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

HOV Services, Inc.
Petitioner,

v

MTT Docket No. 384364

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

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

1. Administrative Law Judge Halick issued a Proposed Order Granting Petitioner's Motion for Summary Disposition on December 13, 2011. The Proposed Order states, in pertinent part, "[t]he parties have 20 days from date of entry of this Proposed Order to file exceptions and written arguments consistent with Section 81 of the Administrative Procedures Act (MCL 24.281)."

2. Neither party has filed exceptions to the Proposed Order.

3. 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.

4. The Tribunal adopts the Proposed Order 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 Order in this Final Opinion and Judgment.

5. Given the above:

    a. The taxes, interest and penalties as levied by Respondent are:

Assessment Number: Q637232

Taxes	Interest*	Penalties
$322,170	$79,182.27	0

*Interest accrues as provided by law.

Assessment Number: Q561823

Taxes	Interest*	Penalties

$801,320	$225,953.84	0

*Interest accrues as provided by law.

b. The taxes, interest and penalties as determined by the Tribunal are:

Assessment Number: Q637232

Taxes	Interest	Penalties
$0	$0	$0

Assessment Number: Q561823

Taxes	Interest	Penalties
$0	$0	$0

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties as indicated herein within 20 days of 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: March 19, 2012 By: Steven H. Lasher

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

HOV Services, Inc. Petitioner, v	MICHIGAN TAX TRIBUNAL MTT Docket No. 385121 Consolidated with 384364
Michigan Department of Treasury, Respondent.	Administrative Law Judge Presiding Thomas A. Halick

PROPOSED ORDER GRANTING
PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER TO ADJOURN HEARING

On November 14, 2011, Petitioner filed a motion for summary disposition and a brief in support.

On November 21, 2011, Respondent filed an untimely written answer to the motion, and on November 29, 2011, Respondent filed an untimely brief in support of its answer.

Oral argument was held on December 2, 2011. Petitioner was represented Gregory A. Nowak and Jackie J. Cook, of the law firm of Miller Canfield. Respondent was represented by Assistant Attorney General, Julius O. Curling.

Upon review of the motion, the case file, and being fully advised of the premises, it is determined that for reasons stated on the record at oral argument, authorities cited in Petitioner's brief, and the legal conclusions in this Order, Petitioner's motion shall be GRANTED.

Standard of Review

Petitioner seeks summary disposition under MCR 2.116(C)(10). Judgment shall be granted under the standards applicable to MCR 2.116(C)(10), there being no genuine issue of material fact, based on the well-pled facts, documentary evidence, and affidavits. MCR 2.116(G)(5). "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . (a) when judgment is sought based on subrule (C)(10)." MCR 2.116(G)(3)(b).

"When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest on the mere allegations or denials in his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her." MCR 2.116(G)(5).

The facts and admissible evidence must be considered in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). A court may not make findings of fact or weigh credibility when deciding the motion. *In Re Handleman*, 266 Mich App 433 (2005). The trial court must give the benefit of any reasonable doubt to the nonmoving party. *Schultes v Naylor*, 195 Mich App 640, 645; 491 NW2d 240 (1992). The court must then determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352,

357; 486 NW2d 361 (1992).

Procedural History

Respondent issued the following assessment of Single Business Tax ("SBT"):

Assessment No.	Tax	Penalty	Interest*
Q637232	$ 322,170	0	$79,182.27

*Interest accrues as provided by law.

Respondent issued the following assessment of Use Tax.

Assessment No.	Tax	Penalty	Interest*
Q561823	$ 801,320	0	$225,953.84

*Interest accrues as provided by law.

Petitioner commenced this appeal on March 19, 2010. A prehearing conference was held on April 5, 2011, at which time the parties agreed to meet for the purpose of a stipulating to undisputed facts. Counsel each stated that they would file a motion for summary disposition, which were due on or before July 11, 2011. However, that deadline passed and neither party filed a motion. Thereafter, the Tribunal scheduled an evidentiary hearing for November 1, 2011.

On October 26, 2011, the parties filed a joint motion to extend the deadline for filing a joint stipulation of facts and motions for summary disposition, representing to the Tribunal that a

hearing was not necessary. The motion was granted, the November 1 hearing date was adjourned, and the parties were required to file their motions by November 11, 2011. An answer to a motion was due by November 18, 2011. A hearing was tentatively scheduled for December 2 and 5, 2011, to be held in the event the motions did not fully dispose of the case. Respondent refused to stipulate to *any* facts. Petitioner filed its proposed stipulation of facts and a motion for summary disposition on November 14, 2011. (Petitioner's motion was timely because the original due date of November 11, 2011, was a state holiday).

On November 21, 2011, the Tribunal granted Petitioner's motion to place Respondent in default for failure make a good-faith effort to stipulate to any facts whatsoever. The Tribunal set aside the default for the limited purpose of permitting Respondent to participate in oral argument on Petitioner's motion.

