

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

Schoeneckers, Inc.,  
Petitioner,

MTT Docket No. 418284  
Assessment No. R545331 &  
*Refund Claim*

v

Michigan Department of Treasury,  
Respondent.

Tribunal Judge Presiding  
B. D. Copping

ORDER GRANTING PETITIONER’S MOTION IN LIMINE

ORDER AWARDING COSTS AND ATTORNEY’S FEES TO PETITIONER

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Schoeneckers, Inc., appeals a single business tax (“SBT”) assessment issued by Respondent and the denial of its SBT refund claim. Petitioner contends that it is not liable for a deficiency in SBT paid, but is instead entitled to a refund of SBT paid for tax periods ending June 30, 2004, June 30, 2005, June 30, 2006, and June 30, 2007. To support this, Petitioner contends that after it realized that it had improperly sourced its sales of other than tangible property based on its customers’ billing addresses on its original returns, it filed amended returns utilizing the cost of performance method under MCL 208.53b,

which clearly demonstrated that although Petitioner conducts business activity both in and outside of Michigan, for some projects a greater proportion of its business activity is performed outside of Michigan.

The Tribunal finds Petitioner is entitled to a refund for tax periods ending June 30, 2005, June 30, 2006, and June 30, 2007, and cancels the assessment, as it related to those tax periods.

## BACKGROUND

Petitioner is a Minnesota corporation that engaged in business activities within and outside of Michigan. Petitioner is primarily a service-based company that helps clients improve their business. To provide this service, Petitioner and its clients enter into a contract that includes the client's requirement to pay Petitioner for costs plus pricing arrangements for event planning and coordination, which includes booking travel arrangements (airfare, hotel accommodations, and local transportation) and finding entertainment and speakers. These contracts also include Petitioner's obligation to pay third party vendors regardless of whether Petitioner is in fact ultimately paid by the client.

While Petitioner also sells tangible personal property, only the sourcing of sales of other than tangible personal property, for purposes of Michigan apportionment under MCL 208.53b, is at issue in this case.

Respondent conducted an SBT audit of Petitioner, which involved the tax periods beginning on July 1, 2003, through June 30, 2007. During the audit, upon discovering that it had been improperly sourcing sales of other than tangible personal property, Petitioner provided Respondent with amended SBT returns, which reflected a change in its Michigan apportionment method from a customer billing address method to the cost of performance method, as required by statute, for the company's tax years ending June 30, 2004, June 30, 2005, June 30, 2006, and June 30, 2007. Respondent, however, denied Petitioner's refund requests as reflected in its amended returns and, as a result of the audit, determined that Petitioner was liable for an SBT deficiency of \$13,015.00, plus statutory interest pursuant to MCL 205.23 and MCL 205.24. Subsequent to the audit and as presented at the hearing, Petitioner provided the Tribunal and Respondent with its second amended SBT returns for the tax years at issue. In the second amended SBT returns, Petitioner claimed the following refunds totaling \$633,827.00:

<b>Tax Period</b>	<b>Tax Type</b>	<b>Refund Claim</b>
6/30/2004	SBT	\$173,193
6/30/2005	SBT	\$179,760
6/30/2006	SBT	\$102,097
6/30/2007	SBT	\$178,777

An informal conference was held on March 21, 2011. A Decision and Order of Determination was issued on May 20, 2011, which affirmed the Hearing Referee's decision to hold Petitioner liable for a deficiency in SBT and to deny

Petitioner's refund request. A Notice of Final Assessment ("Final Assessment") was issued on May 31, 2011, and is summarized, as follows:

<b>Tax Period</b>	<b>Assessment No.</b>	<b>Tax Type</b>	<b>Tax</b>	<b>Penalty</b>	<b>Interest*</b>
6/30/2005	R545331	SBT	\$7,510.00	\$0	\$2,812.82
6/30/2006	R545331	SBT	\$4,395.00	\$0	\$1,322.17
6/30/2007	R545331	SBT	\$1,110.00	\$0	\$234.08

\*Interest accruing and to be computed in accordance with MCL 205.23 and MCL 205.24.

