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

MJR Group LLC,
Petitioner,

v

MTT Docket No. 441767

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DISPOSITION

ORDER DENYING PETITIONER'S
MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner filed its Petition, initiating the above-captioned appeal, on June 20, 2012. Petitioner appeals the denial of refund of Michigan sales taxes for the 2007, 2008, 2009, and 2010 tax years. Respondent denied the refund request on August 12, 2011. Petitioner filed this appeal asserting that, in short, it collected sales tax from customers on sales items such as bottled water and prepackaged candy, in connection with MCL 205.54g(4). Petitioner then paid said tax to Respondent; however, bottled water and prepackaged candy are not subject to sales tax under MCL 205.54d and Administrative Rule 86.

On July 12, 2012, Respondent filed an Answer. In its Answer, Respondent contends that "Petitioner has failed to state a claim upon which relief may be granted. . . ."

On August 9, 2012, Respondent filed a Motion for Summary Disposition, under TTR 230 and MCR 2.116(C)(8). In its Motion, Respondent states that only the State of Michigan can be enriched or gain any benefit from the collection or payment of Michigan sales tax and further, Petitioner's "representations to customers mandate a denial of its claimed refund, regardless of peripheral issues."

On August 30, 2012, Petitioner filed a Response to Respondent's Motion and Motion for Summary Disposition, under TTR 230, MCR 2.116(B)(1), and MCR 2.116(C)(10). In its Response to Respondent's Motion, Petitioner states that its "claim is based on documented facts and Michigan law." Regarding its Motion for Summary Disposition, Petitioner states that "[a]ll of the factual statements . . . are corroborated by either or both sworn affidavits and documentary evidence."

On September 20, 2012, Respondent filed a response to Petitioner's Motion for Summary Disposition. In its Response to Petitioner's Motion, Respondent states that there are several material facts that remain in dispute, as such, Petitioner's Motion for Summary Disposition under MCR 2.116(C)(10) should be denied.

The Tribunal finds that the granting of summary disposition for Respondent is appropriate based on the uncontested facts and case law.

PETITIONER'S CONTENTIONS

Petitioner states that it operates eight movie theaters in southeast Michigan and each movie theater location contains a concession stand. Petitioner contends that on June 20, 2011, Petitioner requested that Respondent "issue a refund of overpaid sales tax paid in error." Petitioner claims that Respondent denied the refund request on August 12, 2011. Petitioner contends that an informal conference was held on March 21, 2012, and Respondent issued a Decision and Order of Determination on May 16, 2012, which denied the claim for refund. Petitioner further contends that the Hearing Referee held that (1) "bottled water and prepackaged candy becom[es] taxable when a vender also sells 75% or more prepared food and makes eating utensils available to the consumer. However, [the hearing referee] recommended (2) the refund not be issued because it would constitute unjust enrichment." Petitioner states that Respondent disagreed on the holding of the Hearing Referee but affirmed the denial of the refund.

Additionally, Petitioner argues that it does not provide utensils in connection with prepackaged candy and bottled water. The Tribunal, however, finds that this point is irrelevant because the law is clear that prepackaged candy and bottled

water are nontaxable items.

Petitioner contends that "[t]he advertised or stated price for menu items is based on market . . . [and sales] tax is NOT added to the stated price for menu items. . . . [Further,] Petitioner clearly states on the concession stand menu board that 'All Prices Include Sales Tax.'" (Emphasis in original.) Additionally, Petitioner cites *M.H. Wilkins Company v Department of Revenue*, Michigan Board of Tax Appeals, Docket No. 375, February 23, 1956, among other cases, where the taxpayer was not entitled to a refund of sales tax erroneously paid to Respondent. Petitioner further states that "[i]f consideration is to be given to the matter of a refund, it should be the customers of the taxpayer rather than the taxpayer who might qualify."