At the oral argument, Respondent moved that the Tribunal accept an untimely affidavit signed by one of Respondent's auditors. Petitioner objected to the admission of the affidavit. The Tribunal denied Respondent's motion to submit the late affidavit. Respondent had a right to file a dispositive motion with supporting affidavits and documentary evidence on or before the original deadline of July 11, 2011, but failed to do so. That deadline was established with the agreement of counsel at the Prehearing Conference held April 5, 2011. Discovery closed on March 18, 2011, however, the Tribunal granted Respondent's request to re-open discovery to allow

depositions to be completed by June 10, 2011. After neither party filed a dispositive motion before July 11, 2011, the Tribunal scheduled a hearing for November 1, 2011.

Again, in the joint motion filed October 26, 2011, the parties represented to this Tribunal that this matter could be decided on motions for summary disposition based on stipulated facts. However, at the ninth hour, Respondent changed its position and refused to stipulate to any facts. Notwithstanding Respondent's about-face, Petitioner filed its dispositive motion and a proposed Joint Stipulation of Facts.

Respondent did not offer any affidavits, depositions, or documentary evidence, until the commencement of the oral argument, at which time Respondent offered an affidavit signed by an auditor. The court rules require the Tribunal to consider an affidavit that is ". . . then filed in the action or submitted by the parties . . . ." MCR 2.116(G)(5). The affidavit in question had not been timely filed or submitted in conformity with the Tribunal's scheduling orders. Recall that at the original prehearing conference in April 2011 the Tribunal granted Respondent's request to extend discovery, in large part, to facilitate the preparation of joint stipulation of facts. Respondent did not submit any discovery material, such as portions of the deposition transcript, in an effort to demonstrate a genuine issue of fact for trial. As noted above, Respondent refused to cooperate in good faith by its failure to stipulate to any facts, not even the most basic matters that cannot be reasonably disputed. Finally, Respondent failed to file a timely answer to Petitioner's motion.

In denying Respondent's motion to offer the untimely affidavit at the oral argument, consideration was given to Respondent's course of conduct in this matter, as outlined above. Furthermore, Petitioner supported its motion with substantial documentary evidence and detailed affidavits setting forth factual matters that Petitioner's witnesses were in a position to ascertain and know. It is exceedingly unlikely that Respondent's auditors would be in a position to offer anything of substance to contradict these basic facts pertaining to Petitioner's business activity. Also, the basic facts that gave rise to the subject assessments were previously advanced by Respondent in the course of the informal conference proceeding, which is memorialized by a written recommendation that is in the case file. Accepting Respondent's version of the facts as true does not change the outcome of this case. Accepting the late affidavit would be prejudicial to Petitioner, given the fact that it was presented for the first time during the oral argument. The hearing was scheduled to commence the next business day –Respondent's tactics would amount to a trial by surprise, contrary to the Tribunal's prior scheduling orders.

Finally, the court rules require the court to "give the parties an opportunity to amend their pleadings . . . unless the evidence then before the court shows that amendment would not be justified." MRC 2.116(I)(5). Upon review of the pleadings, documentary evidence, and timely-submitted affidavits, Respondent has failed to present any substantial evidence to contradict the material facts advanced by Petitioner and there is no reasonable likelihood that any such evidence will be forthcoming. Respondent merely rests on denials in its pleading. Therefore, having failed

to respond as required by MCR 2.116(G)(5), the facts are not in dispute and judgment against Respondent is appropriate for reasons set forth on the record, in Petitioner's motion and brief in support, and herein.

Facts

Petitioner is engaged in the business of commercial printing. Petitioner creates printed material to order as specified by its customers, who provide Petitioner with the text and images to be printed. Petitioner also prepares the printed material for mailing by the United States Postal Service by printing addresses on envelopes, placing the printed paper into the envelopes, and sorting the envelopes.

Petitioner's proposed Joint Stipulation of Facts is incorporated herein by reference. However, some of the proposed facts are not "facts" but rather statements of law, statements of a party's position, or procedural history and these matters are not adopted as "facts." Nevertheless, it is determined that there is no genuine issue of material fact with regard to the following proposed paragraphs set forth in the proposed Joint Stipulation of Facts: 1, 2, 3, 6, 7, 11,12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29.

Paragraphs 4, 5, 8, 9, and 10 are not facts but rather statements of law or legal issues; however, Respondent agreed at the oral argument that these paragraphs accurately frame the issues. Paragraph 24 is not accepted as an undisputed fact because it involves Petitioner's legal

interpretation or characterization of certain contractual language, which shall be resolved as a matter of law herein.

Petitioner supported its allegations of fact with affidavits and documentary evidence, Respondent ". . . may not rest on the mere allegations or denials in his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(5). Respondent failed to meet this standard. The matters contained in Petitioner' affidavits pertain to facts that are particular to Petitioner's business activities and within the personal knowledge of Petitioner's affiants. Therefore, there is no genuine issue of material of fact to be heard in this case.

Conclusions of Law

As stated above, the sole, dispositive issue in this case is whether Petitioner was engaged in the production and sale of tangible personal property or in the performance of services. The parties agree that if the subject mixed transactions are properly characterized as the production and sale of tangible personal property and not the performance of a service that the assessments shall be cancelled. The parties agree that the legal question is governed by the "incidental to services test" set forth in *Catalina Marketing Services, Inc. v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004).