Petitioner filed its appeal of the Final Assessment to the Michigan Tax Tribunal on June 24, 2011. Respondent filed its answer to Petitioner's appeal on July 20, 2011. A hearing was held on August 1, 2012, at which both Petitioner and Respondent presented one witness. At the hearing, Petitioner filed a Motion in Limine requesting that the Tribunal find that Petitioner timely filed its claim for refund for SBT paid for the tax year ending June 30, 2004, within the applicable statute of limitations. Also at the hearing, Petitioner agreed to submit to the Tribunal and Respondent the most recently updated SBT amended returns, as referenced to during the hearing, for the tax years at issue. [Transcript, p 82] In drafting this decision, the Tribunal discovered that these SBT amended returns had not yet been submitted by Petitioner to the Tribunal and therefore the Tribunal initiated a conference call between Petitioner and Respondent on October 11, 2012, wherein the Tribunal requested, without objection from Respondent, that Petitioner fax said returns to the Tribunal and to also provide a copy to Respondent.

## PETITIONER'S CONTENTIONS

Petitioner contends that it is entitled to a refund for overpayment of SBT under MCL 208.53b because it erroneously sourced its sales of other than tangible personal property based on its customer's bill-to addresses versus sourcing its sales of other than tangible personal property under the cost of performance method for apportionment as required by MCL 208.53b. To support its contentions, Petitioner asserts that it sells both services and tangible personal property and the portion of its sales that relate to the sale of services should be sourced based on where the greater proportion of its services are performed. Although Petitioner originally filed tax returns for tax years ending June 30, 2004, June 30, 2005, June 30, 2006, and June 30, 2007, by sourcing its sales of other than tangible personal property based on its customers' billing addresses, Petitioner asserts that it reviewed its records during the course of Respondent's audit, and discovered that it had been improperly sourcing those sales. Petitioner further asserts that it raised this error with Respondent's auditor; however, Respondent's auditor failed to make any adjustments. Because of this, Petitioner amended its June 30, 2004, June 30, 2005, June 30, 2006, and June 30, 2007, year end tax returns utilizing the cost of performance approach under MCL 208.53b. Although Petitioner asserts that Respondent agreed that the cost of performance methodology is appropriate in this situation, Petitioner contends that Respondent "ignored its own guidance . . . in

denying” Petitioner’s refund claims. (Transcript, p 14) In fact, contrary to the statute and its own internal policies, Respondent’s auditor stated in his report that he rejected Petitioner’s proposed changes for several reasons, including that “[t]he cost-of-performance method is not a valid method of identifying sales because the business of the taxpayer includes many different types of activities with both services and tangible goods. It lacks the consistency of application that usage of customer’s ship-to state would provide.” (Respondent’s Exhibit 21, p 5) (Transcript, pp 10 – 16 & 136 – 138; Post-Hearing Brief)

#### PETITIONER’S ADMITTED EXHIBITS

Exhibit B: Notice of Preliminary Audit Determination

Exhibit G: Cost of Performance Analysis for Fiscal Year Ended 06/30/05

Exhibit H: Cost of Performance Analysis for Fiscal Year Ended 06/30/06

Exhibit I: Cost of Performance Analysis for Fiscal Year Ended 06/30/07

Exhibit K: Sample Contract dated August 28, 2006, between General Motors Corporation and Schoeneckers, Inc.

Exhibit L: Sample Contract dated November 9, 2006, between General Motors Corporation and Schoeneckers, Inc.

Exhibit M: Michigan Single Business Tax Return for Fiscal Year Ended 06/30/04 and applicable attachments

Exhibit N: Michigan Single Business Tax Amended Return for Fiscal Year Ended 06/30/04 and applicable attachments

Exhibit O: Michigan Single Business Tax Return for Fiscal Year Ended 06/30/05 and applicable attachments

Exhibit P: Michigan Single Business Tax Amended Return for Fiscal Year Ended 06/30/05 and applicable attachments

Exhibit Q: Michigan Single Business Tax Return for Fiscal Year Ended 06/30/06 and applicable attachments

Exhibit R: Michigan Single Business Tax Amended Return for Fiscal Year Ended 06/30/06 and applicable attachments

Exhibit S: Michigan Single Business Tax Return for Fiscal Year Ended 06/30/07 and applicable attachments

Exhibit T: Michigan Single Business Tax Amended Return for Fiscal Year Ended 06/30/07 and applicable attachments