Petitioner argues that "[t]he courts have not addressed whether enrichment exists when the seller does not pass the tax onto the customer by separately stating the tax as a separate item on the . . . receipt . . . but separately includes it as a factor of the price for the product sold to the customer." Petitioner asserts that "[e]nrichment does exist when the sales tax, supported by the taxpayer's records, is specifically included in the sales price and the sales price charged is an important factor in determining the final price quoted on each job." Petitioner further asserts that "[e]nrichment does NOT exist when the sales tax is included in the sales price,

but the ultimate sales price is determined by external factors (i.e. market, competition, etc.).” (Emphasis in original.)

Petitioner claims that the price for its “sales is determined by market and competitor’s prices without any consideration for sales tax.” Finally, Petitioner states that it is “not required to . . . show that unlawfully collected sales tax was refunded to its customers prior to a claim for refund because there was no unlawful collection of any sales tax . . .”; therefore, there was no unjust enrichment.

RESPONDENT’S CONTENTIONS

Respondent argues that Petitioner is attempting to enrich itself by collecting monies labeled taxes on nontaxable items. Respondent argues that Petitioner advertised to customers that “All Prices Include Sales Tax,” it then collected said monies from sales of “bottled water and candy as [a tax] and remitted sales tax on those items to the State.” Respondent contends that “[a]n entity other than the State of Michigan may not enrich itself or gain any benefit from the collection or payment of Michigan sales tax . . . [and Petitioner] may not enrich itself by lying to customers and keeping the collected tax.” Further, Respondent claims that “MCL 205.73(4) treats any amount designated by a seller as sales tax to be for the benefit of the State, and the seller holds that money in trust for the State until remitted. Thus, law bars the issuance of the refund.” Respondent argues that [w]hile law

permits [Petitioner] to pass the economic burden of levied sales tax on to customers, law does not permit [Petitioner] to tell customers it is passing the tax on to them, only to keep the money received for its own gain." (Emphasis removed.)

Respondent asserts that Petitioner admitted that "it affirmatively represented to customers that it collected sales tax on the sale of bottled water and candy" by displaying a message that stated: "All Prices Include Sales Tax." Respondent claims that such advertisement was deceptive to customers who "thought they were paying sales tax on bottled water and candy." As such, Respondent states that "Michigan law does not require MJR to take affirmative steps and represent to customers that it remits sales tax on the transaction. MCL 205.73(1)." Further, Respondent states that the law is "prohibitory in nature" in that it only requires a retailer to declare instances when sales tax is not included in the price. Respondent asserts that "[t]he statute does not even require a retailer to pass on the economic impact of the tax to customers. The statute merely prohibits it. *Consolidation Coal Co v Dep't of Treasury*, 141 Mich App 43, 55; 366 NW2d 587 (1985)." Additionally, Respondent argues that if "bottled water and candy were not subject to sales tax, [Petitioner] did not have reason or authority to pass sales tax on to customers." Finally Respondent cites *Sims v Firestone Tire & Rubber Co*, 56 Mich App 440, 442-443 (1974), and asserts that "unless [Petitioner] refunds the alleged

wronged individuals, it achieves the same result of unjust enrichment."

FINDINGS OF FACT

Based on the parties' contentions of facts and clear direction in law, the Tribunal need not consider whether prepackaged candy and bottled water is taxable and whether Petitioner sold such items at its venues. See MCL 205.54d(d)[1] and Revenue Administrative Bulletin 2009-8 on Sales Tax – Food for Human Consumption[2]. The fact that Petitioner provides utensils in conjunction with other items that it sells to consumers is immaterial, as the law clearly states that prepackaged candy and bottled water are nontaxable items. The facts in the above-captioned case appear to be similarly contended by both parties. Petitioner operates movie theaters in the state of Michigan, all of which contain concession stands. Said concession stands sell prepackaged candy and bottled water to consumers, among other items. Petitioner utilizes marketing boards at its concession stands to advertise the items sold. Each marketing board contains the statement: "All Prices Include Sales Tax." Petitioner paid to Respondent sales tax on bottled water and prepackaged candy, as well as other taxable food items sold to customers during the 2007, 2008, 2009, and 2010 tax years at issue. On June 20,

