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

Greystone International, Inc.,
Petitioner, MTT Docket No. 429973

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 March 1, 2013. The Proposed Opinion and Judgment provided, in pertinent part, "the 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 evidence admitted at the hearing." 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 Tax Tribunal Act (MCL 205.726)."

Petitioner filed exceptions to the Proposed Opinion and Judgment on March 14, 2013. Respondent has not filed exceptions to the Proposed Opinion and Judgment or a response to Petitioner's exceptions.

PETITIONER'S EXCEPTIONS

1. "It remains uncontroverted that Greystone . . . never once installed the property to real estate. Therefore, it could never alter, repair, or improve real estate. The evidence provided at the hearing showed that third party installers, in all cases, altered the real estate to include the products manufactured by Greystone."
2. "Treasury only used a sampling of the 2008 tax year, a year that is not even at issue before the Tribunal to conclude that subcontractors were used. It appears, at the very least, that in some circumstances, Greystone did not subcontract the installation work, which would disqualify it from the definition of a contractor/manufacturer."
3. "[E]ven in those cases where the invoice claims an installation charge, the amount was paid directly to the installer, not through Greystone. . . . Therefore, these third-party installers were never subcontractors."
4. "The Proposed Opinion and Judgment states as follows: . . . 'There is no indication that Mr. Sousley has personal knowledge regarding whether or how often seats at the Goodrich Quality Theater were moved. . . . Overall, this testimony is speculative and unconvincing.' This same witness, who gave allegedly unconvincing, general, and speculative evidence for the Petitioner, was found credible and noteworthy when cited for other purposes. It seems [it]

would be patently unfair to determine that a witness is credible and not credible at the same time only to serve different purposes."

5. "In *Brunswick Bowling & Billiards Corp v Dep't of Treasury*, 267 Mich App 682, 687; 706 NW2d 30 (2005), the Michigan Court of Appeals stated the dispositive question is whether plaintiff maintained a 'right of power' over the contested items as they were transferred to other states to be used. Contrary to this Tribunal's Proposed Order and Decision, 'the term 'use' as set out in the statute does not encompass the withdrawal from inventory and subsequent distribution of such items in another state.'"
6. "The Court further held that since the items in dispute remained in plaintiff's control and possession when they were sent to another states [sic] the use did not occur in Michigan. . . . This is the identical scenario we have in the instant case. Both Respondent and the Tribunal seem to agree that Greystone has control over the seating until installation, notwithstanding who performed the installation."
7. "Since the withdrawal from inventory is not a taxable use in accordance with *Brunswick*, the taxable use did not occur in the State of Michigan. Therefore, Respondent had no jurisdiction to impose a use tax on Greystone for the subject year."

8. "Under Michigan state law, Greystone is not a consumer. In *Miedema Metal Building Systems Inc v Dep't of Treasury*, 127 Mich App 533; 338 NW2d 924 (1983), the Court of Appeals held that if the taxpayer affixed the property to the realty, he is a consumer within the meaning of the use tax statute. If the taxpayer does not install the property – or affix it to the realty – the taxpayer is not a consumer."
9. "Similarly, Greystone does not install or affix any of its product[s] to the real estate. . . . Since Greystone is not a consumer, it did not consume property (in the State of Michigan). As a result of Greystone failing to qualify as a consumer, Respondent cannot impose a use tax on the Petitioner."

CONCLUSION

The Tribunal has reviewed Petitioner's exceptions and the case file, and finds that the ALJ correctly determined that "the department had reason to believe that the use tax returns failed to accurately report the tax due. See *Vomvolakis, supra*. In such case, the assessment is prima facie correct and the burden of proof is on the taxpayer to prove otherwise. See MCL 205.104a(4)." (Proposed Opinion and Judgment, p 28). Petitioner's exceptions relating to the use of the 2008 tax year as the sample year for the audit and that "in some circumstances" Petitioner did not subcontract the installation are unsupported. Petitioner did not specify in

the exceptions what errors existed in the Proposed Opinion and Judgment regarding the audit methodology. Petitioner does not point to any specific exhibits or testimony to establish that the ALJ erred regarding any determination made regarding the 2008 sample year or the installations that were or were not done by subcontractors. Petitioner has failed to meet its burden of proof regarding this contention.

Regarding the testimony of Mr. Sousley, the Tribunal finds that the ALJ correctly determined his testimony regarding Goodrich Quality Theater and Empire Theaters was "speculative and unconvincing." Mr. Sousley believed or seemed to recall the information given regarding these two theaters, but could cite no specific instance or support for these beliefs. The fact that the ALJ found this testimony to be speculative does not mean that the witness could not be found credible or reliable for other circumstances. The ALJ never made a determination that Mr. Sousley was not a credible or truthful witness; the ALJ merely determined that Mr. Sousley did not have specific or convincing knowledge regarding the seating at either theater discussed in that portion of the testimony. Petitioner has failed to establish that it was "patently unfair" to determine the witness credible as to some aspects of testimony and not credible as to others.

The Tribunal further finds that Petitioner's exceptions relating to the Court of Appeals' decision in *Brunswick* were raised in Petitioner's Post-Hearing Brief and addressed in Respondent's Reply Brief, although not specifically considered in the Proposed Opinion and Judgment. In *Brunswick, supra,* the Court of Appeals determined that "the dispositive question is whether plaintiff maintained a 'right or power' over the contested items as they were transferred to other states to be used or given away for promotional purposes." *Id*. at 687. The Court of Appeals went on to determine that the items in dispute remained in the taxpayer's control and possession when being sent to other states and there was no taxable use that occurred in Michigan. Contrary to Petitioner's exceptions, this is not an "identical scenario" to the present case. The taxpayer in *Brunswick* was not a contractor engaged directly in the business of constructing, altering, repairing, or improving real estate for others. The taxpayer had bowling balls and other items that were held in its inventory and were later given away as promotional items (if not given away, the items remain in the taxpayer's inventory in Michigan). The ownership rights over the inventory items in *Brunswick* did not change to a different use while the items were still in Michigan. In the present appeal, however, the taxable use occurred *in Michigan*, when the seating was removed from Petitioner's inventory and designated to a specific contract where there was a duty to affix them to the

theater floor/riser. See POJ, p 17. The ALJ correctly determined that Petitioner manufactured theater seating and hired independent contractors to install the seating.

Petitioner also relies on the Court of Appeals' decision in *Miedema Metal Bldg Systems Inc v Dep't of Treasury* in its exceptions. In *Miedema, supra*, the taxpayer sold and installed grain storage bins. The Court of Appeals found that the taxpayer was a contractor for purposes of the use tax, the taxpayer installed grain storage bins that were affixed to realty, and the taxpayer was liable for use tax on the cost of the bins. Specifically, the Court of Appeals held that "if petitioner affixes the bins to the realty, he is a 'consumer' under the meaning of the statute and use tax liability can be based upon his cost of the bins." *Id*. at 537. The Court of Appeals reached this determination despite the taxpayer's argument that the bins were "merely bolted onto the foundation." *Id*. at 535. In the present case, the seating is affixed through the use of anchor bolts that remain in the floor and affix the seating to the realty. Just like the circumstances in *Miedema,* Petitioner was found to affix the seating to the realty, and Petitioner is therefore a consumer under the statute and could be held liable for the use tax. Petitioner has failed to prove that the ALJ erred in determining that Petitioner was liable for the use tax as stated in the POJ.

Given the above, the Tribunal adopts the March 1, 2013 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 R745095 is affirmed, in part, in the amount of $184,000, without penalty, and with interest to be calculated per 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: May 10, 2013