Exhibit U: Summary of SBT Returns and Petition

#### PETITIONER'S WITNESS

##### Joel Nierengarten

Joel Nierengarten is the Vice President and Controller of Petitioner and has been employed with Petitioner since 2000. Mr. Nierengarten testified that (i) he is responsible for all of Petitioner's accounting and financial matters, including filing tax returns; (ii) Petitioner is in the business of business improvement; (iii) Petitioner engages in the sale of tangible personal property and in the sale of services other than tangible personal property; (iv) Petitioner's headquarters is located in Minnesota, but Petitioner also has one office located in Michigan, which employs approximately 20 to 30 or so employees; (v) the employees in Michigan engage in sales and services; (vi) Petitioner originally sourced its sales of other

than tangible personal property for purposes of its June 30, 2004, June 30, 2005, June 30, 2006, and June 30, 2007 year end SBT Annual Returns based on the customer's bill-to address; (vii) Petitioner was audited for fiscal years ending June 30, 2004, to June 30, 2007; (viii) during the course of the audit, Petitioner realized it had been improperly sourcing its sales of other than tangible personal property based on the bill-to address of the customer, "which wasn't in compliance with the Michigan rules, which should have been cost of performance"; (Transcript, p 75) (ix) Petitioner raised this issue with Respondent's auditor and Petitioner's cost of performance analysis was available for Respondent to review at the end of the audit; (x) in applying the cost of performance analysis, revenue was sourced to Michigan if an event took place in Michigan; (xi) the entire costs and fees were included in the apportionment factor; (xii) cost of performance analysis was not performed for the fiscal year ending June 30, 2004, because "[t]he detailed information needed to perform it was no longer available"; (Transcript, p 62) (xiii) despite not having the information needed to perform a cost of performance analysis for fiscal year ending June 30, 2004, Petitioner amended its June 30, 2004, return "based on the results of fiscal '05, '06 and '07" and "the average for those three years was . . . used to project the change in '04"; (Transcript, p 63) (xiv) he did not agree with Respondent's preliminary audit determination because "it didn't take into account the correct sourcing of our sales during the audit period, which

should have been based on cost of performance”; (Transcript, p 77) (xv) Petitioner filed amended tax returns for fiscal years ending June 30, 2004, to June 30, 2007, with Respondent on January 26, 2009, because Respondent’s auditor failed to make adjustments with respect to utilizing the cost of performance method for the sourcing of sales other than tangible personal property during the course of the audit; and (xvi) Respondent refused to issue a refund based on Petitioner’s amended tax returns. (Transcript, pp 17 – 104)

### RESPONDENT’S CONTENTIONS

Respondent contends that Petitioner is liable for a deficiency in SBT paid and is not entitled to a refund. To support its contentions, Respondent argues that (i) Petitioner failed to meet its burden to establish it is entitled to a tax refund; (ii) Petitioner’s refund request came at the end of the audit; (iii) Petitioner failed to provide sufficient documentation to support its refund request, specifically with respect to the 2004 year end; (iv) the amounts that Petitioner receives under its contracts with its customers that are attributable to reimbursement should not be included in Petitioner’s sales for sales factor apportionment purposes since services provided by third parties are not a part of Petitioner’s business activity; and (v) only Petitioner’s service fees should be included in determining Petitioner’s sales factor for purposes of apportionment under MCL 208.51. (Transcript, pp 138 – 140) (Post-Hearing Reply Brief)

## RESPONDENT'S ADMITTED EXHIBITS

Exhibit-1: 2003 Michigan Single Business Tax Annual Return

Exhibit-2: 2004 Michigan Single Business Tax Annual Return

Exhibit-3: 2005 Michigan Single Business Tax Annual Return

Exhibit-4: 2006 Michigan Single Business Tax Annual Return

Exhibit-5: 2007 Michigan Single Business Tax Annual Return

Exhibit-6: 2003 Michigan Single Business Tax Amended Return

Exhibit-7: 2004 Michigan Single Business Tax Amended Return

Exhibit-8: 2005 Michigan SBT Apportionment Formula

Exhibit-9: 2005 Michigan SBT Apportionment Formula

Exhibit-10: 2005 Michigan SBT Apportionment Formula

Exhibit-11: 2005 Michigan Single Business Tax Amended Return

Exhibit-12: 2006 Michigan SBT Apportionment Formula

Exhibit-13: 2006 Michigan Single Business Tax Amended Return

Exhibit-14: 2004 Michigan C-8002 Single Business Tax Quarterly Return for the Third Quarter and check for payment

