

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

General Mills Operations, LLC,
Petitioner,

MTT Docket No. 414410
Assessment No. - *Refund Claim*

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
B. D. Copping

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, General Mills Operations, LLC, appeals Respondent's denial of its refund claim and contends that it is entitled to a refund for Single Business Tax ("SBT") paid for tax periods ending May 2005, May 2006, May 2007, and December 2007. To support this, Petitioner contends that it improperly sourced certain sales of "other than tangible personal property" on a so-called, market-based sourcing methodology on its original returns, but filed amended returns for the tax years at issue to properly source service fee income originally included in its Michigan sales factor numerator pursuant to MCL 208.53(b).

The Tribunal finds Petitioner is entitled to a refund, plus statutory interest pursuant to 1941 PA 122, for tax periods ending May 2005, May 2006, May 2007, and December 2007.

BACKGROUND

Petitioner, formerly known as General Mills Operations, Inc., is a Delaware limited liability company that engages in business activities within and outside of Michigan. More specifically, Petitioner manufactures both tangible personal property and also provides, pursuant to intercompany service agreements, sales of other than tangible personal property, e.g., various services, to related affiliates. While Petitioner also sells tangible personal property, only the sourcing of sales of other than tangible personal property to its affiliate, General Mills Cereals, LLC, for tax years ending May 2005, May 2006, May 2007, and December 2007, for purposes of Michigan apportionment under MCL 208.53b, is at issue in this case.

Although the services performed by Petitioner for General Mills Cereals, LLC, were provided entirely outside of Michigan, Petitioner improperly sourced such services on a so-called, market-based sourcing methodology on its original SBT returns for the tax years at issue. Specifically, Petitioner used an approach where it took the percentage of sales of tangible personal property for General Mills Operations, LLC, and used that same percentage to prorate the revenue related to the provision of services to its affiliates. Upon realizing its error, Petitioner filed amended SBT returns for the tax years at issue removing such services entirely from the numerator of the sales apportionment factor, since those services were performed entirely outside of the State of Michigan.

Based on these amended SBT returns, Petitioner contends that it is entitled to the following refunds, totaling \$538,342, plus statutory interest, for the amount of excess SBT paid for the tax years at issue:

Tax Period	Tax Type	Refund Claim
5/29/2005	SBT	\$155,504
5/28/2006	SBT	\$151,727
5/27/2007	SBT	\$155,162
12/31/2007	SBT	\$75,949

Respondent issued a Notice of Denial to Petitioner on March 14, 2011.

Petitioner filed its appeal of the Notice of Denial to the Tribunal on April 18, 2011.

Respondent filed its Answer to Petitioner’s Petition on May 6, 2011. A hearing was held on August 28, 2012, at which Petitioner presented one witness and Respondent presented none.

After the hearing, pursuant to Respondent’s request, the Tribunal entered a Post-Hearing Brief Order on August 29, 2012, which allowed Respondent to submit a Post-Hearing Brief up to 21 days after receipt of the transcript from the hearing and allowed Petitioner to submit a response to Respondent’s Post-Hearing Brief 14 days after receipt of Respondent’s Brief. The transcript was filed on September 10, 2012. On September 27, 2012, Respondent filed Motions requesting that the Tribunal grant it a four-day extension to the Tribunal’s August 29, 2012 Order, and give immediate consideration to its Motion. Although the Tribunal failed to enter an order addressing Respondent’s Motions, had the

Tribunal done so, it would have (i) granted Respondent's Motion for Immediate Consideration, although Respondent failed to include a statement that it contacted Petitioner and whether Petitioner would be filing a response, due to the fact that Respondent's Brief was due October 1, 2012, and (ii) found that Respondent showed good cause as to why the Tribunal should grant its Motion for extension. As such, the Tribunal finds Respondent's Post-Hearing Brief, filed on October 5, 2012, and Petitioner's Post-Hearing Reply Brief, filed on October 19, 2012, were timely, and as a result, shall be taken into consideration in the rendering of this Final Opinion and Judgment.

