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

E.H. Tulgestka & Sons Inc.,
Petitioner,

MTT Docket No. 414131

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

FINAL OPINION AND JUDGMENT

This matter was heard before Administrative Law Judge ("ALJ") Thomas A. Halick. A Proposed Opinion and Judgment was issued on July 27, 2012. The Proposed Opinion and Judgment provided, in pertinent part, "[t]he parties shall have 20 days from the 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)," and "exceptions and written arguments shall be limited to the matters addressed in the motions." In addition, "[t]his Proposed Opinion and Judgment, 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 Michigan Tax Tribunal Act (MCL 205.726)."

Respondent filed exceptions to the Proposed Opinion and Judgment on August 16, 2012. Petitioner has not filed a response to Respondent's Exceptions.

RESPONDENT'S EXCEPTIONS

1. While Respondent does not agree that *Andrie v Dep't of Treasury*, __ Mich App __; __NW2d__ (2012), was correctly decided, Respondent "acknowledges that until the Michigan Supreme Court issues a stay or reverses [the decision that it] . . . is binding on the parties and this Tribunal."
2. Respondent argues that *Andrie* is factually distinct from the present case and that the present case could be resolved without addressing *Andrie.*
3. Petitioner admits that "it did not pay sales tax to the retailer at the time of its purchase of tangible personal property. In *Andrie*, there was a dispute as to whether Andrie paid sales tax to the retailer at the time of its purchase of tangible personal property."
4. The Proposed Opinion and Judgment acknowledged the differences between the two cases, but "repeats the errors set forth in *Andrie* and adds a layer of extraneous analysis that is not found in the *Andrie* opinion that are unnecessary to the resolution of the present case . . . ."
5. The Court of Appeals in *Andrie* cited *Combustion Engineering v Dep't of Treasury*, 216 Mich App 465; 549 NW2d 364 (1996).
6. The Court in *Combustion Engineering* held that the purchaser "does not have to prove that the retailer actually remitted the sales tax it paid to the State."

7. "The issue in *Andrie* was whether Andrie *ever paid* sales tax to the retailer in the first place." (Emphasis in original).

8. The *Andrie* Court confused the burden the purchaser has to prove that it paid sales tax or remitted use tax with whether the purchaser has a burden to prove that the sales tax paid to the retailer was remitted to the state. The Court in *Andrie* misapplied the ruling in *Combustion Engineering* and reached an erroneous result.

9. The analysis on page 25 of the Proposed Opinion and Judgment regarding the "passive versus active tense of the language in MCL 205.94(a) . . . misunderstands the interplay between the Sales Tax Act and the Use Tax Act."

10. "If the Legislature had drafted the statute in the active tense as suggested in the proposed opinion, the consumer would not qualify for the exemption even if the retailer remitted the tax to the State."

11. "While sometimes characterized as complementary, the use tax and the sales tax are two distinct taxes that relate to two, wholly distinct taxable events."

12. The exemption in MCL 205.94(1)(a) does not require the purchaser to prove that the retailer remitted the sales tax to the State. The purchaser is only required to establish "that it either reimbursed the retailer for the sales tax or that the seller affirmatively represented that he would take care of the sales tax obligation."

CONCLUSION

The Tribunal has reviewed Respondent's exceptions, and the case file, and finds that the ALJ did not err in his conclusion that the Court of Appeals decision in *Andrie v Dep't of Treasury* was applicable in the present case. Much of Respondent's arguments in the exceptions are taken verbatim from its Post Trial Brief, which was already given consideration by the ALJ in the Proposed Opinion and Judgment. Again, while Respondent may disagree with the *Andrie* decision and contend that the Court of Appeals misapplied the ruling in *Combustion Engineering*, the ruling in *Andrie* is a published decision that must be followed by the Tribunal.

In addition to its disagreement with the ruling in *Andrie*, Respondent contends that *Andrie* is factually distinguishable from the present case and does not need to be addressed in order to resolve this appeal. The ALJ discussed these factual differences in the Proposed Opinion and Judgment, and determined that Petitioner admitted facts proving that sales tax was not collected or remitted on transactions that were believed to be exempt. The ALJ then determined that "except for a few asset purchases indicated in this opinion, the presumption created by *Andrie* has been rebutted and . . . the transaction is subject to use tax." POJ p. 24. Accordingly, the ruling in *Andrie* was not applied by the ALJ to these asset purchases contained in the audit.