Exhibit-15: 2004 Michigan C-8002 Single Business Tax Quarterly Return for the Fourth Quarter and check for payment

Exhibit-16: 2005 Michigan C-8002 Single Business Tax Quarterly Return for the Second Quarter and check for payment

Exhibit-17: 2005 Michigan C-8002 Single Business Tax Quarterly Return for the Third Quarter and check for payment

Exhibit-18: 2005 Michigan C-8002 Single Business Tax Quarterly Return for the Fourth Quarter and check for payment

Exhibit-19: 2006 Michigan C-8002 Single Business Tax Quarterly Return for the Second Quarter and check for payment

Exhibit-20: 2006 Michigan C-8002 Single Business Tax Quarterly Return for the Third Quarter and check for payment

Exhibit-21: Audit Report of Findings including tables

Exhibit-22: Final Assessment(s) for the taxes at issue

### RESPONDENT'S WITNESS

#### Clyde Williams

Clyde Williams is an auditor and has been an employee of Respondent since 1987, but has been a manager with Respondent since 1993. Mr. Williams testified that (i) he has been the supervisor of the auditor, Mike Kelly, who conducted the audit at issue in this case for the past seven years; (ii) he reviews and approves audits, including the audit at issue in this case; (iii) Respondent accepts a taxpayer's definition of what type of company they are based on their filings, unless documentation submitted proves otherwise; (iv) based on Petitioner's original tax returns, Respondent assumed that Petitioner was more so in the business of selling tangible personal property versus intangible services; (v) the audit at issue in this case lasted for several years; (vi) Petitioner did not raise an issue with respect to its apportionment method until the end of the audit; (vii) Petitioner did not provide

sufficient evidence to support its request to change its apportionment method to the cost of performance; (viii) the hearing referee explained the lack of sufficient evidence to support Petitioner's use of the cost of performance method at the informal conference; (ix) not all of the evidence presented to the Tribunal was also presented at the informal conference; (x) new evidence presented to the Tribunal has not been audited or verified; (xi) Petitioner's amended returns were not accepted because Petitioner failed to submit supporting information in order for Respondent to verify the numbers contained therein; (xii) he did not review Petitioner's amended returns prior to the informal conference; and (xiii) he was not involved in the denial of Petitioner's refund request in its amended returns.

(Transcript, pp 104 – 136)

### FINDINGS OF FACTS

1. Petitioner is a Minnesota corporation, with its headquarters and principal office located at 7630 E. Bush Lake Rd., Minneapolis, MN 55440.
2. During the tax periods at issue, Petitioner engaged in both the sale of tangible personal property and sales of other than tangible personal property. The only issue in this case is with respect to sales of other than tangible personal property.
3. Respondent conducted an SBT audit of Petitioner for the period of July 1, 2003, to June 30, 2007.
4. Petitioner originally sourced the sale of other than tangible property, for the tax periods at issue, based on its customers' billing addresses instead of in accordance with MCL 208.53(b).

5. Petitioner became aware of and notified Respondent's auditor of its improper sourcing of sales of other than tangible personal property during the course of Respondent's audit.
6. Petitioner revised its sourcing of sales of other than tangible personal property to reflect the cost of performance under MCL 208.53b and made this information available to Respondent's auditor prior to the end of the audit.
7. Petitioner included its fees plus the costs associated with services Petitioner contracted for with third parties that were to be reimbursed on a cost plus basis by its customers in its calculations of sales of other than tangible personal property.
8. Despite Petitioner's request, Respondent's auditor did not adjust Petitioner's numbers for tax periods ending June 30, 2004, June 30, 2005, June 30, 2006, and June 30, 2007, to comply with MCL 208.53b during the course of the audit.
9. The Audit Report of Findings states:
  - a. The auditor, Mike Kelly, of the Illinois office reviewed the taxpayer's proposed changes and rejected them due to the following reasons:
    - i. The cost-of-performance method is not a valid method of identifying sales because the business of the taxpayer includes many different types of activities with both services and tangible goods. It lacks the consistency of application that usage of the customer's ship-to state would provide.
    - ii. Identification of the location of performance seemed arbitrary in many circumstances without a listing of hours billed by location or other definitive criteria.
    - iii. Only Michigan customers were reworked. If cost-of-performance were used, 100% of sales activity would have to be examined. (Respondent's Exhibit 21, pp 5 – 6)