On October 30, 2012, Respondent filed a Motion for Leave to File Reply Brief. In the Motion, Respondent stated, "In its October 19, 2012 post-trial reply brief, Petitioner has made a number of demonstrably inaccurate or misleading statements . . . and Respondent requests leave to address them." Based on the contents of Respondent's Motion, the Tribunal found that Respondent had shown good cause to justify the granting of its Motion. The Tribunal further found that due to the impendency of rendering a timely decision in this case, the Tribunal gave Respondent's Motion immediate consideration and, as a result, an Order was entered on November 7, 2012, allowing Respondent seven days from the entry of the Order to submit a reply brief.

On November 15, 2012, Respondent filed its Post-Hearing Sur-Reply Brief to Petitioner's Post-Hearing Reply Brief filed on October 19, 2012.¹

PETITIONER'S CONTENTIONS

Petitioner contends that it is entitled to a refund for overpayment of SBT under MCL 208.53(b) because it erroneously sourced its sales of other than tangible personal property (i.e., services performed for General Mills Cereals, LLC, at various General Mills Cereals locations) based on a so-called, market-based sourcing methodology on its original returns for the tax years at issue as opposed to the proper method for the sourcing of the sale of services, as required by MCL 208.53(b). To support its contentions, Petitioner asserts that (i) it sells both services and tangible personal property; (ii) the portion of its sales that relate to the sale of services to General Mills Cereals, LLC, should be sourced outside of Michigan entirely, since General Mills Cereals, LLC, did not have or operate any facilities in Michigan and, therefore, none of Petitioner's employees performed any services in Michigan; (iii) under the Amended and Restated Contract Operating Agreement (the "Agreement"), Petitioner was required to provide production support services to General Mills Cereals, LLC; (iv) while it has a manufacturing plant and a distribution center located in Michigan, both of these facilities are used

¹ Although Respondent failed to file its Post-Hearing Sur-Reply Brief within seven days from the entry of the Tribunal's November 7, 2012, Order, the Tribunal finds it appropriate to consider Respondent's Post-Hearing Sur-Reply Brief in the rendering of this Final Opinion and Judgment to address erroneous contentions contained therein.

in the production or distribution of Yoplait Yogurt and certain other products, none of which are a part of the General Mills Cereals, LLC, product lines, and neither facility is used in connection with its agreements with General Mills Cereals, LLC; (v) even though the research and development (“R & D”) services, pursuant to the Master Service Agreement (the “MSA”), were all performed outside of Michigan, Petitioner also erroneously included this revenue in its Michigan sales factor for the tax year ending May 2005; (vi) Petitioner discovered its error with respect to the R & D services approximately a week before hearing, which led to it immediately informing Respondent of this error at that time; (vii) it reported compensation on its SBT returns related to the production of Yoplait Yogurt, which occurred in Michigan, but is a separate revenue stream unrelated to the issue in this case; (viii) its response to Respondent’s Interrogatory #11 incorrectly indicated that Petitioner’s employees had performed services under its agreements with General Mills Cereals, LLC, in Michigan; (ix) total costs it paid under the Agreement are consistent with General Mills Cereals, LLC’s, cost of goods sold on General Mills Cereals, LLC’s, Federal Form 1065; (x) Respondent’s reliance on tax court cases to validate Respondent’s assertions that Petitioner failed to substantiate its claim for refund do not hold precedential value in Michigan; (xi) although Respondent contends that Petitioner failed to substantiate its claim for refund, Petitioner “reached out to Respondent on numerous occasions in an attempt

to understand what additional documentation Respondent was requesting, but to no avail” (Post-Hearing Reply Brief, p 26); and (xii) Petitioner “has provided the Tribunal with . . . an abundance of contemporaneous documentation and testimony to prove that no services were performed in Michigan under the Agreement or the MSA.” (Post-Hearing Reply Brief, p 27)

As indicated above, Petitioner originally filed tax returns for tax years ending May 2005, May 2006, May 2007, and December 2007, by sourcing its sales of other than tangible personal property based on a market-based sourcing methodology, which was based on its actual sales of tangible personal property apportionment percentage; however, upon realizing its error, Petitioner filed amended SBT returns with Respondent, whereby Petitioner removed the services it provided to General Mills Cereals, LLC, from the numerator of its SBT sales apportionment factor for the tax years at issue based on MCL 208.53(b).