[1] "Additional sales excluded from tax includes . . . [t]he sale of bottle water."
[2] While "prepared food" sold at concession stands is taxable, "prepackaged items (e.g., candy bars, chips, nuts, cans or bottles of soda pop) not heated by the seller and sold without eating utensils" is not a "prepared food" by

2011, Petitioner then requested a refund from Respondent, which Respondent rejected on August 12, 2011. On October 11, 2011, Petitioner requested an Informal Conference, which occurred on March 21, 2012. Respondent issued a Decision and Order of Determination on May 16, 2012, denying Petitioner's claim for refund. The Hearing Referee determined that any refund would unjustly enrich Petitioner and Respondent also found that sales of prepackaged candy constituted sales of "prepared food," and was thus, subject to sales tax. Petitioner timely filed this appeal on June 20, 2012.

APPLICABLE LAW

There is no specific tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions. TTR 111(4).

Petitioner moves for summary disposition under MCR 2.116(C)(10) and MCR 2.116(B)(1). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. The Tribunal must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists

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definition, and therefore, is not taxable.

requiring hearing. *Spiek v Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998). When determining whether there is a genuine issue of material fact, the admissible evidence must be viewed in the light most favorable to the non-moving party, in this instance, Respondent. *Heckman v Detroit Chief of Police*, 267 Mich App 480; 705 NW2d 689 (2005). We will render a decision on a motion for summary disposition if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law. MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Because summary disposition decides an issue against a party before hearing, we grant such a remedy cautiously and sparingly, and only after carefully ascertaining that the moving party has met all requirements for summary disposition. Furthermore, the Tribunal will not resolve disagreements over material factual issues through summary disposition.

Respondent moves for summary disposition under MCR 2.116(C)(8). Motions for summary disposition under MCR 2.116(C)(8) are appropriate when the opposing party has failed to state a claim on which relief can be granted. Summary disposition should be granted when the claim, based solely on the

pleadings, is so clearly unenforceable that no factual development could possibly justify a right to recovery. *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993). In reviewing a motion for summary disposition under this subsection, the court must accept as true all factual allegations in support of a claim, as well as all inferences which can fairly be drawn from the facts. *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

CONCLUSIONS OF LAW

This Tribunal has carefully considered Petitioner's Motion for Summary Disposition[3] under the criteria for MCR 2.116(B)(1) and MCR 2.116(C)(10) and based on the affidavits, pleadings, and other documentary evidence submitted by the parties, determines that Petitioner's Motion shall be denied. As such, Petitioner has not stated a claim upon which relief can be granted and this Tribunal finds that Respondent's motion for summary disposition under the criteria for MCR 2.116(C)(8) is appropriate.

[3] Petitioner's Motion was a total 34 pages (not including exhibits). TTR 205.1111 provides that "[i]f an applicable entire tribunal rule does not exist, the 1995 Michigan Rules of Court, as amended, and the provisions of chapter 4 of Act No. 306 of the Public Acts of 1969, as amended being §§24.271 to 24.287 of the Michigan Compiled Laws, shall govern." In the absence of any tribunal rule that applies, MCR 2.119 provides that, "[**e**]**xcept as permitted by the court**, the combined length of any motion and brief, or of response and brief, **may not exceed 20 pages** double spaced, exclusive of attachments and exhibits." (Emphasis added.) Courts have upheld the 20-page maximum. See *People v Leonard*, 224 Mich App 569; 569 NW2d 663 (1997). Petitioner failed to request an extension to its brief. Nevertheless, the fact that Petitioner failed to follow MCR 2.119 is *de minimus* in nature, as the excessive length of

Clearly, the facts and case law support Respondent's contention that Petitioner would be unjustly enriched by claiming to charge a tax on sales items not subject to sales tax under MCL 205.54g then requesting Respondent to refund said tax. MCL 205.73(4) states that "[a] person other than this state may not enrich himself or herself or gain any benefit from the collection or payment of the tax." In that regard, Michael R. Mihalich submitted an affidavit in which he claimed that no sales tax was added to the items sold at the movie theaters and in lieu of charging the customers sales tax, Petitioner pays all sales tax. The Tribunal finds this argument to be without merit because Petitioner requests a refund from the state for an amount which its customers paid.

