 10801.
2. Respondent, Michigan Department of Treasury (the "Respondent"), is a department of the State of Michigan, and is the governmental authority responsible for administering the Single Business Tax ("SBT") Act, MCL § 208.1 et. seq., now repealed, and the taxes that were applicable for the year at issue which are the subject of this Petition.
3. Petitioner's federal employer identification number is XX-XXX7884.
4. Petitioner is classified as an S Corporation for federal and state income tax purposes.

PROCEDURAL HISTORY

5. Petitioner filed its 2004 SBT return.
6. Petitioner also filed an amended 2004 SBT return on or about October 16, 2007. The tax return was amended to reflect an adjustment by the Internal Revenue Service to

Petitioner's 2004 federal income tax return, which adjustments were unrelated to the Grey Goose transaction and the issues involved in this controversy.

7. Petitioner's initial and amended 2004 SBT returns reflected the gain on the sale of Petitioner's assets related to the Grey Goose vodka product line, as described in more detail below.

8. Respondent audited Petitioner's 2004 SBT return, utilizing Petitioner's amended return as a basis for the audit (the amended return is hereinafter referred to as the "Tax Return").

9. Petitioner disagreed with Respondent's Audit Determination.

10. Respondent issued its Bill for Taxes Due ("Intent to Assess") number R498688 on or about November 10, 2009.

11. Following receipt of the Intent to Assess, on or about November 20, 2009, Petitioner sent checks to Respondent for the purpose of paying the taxes and interest reflected in the Intent for all years other than the 2004 tax year.

12. Respondent issued its Final Bill for Taxes Due ("Final Assessment") Number R498688 (the "Assessment") on or about January 19, 2010. Although Petitioner previously sent the checks, the Assessment continued to reflect taxes and interest for 2005, 2006 and 2007. Petitioner and Respondent are continuing their efforts to resolve the payment issue for 2005-2007 and will supplement this Stipulation when the issue is resolved.

13. Petitioner appealed the Assessment upon the commencement of this action by the filing of its Petition on February 23, 2010.

PETITIONER'S BUSINESS

14. Petitioner is an importer and distributor of wines and spirits. Petitioner's business activity in Michigan is limited solely to sales of wine and spirits - - primarily to the Michigan Liquor Control Commission.

15. Petitioner maintains no business locations within the State. Petitioner does maintain inventory stock at its Michigan broker's location in Highland Park, Michigan.

16. In addition to its business activities of importing and distributing liquors, Petitioner also owned trade names or licenses to produce and sell several of the brands it sold, including Grey Goose vodka.

17. Prior to 2004, Petitioner owned the exclusive rights to trademark and license a product line known as Grey Goose vodka.

18. Unlike other products imported and distributed by Petitioner that were produced by unrelated third-party producers, Grey Goose vodka was produced by Petitioner's affiliate, Grey Goose SAS ("SAS"). SAS was a French company that produced, shipped, and owned the manufacturing plant for Grey Goose vodka.

19. Petitioner's ownership of SAS was through an intermediate holding company known as Grey Goose Bottling Co., LLC ("GGB"), a Delaware limited liability holding company that owned 100% of SAS.

20. SAS produced Grey Goose vodka in France and shipped it to Petitioner, its sole customer in the United States.

21. Petitioner sold Grey Goose vodka products to its customers, liquor and beverage distributors within Michigan and elsewhere in the United States.

THE SALE TRANSACTION

22. Petitioner's involvement with the Grey Goose line of business was completely different and functionally unique from all of Petitioner's other business activities.

23. Grey Goose represented the first and only product line developed and manufactured by Petitioner, and the only aspect of its activities that was handled through the use of separate companies and entities.

24. In 2004, pursuant to an Asset Purchase Agreement among Petitioner, SAS and the purchaser, Bacardi, Limited, Petitioner sold all of its tangible and intangible assets relating to the Grey Goose vodka product line, including inventory and all intellectual property rights relating to the production, distribution, and marketing of the Grey Goose vodka. (The "Grey Goose Transaction.")

25. In 2004, as part of the same transaction, Petitioner's affiliate, SAS, also sold its respective assets to the purchaser, Bacardi, Limited.

26. The adjusted purchase price paid by purchaser to the selling entities was $2,278,588,589. Of this amount, $2,144,993,971 was paid to Petitioner and allocated by Petitioner and the purchaser as follows:

Finished inventory in France	$12,010,430
Dry goods – gin	$658,579
Prepaid – media	$3,127,589
Prepaid – sponsorships	$461,000
Inventory in USA	$9,110,778
Intangible and intellectual property	$2,119,625,596
Total	**$2,144,993,971**

27. The Grey Goose Transaction was the largest financial transaction in the Petitioner's history.

28. Upon information and belief, the Grey Goose Transaction was one of the largest transactions in the history of the liquor industry.