(Transcript, pp 3 – 7, 67 – 69; Post-Hearing Reply Brief)

PETITIONER’S ADMITTED EXHIBITS

Exhibit A: Petitioner’s Michigan Single Business Tax 2nd Amended Return for Fiscal Year Ended 5/05 and Applicable Attachments

Exhibit B: Petitioner’s Michigan Single Business Tax 2nd Amended Return for Fiscal Year Ended 5/06 and Applicable Attachments

Exhibit C: Petitioner’s Michigan Single Business Tax Amended Return for Fiscal Year Ended 5/07 and Applicable Attachments

- Exhibit D: Petitioner's Michigan Single Business Tax Amended Return for Fiscal Year Ended 12/07 and Applicable Attachments
- Exhibit E: Respondent's Notice of Denial of Refund Claims dated March 14, 2011
- Exhibit F: Contract Operating Agreement between General Mills Operations, LLC, and General Mills Cereals, LLC
- Exhibit G: Petitioner's Statement Regarding General Mills Operations, LLC, Michigan Refund Claims
- Exhibit H: Petitioner's Supporting Documentation and Applicable Attachments Submitted to Respondent On or About April 2, 2012
- Exhibit I: Affidavit of Denise Helmken and Supporting Documentation Submitted to Respondent On or About July 16, 2012
- Exhibit J: Petitioner's Michigan Single Business Tax 1st Amended Return for Fiscal Year Ended 5/05 and Applicable Attachments
- Exhibit K: Petitioner's Michigan Single Business Tax 1st Amended Return for Fiscal Year Ended 5/06 and Applicable Attachments
- Exhibit L: Petitioner's Michigan Single Business Tax Originally Filed Return for Fiscal Year Ended 5/05 and Applicable Attachments
- Exhibit M: Petitioner's Michigan Single Business Tax Originally Filed Return for Fiscal Year Ended 5/06 and Applicable Attachments
- Exhibit N: Petitioner's Michigan Single Business Tax Originally Filed Return for Fiscal Year Ended 5/07 and Applicable Attachments
- Exhibit O: Petitioner's Michigan Single Business Tax Originally Filed Return for Fiscal Year Ended 12/07 and Applicable Attachments
- Exhibit P: Affidavit of Denise Helmken and Supporting Documentation Submitted to Respondent On or About August 21, 2012

PETITIONER'S WITNESS

Denise J. Helmken

Denise J. Helmken is a senior tax manager of controversy and state planning for Petitioner and has been employed by Petitioner for 14 years. Ms. Helmken testified that (i) during the tax years at issue, Petitioner was known as General Mills Operations, Inc.; (ii) Petitioner manufactured and sold tangible personal property (i.e., Yoplait Yogurt, Betty Crocker snack mixes, fruit roll-ups, etc.) and engaged in the sale of services (i.e., manufacturing related and associated services and R & D services to affiliates); (iii) Petitioner entered into a contract on May 24, 2002, to perform manufacturing related services to General Mills Cereals, LLC, which remained in effect for the tax years at issue; (iv) all of the services performed by Petitioner pursuant to agreements with General Mills Cereals, LLC, were performed outside of Michigan and all the costs associated with performing those services were incurred outside of Michigan; (v) Petitioner “had two locations [in Michigan], a yogurt production facility in Reed City, Michigan, and a distribution center [for the yogurt inventory] in Kalamazoo” (Transcript, 30); (vi) “Yoplait Yogurt . . . is not a product of [General Mills Cereals, LLC]” (Transcript, p 21); (vii) Petitioner improperly sourced its services for General Mills Cereals, LLC, based on market-sourcing methodology by including those services in Petitioner’s Michigan sales apportionment factor numerator “[b]ecause we didn’t