The ALJ further determined that *Andrie* would apply to the transactions with Michigan vendors, when those vendors had no reason to believe that the transactions were exempt from tax. POJ p. 31. The asset exceptions were thus reduced by the $22,191 attributable to these four vendors, and the resulting tax due for the tax period April 1, 2005, to March 31, 2009, was $1,395. As stated in the POJ, the amount of tax paid by Petitioner for this tax period for capital asset exceptions was $2,727. The ALJ determined that Petitioner was therefore due a refund of $1,332. POJ p. 32. Respondent appears to disagree with the ALJ's determination to apply the presumption in *Andrie* to purchases from these four Michigan vendors. The Tribunal finds that sales tax was required to be collected from these four vendors, as there is no indication that Petitioner had ever provided an exemption certificate or claimed the purchase was exempt. The Court of Appeals in *Andrie* determined that:

> Our Supreme Court and this Court have held on multiple occasions that the mere fact that a transaction is subject to sales tax necessarily means that the transaction is not subject to use tax. See, e.g., *Elias Bros Restaurants v Dep't of Treasury*, 452 Mich 144, 146 n 1; 549 NW2d 837 (1996) ("The Use Tax Act, as amended, is an 'excise' or 'privilege' tax that covers transactions not subject to the general sales tax."); *Fisher & Co v Dep't of Treasury*, 282 Mich App 207, 209; 769 NW2d 740 (2009) ("The Use Tax Act is complementary to the Michigan General Sales Tax Act . . . and is designed to cover those transactions not subject to the sales tax.").

Id at 9. As the transactions with the four Michigan vendors in this case were subject to sales tax, the decisions issued in *Andrie, Elias Bros Restaurants,* and *Fisher & Co,* support the ALJ's determination that Petitioner was not subject to use tax for those purchases.

Respondent also argued that the ALJ erred in the discussion on page 25 of the Proposed Opinion and Judgment regarding the active versus passive tense of the language in MCL 205.94(a). The Tribunal finds no error with respect to the ALJ's statement that this section of the statute is written in the passive tense. The ALJ correctly indicated that the statute is not written to specifically state who must pay the tax on the retail sale to a consumer. There is also no error by the ALJ in stating in a footnote that the Legislature could have drafted the provision in the active tense. There is no error of law on the part of the ALJ in the statements regarding how the literal wording of the statute was drafted. Further, the Tribunal finds that even if the ALJ made no reference to the actual wording of the statute, the holding in *Andrie* would still apply to the transactions with the Michigan vendors in this matter.

The Tribunal further finds that the determination of the ALJ to cancel the assessment due to the application of the legislative amendment contained in MCL 205.27a(12) was correct. The ALJ determined that Petitioner did file a return for the use tax during the tax years at issue and Respondent had no authority to assess

use tax for periods prior to April 1, 2005. POJ pp. 34 – 35. Respondent raises no objection to the cancellation of the assessment in the exceptions. The Tribunal finds that the total tax liability contained in the assessment related to tax periods prior to April 1, 2005. Because Respondent had no authority over years prior to 2005 that were included in the audit, the assessment was properly cancelled.

Given the above, the Tribunal adopts the July 27, 2012, Proposed Opinion and Judgment as the Tribunal's Final Opinion and Judgment in this case, pursuant to MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact, and Conclusions of Law in the Proposed Opinion and Judgment in this Final Opinion and Judgment. Therefore,

IT IS ORDERED that the Administrative Law Judge's Proposed Opinion and Judgment is AFFIRMED and adopted by the Tribunal as the Final Opinion and Judgment.

IT IS FURTHER ORDERED that Assessment No. R402803 is cancelled.

IT IS FURTHER ORDERED that Petitioner is entitled to a *refund* of $1,332 of use tax paid on asset purchases for the years assessed for April 1, 2005, through March 31, 2009, with interest to be calculated under 1941 PA 122.

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

MICHIGAN TAX TRIBUNAL

By: Kimbal R. Smith III

Entered: September 19, 2012