10. After the audit, Petitioner amended its tax returns for tax years ending June 30, 2004, June 30, 2005, June 30, 2006, and June 30, 2007, to properly source sales of other than tangible personal property based on the cost of performance under MCL 208.53(b).
11. Petitioner did not perform the cost of performance analysis for the fiscal year ending June 30, 2004, because “[t]he detailed information needed to perform it was no longer available.” (Transcript, p 62)
12. Petitioner amended its June 30, 2004, year end tax return “based on the results of fiscal ’05, ’06 and ’07” and “the average for those three years was . . . used to project the change in ’04.” (Transcript, p 63)
13. Petitioner indicated on the Notice of Preliminary Audit Determination, dated January 21, 2009, signed January 26, 2009, that it “[d]oes not agree with this preliminary determination” and further indicated:

The Taxpayer has advised the auditor that [Petitioner] is in the process of finalizing its sales apportionment cost of performance analysis. [Petitioner] made the auditor aware of this issue during the course of the audit and the auditor did not want to address the matter. Enclosed are amended returns for fiscal years 2004 through 2007 with revised sales apportionment percentages using cost of performance analysis. (Petitioner’s Exhibit B)
14. Petitioner asserts that it is entitled to a refund for the tax periods ending June 30, 2004, June 30, 2005, June 30, 2006, and June 30, 2007, based on its amended returns, filed with Respondent on January 26, 2009, which reflect the sourcing of sales of other than tangible personal property based on the cost of performance method under MCL 208.53b.
15. Respondent refused Petitioner’s refund request for tax periods ending June 30, 2004, June 30, 2005, June 30, 2006, and June 30, 2007.
16. The Decision and Order of Determination upheld the Informal Conference Recommendation that Petitioner did not provide sufficient evidence to

support its cost of performance calculations and therefore upheld the decision to affirm the assessment and deny Petitioner's refund request.

17. Respondent's Internal Policy Directive (IPD) 2006-8 provides Respondent with guidance regarding costs of performance for SBT Sales Apportionment. IPD 2006-8 states, "If the service is performed both within and outside of Michigan, then a taxpayer must demonstrate, using a 'costs of performance' analysis on a transactional basis, where the greater proportion of the business activity is performed."

18. Respondent issued to Petitioner a Final Assessment No. R545331 ("Final Assessment") for fiscal years ending June 30, 2005, June 30, 2006, and June 30, 2007, dated May 31, 2011, assessing a deficiency in SBT in the amount of \$13,015.00, penalty in the amount of \$0.00, and interest in the amount of \$4,369.07, for a total assessment of \$17,384.07.

19. Mr. Nierengarten testified that he "doesn't remember" if Respondent requested verification or records to verify what was stated on the amended returns, but indicated that all records or documentation "were available." (Transcript, p 95) In addition, Mr. Williams testified that he was "not sure" as to whether the Department ever requested any additional information. (Transcript, p 122)

### 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").

Petitioner performs its business activities both within and outside of the State of Michigan. Because "[t]he SBTA *distinguishes* between two types of sales: sales of tangible personal property and sales 'other than sales of tangible personal property' . . .," *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 339; 793 NW2d 246

(2010) [emphasis added], 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:

\* \* \*

(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.

\* \* \*

Respondent also has an IPD providing guidance on the proper interpretation and application of MCL 208.53. The IPD specifically states, “If the service is performed both within and outside of Michigan, then a taxpayer *must* demonstrate, *using a ‘costs of performance’ analysis* on a transactional basis, where the greater proportion of the business activity is performed.” (IPD 2006-8) [Emphasis Added]

MCL 208.53(b) and Respondent’s IPD support Petitioner’s method of sourcing its sales of other than tangible personal property. The Tribunal, therefore, rejects Respondent’s decision to not follow the statute and its own guidance based solely on the fact that it asserts that it did not have sufficient documentation to verify Petitioner’s cost of performance analysis which was provided to Respondent *prior to* the completion of the audit.