know better” (Transcript, p 36); (viii) Petitioner filed amended SBT returns for the tax years at issue with Respondent in May, 2010; (ix) Petitioner’s amended SBT returns for the tax years at issue only contained changes to the numerator (removal of service revenue from General Mills Cereals, LLC) and nothing else; (x) Respondent denied Petitioner’s amended SBT returns; (xi) while R & D services were improperly sourced to the sales factor number for fiscal year ending May, 2005, “beginning in fiscal year ending 5-2006 we sourced the R and D services to Minnesota, which is where the headquarters are and where that service was performed” (Transcript, p 42); (xii) Petitioner keeps track of where an employee performs services based on the location where the employee provides those services; (xiii) “[an] employee is assigned a cost center[, t]hat cost center is then assigned to a plant, and that plant is then assigned to a code which says which entity they belong in” (Transcript, p 52); and (xiv) although she reviewed Petitioner’s answers to Respondent’s interrogatories prior to them being submitted to Respondent, the answer to Interrogatory #11 is incorrect since Petitioner’s employees did not perform services for General Mills Cereals, LLC, in Michigan. (Transcript, pp 9 – 67)

RESPONDENT’S CONTENTIONS

Respondent contends that Petitioner is not entitled to a refund for purported excess SBT paid. To support its contentions, Respondent argues that Petitioner

failed to substantiate its claim for refund. More specifically, Respondent states that (i) Petitioner originally provided Respondent with an explanation of facts, but then changed its explanation, which did not coincide with its original explanation; (ii) Petitioner provided an affidavit from Ms. Helmken about a week before the hearing that contained new facts that Respondent had never seen; (iii) it (Respondent) has been cooperatively working with Petitioner to resolve this issue; however, Petitioner has failed to provide any documentary evidence (i.e., source documentation) that it is entitled to a refund, including Petitioner's failure to provide Respondent documentation used to support Petitioner's original and revised contentions within 21 days of the entry of the Tribunal's April 17, 2012, Order; (iv) Petitioner failed to verify where its employees performed the services required under its agreements with General Mills Cereals, LLC; (v) there was another contract between Petitioner and General Mills Cereals, LLC, the MSA, which detailed Petitioner's obligation to provide R & D services; however, neither the MSA nor any documentation regarding R & D services was provided for Respondent to ascertain where these services were provided; (vi) "[a]ll version[s] of the returns filed by [Petitioner] reported large amounts of compensation paid in Michigan, reflecting a sizable Michigan workforce" (Post-Hearing Brief, p 16); (vii) although Petitioner's amended return included a statement, in relying on MCL 208.53(b), that "[t]he services, which [Petitioner] performed within Michigan

pursuant to the Agreement were not proportionally greater than the services that were performed without Michigan” (Post-Hearing Brief, p 18), Respondent states, in response to its contention that Petitioner failed to prove it is entitled to a refund, “Basically in retail, no receipt, no refund” (Transcript, p 70).

In its Post-Hearing Sur-Reply Brief, filed on November 15, 2012, Respondent contends that (i) it has “repeatedly asked Petitioner’s counsel for reliable, low-level, contemporaneous substantiation, and the reason why informal discovery never worked was because Petitioner only provided what it wanted to provide” (Post-Hearing Sur-Reply Brief, p 2); (ii) it is Petitioner’s burden “not only to track but to prove . . . costs on a sale by sale, transaction by transaction basis” (Post-Hearing Sur-Reply Brief, p 3); (iii) “it is true, just as [Petitioner] asserts, that Respondent declined any discussion of the additional information [regarding the R & D services in the MSA]: it was a week before trial, and the parties were supposed to be preparing for a hearing, not discussing what additional discovery might be necessary based on this new revelation” (Post-Hearing Sur-Reply Brief, p 6); (iv) it “made clear, specific requests, and [Petitioner] simply ignored them” (Post-Hearing Sur-Reply Brief, p 6); and (v) contrary to TTR 255(2), Petitioner’s “representative signed the interrogatories, apparently not even in the presence of a notary . . . [which] converts the responses to representative admissions under MRE 801(d)(2)(C) and (D)” (Post-Hearing Sur-Reply Brief, p

8). (Transcript, pp 7 – 9, 69 – 70; Post-Hearing Brief; Post-Hearing Sur-Reply Brief)