29. Petitioner recognized a substantial gain from the transaction, which gain was included in Petitioner's federal income tax return as taxable income, and consequently included by Petitioner in its tax base for its 2004 Tax Return.

30. In addition to including more than $2 billion of gain in its SBT tax base for the 2004 tax year, Petitioner reflected the sale from the transaction in the denominator of the sales factor portion of the apportionment formula used to apportion Petitioner's tax base among Michigan and other states in which Petitioner was taxable.

31. For federal income tax purposes, the gain reflected on Petitioner's federal income tax return, Form 1120S, was allocated to its shareholders in accordance with their percentage ownership interests in Petitioner.

32. Petitioner's shareholders also reflected the gain in their 2004 federal and resident state individual income tax returns on an unapportioned basis.

33. To the extent that Petitioner had nexus with various states that imposed an individual income tax, Petitioner's shareholders reflected the gain in their 2004 nonresident state individual income tax returns for the entire gain allocated to each shareholder, which was then allocated or apportioned to each state in accordance with that state's allocation or apportionment rules. The shareholders filed such returns in approximately 35 states. Petitioner agrees to provide summaries of such returns, or copies of the returns, if available, upon the request of Respondent or the Tribunal.

34. In its 2004 SBT return, Petitioner reported total sales in Michigan (sales of products distributed by it) of $18,754,142 over total sales everywhere of $2,542,422,073.

35. With respect to the 2004 calendar year, Respondent recalculated the denominator of the sales factor by removing the proceeds of the Grey Goose sale.

36. Specifically, Respondent removed $2,176,474,888 from the denominator of sales factor, recalculating the total Michigan sales of $18,754,142 over a 2004 sales denominator of $365,947,185, which increased the 2004 Michigan sales factor apportionment percentage from 0.7376% to 5.1248%, and the overall Michigan apportionment percentage from 0.8891% to 4.8376%.

37. Respondent audit adjustment, as reflected in the Assessment, ultimately increased Petitioner's Michigan tax base by $50,228,911, to $61,539,162, and resulted in an asserted tax increase of $858,914, plus additional interest.

38. If Petitioner prevails on the legal issues relating to the determination of the sales factor of the apportionment formula, the Assessment should be cancelled in full.

39. Paragraphs 11 and 12 of the Stipulated Facts are hereby modified to reflect that the payments made by Petitioner for the 2005-2007 years have been accepted by Respondent and discharge all outstanding liability for those years. Respondent has issued a corrected Final Assessment, which reflects only the amount assessed for 2004 with respect to the Grey Goose transaction and apportionment issues.

VI. APPLICABLE LAW

Petitioner and Respondent move for summary disposition pursuant to MCR 2.116(C)(10). Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). 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. *Washburn v Michailoff*, 240 Mich App 669; 613 NW2d 405 (2000). (Citing MCR 2.116(I)(2).)

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Insurance Association*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

VII. CONCLUSIONS OF LAW

The Tribunal has carefully considered the parties' Motions and finds that granting Respondent's Motion is warranted, based on the pleadings, stipulation of facts and other documentary evidence filed with the Tribunal. The parties have proven that there is no genuine

issue in respect to any material fact. MCR 2.116(C)(10). The Tribunal finds that the parties have submitted a stipulation of facts sufficient to justify judgment favoring Respondent.

The goal of statutory construction is to give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. *Turner v Auto Club Insurance Association*, 448 Mich 22, 27; 528 NW2d 681 (1995). Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. *Luttrell v Department of Corrections*, 421 Mich 93; 365 NW2d 74 (1984). MCL 208.51(1) sets forth the sales factor to be "a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year." (Emphasis added.) Here, MCL 208.7(1) is the applicable statute for the tax year in question.

MCL 208.7(1)(a) defines the term "sale" or "sales" to mean amounts received by the taxpayer as consideration for specifically enumerated activities. MCL 208.7(1)(a)(i)-(iii) provides three types of activities for which amounts received by the taxpayer will be considered sales. See *HJ Heinz Co v Department of Treasury*, 197 Mich App 210; 494 NW2d 850 (1992). Under the SBT, a "sale" means the gross receipts arising from a transaction in which gross receipts constitute consideration for the performance of services which constitute business activities. *Credit Acceptance Corp v Department of Treasury*, 236 Mich App 478; 601 NW2d 109 (1999).