Furthermore, although Respondent contends that the fiscal year ending June 30, 2004, was not part of Respondent's audit, a review of the evidence shows the audit period was in fact from July 1, 2003, to June 30, 2007. (See Petitioner's Exhibit B) Therefore, granting Petitioner's Motion in Limine to include the tax year ending June 30, 2004, in this case is proper.

The Tribunal, however, finds that although the cost of performance is the proper method to determine Petitioner's SBT liability for the tax years at issue with respect to its sales of other than tangible personal property, Petitioner has failed to meet its burden to "come forward with positive proof of [its] income" for the tax year ending June 30, 2004. See *Kostyu v Dep't of Treasury*, 170 Mich App 123, 130; 427 NW2d 566 (1988). Additionally, Petitioner acknowledged that it no longer had the documentation it needed to perform a cost of performance analysis for the tax year ending June 30, 2004, and merely "pro-rated" its calculations based on tax years ending June 30, 2005, June 30, 2006, and June 30, 2007. (Transcript, pp 62 – 63) Averaging different tax years does not meet Petitioner's burden of proof and is not the proper way to calculate SBT under MCL 208.53b. Because Petitioner failed to meet its burden of proof by properly substantiating its refund request for the tax year ending June 30, 2004, the Tribunal finds that the sales apportionment percentages used by Petitioner on its original SBT return for fiscal

year ending June 30, 2004, must be sustained, even though these original apportionment percentages were undoubtedly incorrect.

The Tribunal must also determine whether the costs Petitioner charges to its clients for reimbursement are to be included in Petitioner's total sales of other than tangible personal property under MCL 208.51. "Under MCL 208.51(1), the sales factor is a fraction that has as its numerator the taxpayer's *total sales* in this state, and as its denominator 'the *total sales* of the taxpayer everywhere during the tax year.'" *Midwest Bus Corp, supra*. Although decided prior to the amendment of MCL 208.7, Petitioner's obligation to pay third-party vendors can be distinguished from *PM One, Ltd v Dep't of Treasury*, 240 Mich App 255; 611 NW2d 318 (2000), in that Petitioner "owned the consideration [to pay] the third-party vendors." *Id* at 265. Petitioner's requirement to pay the third-party vendors did not hinge on whether Petitioner was reimbursed for costs by its clients. Additionally, although not binding, IPD 2006-8 states:

"Costs of performance" means direct costs consistent with a taxpayer's method of accounting for federal income tax purposes. In other words, those costs directly related to the activity performed for the client. Indirect costs not directly related with the performance of the contracted service are not used in calculating the costs of performance.

Direct costs do not include fixed costs unrelated to the provision of property or services; or remotely related costs such as human resources management, accounting, advertising, or activities

conducted to maintain the business but not to provide the business activity in question.

The determination of direct costs is dependent on an examination of the nature of the service performed. Direct costs may include labor costs of those employees directly related to the performance of the service in question; materials, equipment, and supplies directly related to the performance of the service; *and payments to an independent contractor who performs services directly related to the contractual obligations.* (Emphasis added)

As such, the Tribunal finds that Petitioner's total sales for purposes of MCL 208.7 and MCL 208.51 include reimbursed costs that Petitioner was obligated to pay to third party independent contractors.

Further, the Tribunal finds that, in light of the circumstances of this case, awarding costs and attorney's fees to Petitioner is appropriate. TTR 145(1) allows the Tribunal to order costs be remunerated to a prevailing party in an appeal before the Tribunal. The rule itself, however, provides no guidelines or criteria by which the Tribunal is to measure whether costs should be awarded. While MCR 2.625 provides courts with some criteria in determining whether an award of costs is appropriate, such direction is only applicable where an action or defense was frivolous, as provided by MCL 600.2591. (MCR 2.625(A)(2)) MCL 600.2591, contained in the Revised Judicature Act of 1961, however, "applies only to the organization and jurisdiction of the courts and to civil procedure." *Federal-Mogul Corp v Dep't of Treasury*, 161 Mich App 346, 367 – 368; 411 NW2d 169 (1987),

citing *City of Birmingham v Oakland County*, 49 Mich App 299, 306 – 307; 212 NW2d 51 (1973). “Since this is an administrative proceeding before the Tax Tribunal, the [Revised Judicature Act] does not apply.” *Federal-Mogul Corp*, *supra*, p 368. Thus, the decision to award costs is solely within the discretion of the Tribunal judge.