RESPONDENT'S ADMITTED EXHIBITS

R-1: General Mills Operations' Original and Amended Single Business Tax Returns:

a- FYE 2005 (05/01/2004-05/31/2005)

b- FYE 2006 (05/01/2005-05/31/2006)

c- FYE 2007 (05/01/2006-05/31/2007)

d- Short Taxable Year Ending 12/31/2007 (06/01/2007-12/31/2007)

R-2: March 14, 2011 Notice Disallowing Petitioner's Refund Claims

R-3: Internal Policy Directive 2006-8 (September 29, 2006)

R-4: April 2, 2012 Letter from Tim Pratschler to Jack Panitch (With Attachments)

R-5: Petitioner's Responses to Respondent's First Set of Interrogatories and Requests for Production of Documents, Dated May 9, 2012

R-6: Amended and Restated Contract Operating Agreement, Dated May 24, 2002

R-7: Original and Amended Statements Explaining Allocation of Service Receipts

FINDINGS OF FACTS

1. Petitioner, formerly known as General Mills Operations, Inc., is a Delaware limited liability company, with its headquarters and principal office located at Number One General Mills Boulevard, Minneapolis, Minnesota 55426.
2. For the tax periods at issue, Petitioner engaged in business activities within and outside of Michigan.

3. During the tax periods at issue, Petitioner engaged in both the sale of tangible personal property and sales of other than tangible personal property; however, only the sales of other than tangible personal property with respect to the services Petitioner provided to General Mills Cereals, LLC, are at issue in this case.
4. On Petitioner's originally filed SBT returns, Petitioner improperly sourced certain sales of other than tangible personal property on a market-based sourcing methodology, e.g., by erroneously applying its sales of tangible personal property apportionment percentage to its sales of services.
5. Petitioner amended its SBT returns for the tax periods at issue to properly source service fee income, originally included in the Michigan sales factor numerator, pursuant to MCL 208.53(b).
6. While Petitioner had payroll in Michigan, the entire Michigan payroll related to its production and distribution of Yoplait Yogurt and other products in a Michigan production facility and a Michigan distribution center, which were not related to the services it provided to General Mills Cereals, LLC.
7. Based on the credible testimony of Petitioner's witness and voluminous, detailed summary schedules, Petitioner established that all of the services performed by Petitioner pursuant to agreements with General Mills Cereals, LLC, were performed outside of Michigan and all the costs associated with those services were incurred outside of Michigan.
8. Pursuant to the Agreement, Petitioner's services that it provided to General Mills Cereals, LLC, were exclusively performed at General Mills Cereals, LLC, facilities and plants, which were all located outside of Michigan.
9. Pursuant to the MSA, R & D services provided by Petitioner to General Mills Cereals, LLC, were performed at Petitioner's headquarters in Minnesota.
10. Respondent issued a Notice of Denial to Petitioner on March 14, 2011. The Notice of Denial states:

Amended returns filed for years ending 2005 – 2007 to change the apportionment by removing service fee income are denied. Sufficient information was not given pertaining to who General Mills Cereals LLC is and a copy of the operating agreement.

CONCLUSIONS OF LAW

MCL 208.41 provides that a taxpayer, whose business activities are taxable both within and without this state, shall apportion his tax base as provided in Chapter 3 of the Single Business Tax Act (“SBTA”).

A taxpayer’s tax base for purposes of SBT is based on weighted sales, payroll, and property apportionment factors. “[A] taxpayer’s tax base . . . is the taxpayer’s contribution to the economy (also described as business income before apportionment).” *E I Du Pont De Nemours & Co v Dep’t of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued August 7, 2012 (Docket No. 304758), p 1, citing MCL 208.9(1) and *Midwest Bus Corp v Dep’t of Treasury*, 288 Mich App 334, 338; 793 NW2d 246 (2010).

MCL 208.51 defines sales factor as “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.)

Although Petitioner performs its business activities both within and outside of the State of Michigan, as indicated above, only Petitioner’s sale of other than

tangible personal property, with respect to the services it provided to General Mills Cereals, LLC, is at issue in this case.