Further, Petitioner has included case law that the Tribunal is unable to locate.[4] Additionally, Petitioner has included several cases, which don't appear relevant to the issues present in this case. Petitioner incorrectly claims that courts have not addressed the issue in the present case; however, Petitioner cites to cases which demonstrate that this assertion is clearly not accurate.

Specifically, Petitioner cites *Sims v Firestone Tire & Rubber Co*, 397 Mich 469; 245 NW2d 13 (1976) and *Al Serra Chevrolet, Inc, v Department of Treasury*,

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the brief does not affect the outcome of this opinion.

[4] Petitioner cites "*Skaff Carpet & Furniture v Department of Treasury*, MTT Docket No. 54911, 116 Mich App 582, 323 NW2d 493, August 26, 1982." The case at 116 Mich App 582 is actually a Tribunal decision, *O'Reilly v Wayne*

MTT Docket No. 315295, Proposed Opinion and Judgment (May 27, 2010), which both involve retail sellers of tangible personal property disputing sales tax. In *Sims*, the court held that the taxpayer is permitted to pass the burden of taxes and tax-related penalties onto its consumers. In *Al Serra*, the taxpayer erroneously paid sales tax to Respondent. The Entire Tribunal held that the taxpayer:

> is not entitled to a refund or credit for sales tax erroneously collected and remitted on the shop supplies charged to customers of the repair shop. . . . [T]o avoid unjust enrichment, Petitioner must first show that unlawfully collected sales tax was refunded to its customers prior to a claim for refund with Respondent. *Al Serra Chevrolet, Inc v Mich Dep't of Treas*, MTT Docket No. 315295, Final Opinion and Judgment, p. 4 (Dec. 20, 2010).

Alternatively, the Administrative Law Judge sets forth an option that was accepted by the Tribunal:

> Assuming that Petitioner erroneously collected sales tax related to "shop supplies" from its customers and remitted it to the state, the tax would be held in trust for the benefit of the customers. The remedy in this situation is not to reduce the use tax assessment by an amount equal to the improperly collected sales tax, but rather the taxpayer could have pursued a claim for a refund of the improperly collected sales tax. In such cases, a refund could not be lawfully paid to the taxpayer (Petitioner), unless Petitioner first refunded any improperly collected sales tax to its customers, in order to avoid unjust enrichment. MCL 205.73(3). *Al Serra Chevrolet, Inc v Mich Dep't of Treas*, MTT Docket No. 315295, Proposed Opinion and Judgment, pp. 17-18 (May 27, 2010).

Co. regarding the Headlee Amendment and is not relevant to this case.

The facts of the aforementioned case closely resemble the present case and the Tribunal finds that Petitioner has not distinguished from *Al Serra*. Additionally, the Tribunal has held in *Al Serra* that Petitioner will be unable to recover erroneously remitted sales tax until it can demonstrate that it has first reimbursed its customers for the overpayment. Further, the Tribunal finds that it is highly unlikely that Petitioner will be able to demonstrate that it has reimbursed all the appropriate customers from 2007 through 2010. As such, Respondent is in the best position to hold the funds in trust, as discussed in *Al Serra*. This, however, does not bar Petitioner from reimbursing customers that it is able to locate and submitting a request for reimbursement for those taxes to Respondent.

In light of the facts presented above, the Tribunal finds that the granting of summary disposition on behalf of Respondent under MCR 2.116(C)(8) is appropriate. Therefore,

IT IS ORDERED that Respondent's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that this case is DISMISSED.

MICHIGAN TAX TRIBUNAL

Entered: Sept. 27, 2012 By: Kimbal R. Smith III