That being said, Respondent had no basis to believe its interpretation of the facts was correct and it failed to follow the clear language of the statute, MCL 208.53(b), and its own guidance found in IPD 2006-8. Not only should Respondent be aware that the proper way to source sales of other than tangible personal property for apportionment purposes is to utilize the cost of performance method under MCL 208.53, but Respondent was also made aware of, and acknowledged, Petitioner’s error in improperly sourcing its sales of other than tangible personal property based on its customers’ billing addresses during the course of its audit. As such, although Respondent argues that the audit had been on-going for a long period of time, was nearly complete, and it lacked sufficient information to utilize such approach, Respondent, the auditor, audit manager, and other members of Respondent’s enforcement bureau who review audit reports should have realized the auditor’s obvious error in interpreting the statute and error in judgment in failing to resolve the issue by working with Petitioner to obtain the

necessary documentation and determining what the Petitioner's actual SBT liability for the years at issue should have been.

Respondent is charged with not only enforcing the statutes under its jurisdiction, but doing so in a manner that results in the correct amount of tax being assessed against taxpayers. "The correct amount of tax" being the amount that is due and owing, whether an additional amount of tax due or a refund, based on the statutes, rules, RABs, IPDs, precedential court cases, or other guidance provided by Respondent. Respondent's role is not that of an advocate for positions that maximize the amount of revenue being collected by the state.

MCR 2.114 provides that a signature on "pleadings, motions, affidavits, and other papers" by a party "constitutes a certification by the signer that (1) he or she has read the document; (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, *the document is well grounded in fact and is warranted by existing law* or a good-faith argument for the extension, modification, or reversal of existing law; and (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay *or needless increase in the cost of litigation.*" (Emphasis added.) MCR 2.114(E) provides that "[i]f a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to

pay to the other party or parties *the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees.*”

(Emphasis added)

The Tribunal, therefore, finds Respondent’s (i) inability to work with Petitioner to verify the corrected calculations during the course of the audit; (ii) failure to follow MCL 205.83b; (iii) disregard of its own guidance, IPD 2006-8; and (iv) violation of MCR 2.114, warrants awarding Petitioner costs and reasonable attorney’s fees. In sum, once Petitioner notified the auditor that the sales factor, with respect to the service portion of Petitioner’s business, was not being properly sourced, the auditor (or the audit manager) should have realized an obvious error had been made and worked with Petitioner to determine what the proper apportionment method and percentage of Michigan sales should have been. Respondent’s enforcement bureau’s failure to administer the tax at issue properly and its disregard of the applicable statute and its own guidance resulted in Petitioner and Respondent incurring substantial amounts of unnecessary time and expense that neither party should have had to incur.

#### JUDGMENT

IT IS ORDERED that Petitioner’s Motion in Limine is GRANTED.

IT IS FURTHER ORDERED that Assessment No. R545331 is CANCELLED.

IT IS FURTHER ORDERED that Petitioner's refund claim is GRANTED with respect to the revised amended returns submitted by Petitioner to the Tribunal on October 11, 2012, for tax periods ending June 30, 2005, June 30, 2006, and, June 30, 2007.

IT IS FURTHER ORDERED that Petitioner's refund claim with respect to tax period ending June 30, 2004, is DENIED.

IT IS FURTHER ORDERED that Petitioner shall be awarded COSTS AND ATTORNEY'S FEES.

IT IS FURTHER ORDERED that Petitioner shall submit to the Tribunal and Respondent within 14 days of the entry of this Final Opinion and Judgment a bill of costs and attorney's fees for the costs and fees incurred in the filing and prosecuting of this appeal. The bill of costs shall state separately each item claimed and a detailed description and accounting of the basis for claiming each item of cost. The amounts claimed shall also be verified by an affidavit of the party or authorized representative and the affidavit shall state that each item is correct and was necessarily incurred. See TTR 145.

IT IS FURTHER ORDERED that Respondent may respond to Petitioner's bill of costs and fees within 14 days of the service of the bill of costs and attorney's fees.

MICHIGAN TAX TRIBUNAL

By: B.D. Copping

Entered: 10/23/12