“The SBTA distinguishes between two types of sales: sales of tangible personal property and sales ‘other than sales of tangible personal property’ . . . ,” *Midwest Bus Corp* at 339. As such, Petitioner is required to separately apportion its income from sales of tangible personal property under MCL 208.52 and sales other than tangible personal property under MCL 208.53. MCL 208.53 provides:

Sales, other than sales of tangible personal property, are in this state if:

- (a) The business activity is performed in this state.
- (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.

* * *

Business activity is defined in MCL 208.3. MCL 208.3(2) provides, in part:

“Business activity” means 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, but shall not include the services rendered by an employee to his employer, services as a director of a corporation, or a casual transaction. (Emphasis added.)

Although Respondent contends otherwise, based on the testimony of Ms. Helmken, the absence of any General Mills Cereals, LLC, plants or facilities in

Michigan, and the voluminous and detailed evidence provided by Petitioner, the Tribunal finds that Petitioner has sufficiently proven that its sales of other than tangible personal property, with respect to the services it provides to General Mills Cereals, LLC, are not performed in Michigan, nor are costs incurred with regard to those services in Michigan.

The Tribunal finds no merit to Respondent's misplaced contention that, in order to prove that the services at issue were not performed in Michigan, Petitioner would have to provide detailed records that documented and accounted for each service hour performed by every employee. While that level of documentation may be appropriate for a formal, on-site audit of a taxpayer, given the preponderance of evidence, including the detailed, summary spreadsheets; the lack of any General Mills Cereals, LLC, plants or facilities located in Michigan; and the credible testimony of Petitioner's witness, the Tribunal finds that said evidence is more than adequate to establish the credibility and validity of Petitioner's claim for refund.

Furthermore, the Tribunal similarly finds no merit to Respondent's contention that, contrary to TTR 255(2), Petitioner's "representative signed the interrogatories, apparently not even in the presence of a notary . . . [which] converts the responses to representative admissions under MRE 801(d)(2)(C) and (D)" (Sur-Reply Brief, p 8). Pursuant to TTR 111(1), the Tax Tribunal Rules

govern the practice and procedure in all cases and proceedings before the Tribunal.

Only if a rule does not exist will the Tribunal look to the Michigan Court Rules and Michigan Compiled Laws. See TTR 111(4). In that regard, TTR 255 specifically deals with interrogatories to parties. Although TTR 255(2) states that interrogatories shall be answered separately and fully in writing under oath, TTR 255(3) provides the remedy if subrule (2) is violated. TTR 255(3) states:

If any of the interrogatories have not been answered within the time specified under subrule (2) of this rule, then the Tribunal, *on motion and for good cause shown*, may issue an order compelling a response. A party who fails to answer interrogatories pursuant to an order of the Tribunal may be placed in default as provided by R 205.1247. (Emphasis added.)

As such, Respondent's recourse would have been to file a motion with the Tribunal requesting the Tribunal issue an order compelling Petitioner to provide it with notarized interrogatories. The Tribunal does not treat answers to interrogatories as admissions, nor does TTR 255 provide that answers to interrogatories are treated as admissions.

In light of the above, and because the services provided to General Mills Cereals, LLC, were demonstrably performed entirely outside the State of Michigan, and therefore, do not contribute to Michigan's economy, the revenue from those services should not have been included in Petitioner's numerator for determining its SBT base under MCL 208.51. As a result, the Tribunal finds that

Petitioner is entitled to a refund for SBT paid, plus applicable statutory interest pursuant to 1941 PA 122, with respect to its sales of other than tangible personal property (i.e., services) to General Mills Cereals, LLC, for the tax years at issue.

JUDGMENT

IT IS ORDERED that Petitioner's refund claim, plus statutory interest pursuant to 1941 PA 122, with respect to tax years ending May 2005, May 2006, May 2007, and December 2007 is GRANTED.

IT IS FURTHER ORDERED that Respondent shall issue a refund as required by this Order within 28 days of entry of this Final Opinion and Judgment.

MICHIGAN TAX TRIBUNAL

By: B.D. Copping

Entered: 11/28/12