MCL 208.7(1)(a)(i) involves amounts received as consideration from,

> the transfer of title to, or possession of, property that is the stock in trade or other property of a kind which would properly be included in the inventory of the

> taxpayer if on hand at the close of the tax period or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. [Emphasis added.]

The parties agree that "[t]he Grey Goose transaction was the largest in the Petitioner's history," (Stipulated Facts, p. 5) and that "Grey Goose represented the first and only product line developed and manufactured by Petitioner, and the only aspect of its activities that was handled through the use of separate companies and entities." Stipulated Facts, p. 4. There was no evidence to show that the trademarks and trade names were or even could have been "stock in trade" or "included in the inventory" held for sale to customers. Further, based on the testimony of the parties, the Grey Goose Transaction was not conducted in the ordinary course of business and therefore, MCL 208.7(1)(a)(i) does not apply.

MCL 208.7(1)(a)(ii) provides that amounts received as consideration for "[t]he performance of services which constitute business activities other than those performed under subparagraph (i), or from any combination of business activities under either subparagraph are sales." "Business activity" is defined to mean in part:

> A transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others . . . . Although an activity of a taxpayer may be incidental to another or other of his business activities, each activity shall be considered to be business engaged in within the meaning of this act.

MCL 208.3(2). The sale of a business is not a performance of a service that constitutes business activity nor a combination of business activities under subsections (i) and (iii) and thus, does not meet the requirement as a "sale" under this subsection.

Finally, MCL 208.7(1)(a)(iii) states that a "sale" is "[t]he rental, lease, licensing, or use of tangible or intangible property which constitutes business activity." In *Ford Credit International,*

Inc. v Department of Treasury, 270 Mich App 530, 535; 716 N.W.2d 593 (2006), the Court noted that subsection (iii) "…did not include dividends of any type," the section only applies to rentals, leases, licensing or temporary use of property. Therefore, this subsection is not applicable to the Grey Goose Transaction because the section only includes amounts received from transactions where the taxpayer allowed for temporary possession and use of the property by another party. It does not include a sale that transfers title and possession of the property. The Tribunal finds that the Grey Goose Transaction is not a "sale" under the specific definition set forth in the SBT Act.

Petitioner contends that MCL 208.69 exists to promote fairness under the SBT and can be instigated by Respondent or upon petition by the taxpayer. Pet Brief, p. 12. Petitioner goes on to state that "[s]ection 69 requires 'apportionment relief,' i.e., inclusion of the Grey Goose transaction in an alternative apportionment mechanism"; however, Respondent did not instigate and Petitioner did not file a petition under MCL 208.69. Petitioner must petition the commissioner of revenue for all claims regarding the apportionment of a taxpayer's business activity. *Home Properties LP v Department of Treasury*, 2009 Mich App Lexis 1340. Further, MCL 208.69(4) states that "[t]he filing of a return or an amended return shall not be considered a petition . . . ." Therefore, in order for Petitioner to file an appeal under MCL 208.69, it must first petition the commissioner of revenue, separate of the initial filing of a return or amended return. Petitioner failed to do so and thus waived MCL 208.69.

Petitioner further contends that "the tax assessed by Respondent . . . cannot withstand constitutional challenge on Commerce Clause and Due Process grounds failing both the internal and external consistency tests." Pet Brief, p. 17 citing *Container Corp of America v Franchise Tax Board*, 463 US 159; 103 S Ct 2933 (1983). However, courts have held that "the three-factor

formula is not perfect, and . . . the constitution requires neither a perfect formula nor a perfect apportionment. The United States Supreme Court long ago upheld the constitutionality of formulary apportionment." *Trinova Corp v Department of Treasury*, 433 Mich 141, 438; N.W.2d 428 (1989). Further, the statutory language of MCL 208.7(1)(a)(i)-(iii) does not include the permanent and final sale of intangible assets such as the type in the Grey Goose Transaction. Therefore, the formula used by Respondent to determine Petitioner's tax meets constitutional standards and because Petitioner benefited from Michigan's market, the formula does not violate the internal and external consistency tests under the Commerce Clause and Due Process Clause.

VIII. JUDGMENT

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

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

IT IS FURTHER ORDERED that Assessment No. R498688 is AFFIRMED.

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

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

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

MICHIGAN TAX TRIBUNAL

By: Cynthia J. Knoll

Entered: October 5, 2011
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