The department contends that the printed materials and envelopes were created only to establish a

medium by which "notice" was provided to individuals designated by Petitioner's customers. That is, the essence of the transaction is the transmission of intangible information to third parties designated by Petitioner's customers and the printed paper and the addressed, stamped envelopes were merely incidental to Petitioner's printing and mailing services. As such, the sales would be sourced to Michigan under MCL 208.52 for SBT purposes and Petitioner would be liable for use tax on property used in the course of performing the services (the industrial processing exemption would not apply under MCL 205.94o).

The contracts at hand involve an indivisible mix of both services and the sale of personal property, which requires an application of the law under *Catalina,* in order to determine the overall character of the transactions as predominantly a sale or a service for tax purposes. Upon consideration of the six-factor test and all relevant facts and circumstances, it is determined that for each contract, the essence of the entire transaction is the sale of printed materials, with the services being incidental to those sales. As such, the transactions are properly treated as sales of tangible personal property for use tax and SBT purposes. *Catalina* set forth the legal test:

1) What the buyer sought as the object of the transaction,
2) What the seller of the service or service provider is in the business of doing,
3) Whether the goods were provided as a retail enterprise with a profit-making motive,
4) Whether the goods were available for sale without the service,
5) The extent to which intangible services have contributed to the value of the physical item

that is transferred, and

6) Any other factors relevant to the particular transaction.

A court must consider the totality of the transaction. Petitioner's analysis of the above factors on the record during oral argument is persuasive. The classic case of a mixed transaction that is essentially a *service* is a contract for legal services, where the attorney provides legal counsel and also produces a legal brief for the court and client. In such case, the brief (the paper and ink) is merely a tangible medium of transmission for intangible intellectual property or a legal service. The brief itself is not the essence or object of the transaction, but rather the attorney's knowledge and skill is what the client bargains for and which contributes the value to the tangible item. In this case, Petitioner does not create the content that is printed on the paper. Rather, Petitioner's customers create or provide the images and other content and Petitioner's job is to produce the printed paper that is placed in envelopes, which are mailed to individuals designated by Petitioner's customers.

The printed materials in this case are distinguishable from the printed copies of diplomas at issue in *University of Michigan Bd of Regents v Dep't of Treasury,* 217 Mich App 665; 553 NW2d 349 (1996). In that case, the office of the registrar at the University of Michigan provided a service of reviewing records and producing a copy of a replacement diploma, which contained personalized information about the graduate, the degree obtained, and the date of graduation. The intangible content that was retrieved and verified by the university was the predominant factor, thrust, or

purpose of the transaction, not the paper diploma itself.

In our present case, Petitioner does not own or create the printed content. Petitioner performs no service in this regard. Petitioner's customers seek to acquire a printed document that is enclosed in an envelope that is suitable for immediate mailing. The predominant factor, thrust, or purpose of the transaction is the tangible property.

Respondent's case relies heavily upon the use of the term "services" that appears throughout the exemplar contracts filed with Petitioner's motion. Petitioner and its customers voluntarily chose that language to describe the business activity. In many cases, a taxpayer's case will rise or fall based on its own choice of terminology used in its contracts. Generally, a taxpayer cannot be heard to complain that its own characterization of a transaction should be disregarded after adverse tax implications arise. Nevertheless, neither can it be said that the taxpayer's choice of labels dictates the tax consequences of a transaction. For example, had Respondent prevailed in this case merely because Petitioner's contracts refer to "services," this would suggest that if the contractual language were thereafter changed to refer to a "sale of property," Petitioner would prevail in the next audit, even though nothing of substance had changed. Regardless of the usage of the term "services," the contracts require Petitioner to produce and sell tangible products. The customer pays for the tangible property on a per unit basis. Petitioner's arguments and legal authorities on this point are well taken.

With regard to the "State of Michigan Agreement" (Appendix C to the Affidavit of James Reynolds), the term "Services" is defined as "any function performed for the benefit of the State." (*Id*., p. 29). At least for this contract, the term "services" was given a special definition that is broad enough to encompass the production of printed material for sale to Petitioner's customers. In any event, the Tribunal agrees with Petitioner and authorities cited in Petitioner's brief, that in the context of this case, the facts and substance of the transactions dictate the tax consequences and not merely the labels or terminology in the contracts.

Petitioner has stated that it conducts business activity as a "printer" and there is no substantial evidence to the contrary. Respondent's own Administrative Rule 205.113(1979 AC) recognizes that printed material sold by a "printer" is a "sale of tangible personal property." Furthermore, the rule indicates that printers are generally eligible for an industrial processing exemption, which presupposes that a printer's work product is tangible personal property for use tax purposes.

In applying the *Catalina* test to the undisputed facts, it is determined that Petitioner was engaged in the manufacture and sale of tangible personal property. This determination resolves the legal dispute in this case, and entitles Petitioner to a judgment in its favor under MCR 2.116(C)(10).

IT IS ORDERED that Petitioner's Motion for Summary Disposition is GRANTED and assessments Q637232 and Q561823 are 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 consistent with

Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the matters addressed 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: December 13, 2011

By: Thomas A. Halick