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

Brunt Associates, Inc.,
Petitioner,

v

MTT Docket No. 461270

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER DENYING PETITIONER'S MOTION TO WITHDRAW RESPONSES TO RESPONDENT'S FIRST DISCOVERY REQUESTS

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Brunt Associates, Inc., appeals Final Assessment No. S298373 levied by Respondent, Michigan Department of Treasury, on December 7, 2010. The Final Assessment established that Petitioner owes use tax in the amount of $284,082, plus interest of $45,081.04, continuing to accrue. Edward S. Kisscorni, CPA, represented Petitioner, and Randi M. Merchant, Attorney, represented Respondent.

On October 23, 2014, Petitioner filed a motion to withdraw and amend its responses to Respondent's discovery requests. Respondent filed a response to the motion on November 13, 2014.

A hearing on this matter was held on January 22, 2015. Petitioner's witnesses were Brian J. Brunt, David F. Rea, and Denise M. Maciok-Brunt. Respondent's sole witness was Stephanie R. Mitchell. The Tribunal ordered the parties to submit post-hearing briefs and both parties filed their respective briefs on February 27, 2015. No response briefs were permitted.

Based on the evidence, testimony, and case file, the Tribunal finds that Petitioner's Motion to Withdraw its original discovery responses shall be denied. The Tribunal further finds Petitioner is a "manufacturer/contractor" and is liable for use tax and interest, as contained in the Final Assessment, and as later modified in the Post Audit Report of Findings.

PETITIONER'S CONTENTIONS

Petitioner contends that: (i) it is in the business of manufacturing custom furniture for

sale at retail; (ii) the custom furniture installed by Petitioner remains tangible personal property after the installation; (iii) Petitioner is a manufacturer that qualifies for the industrial processing exemption and the assessment should be cancelled; (iv) Respondent did not follow its own guidance under its Revenue Administrative Bulletins and did not follow the law in its audit determination; (v) certain audit procedures were not reasonable and did not follow generally accepted audit standards.

In its post-hearing brief, Petitioner argues that neither the Sales Tax Act, nor Use Tax Act, provides a clear definition of contractor and Michigan law does not "provide any guidance as to when tangible personal property, when affixed to realty, becomes a structural part of realty."[1] Petitioner included two use tax cases it claims addresses this issue, *Granger Land Development Co v Dep't of Treasury*[2] and *Healey Fire Protection, Inc v Dep't of Treasury*.[3] Petitioner argues that *Granger* supports a determination that the mere size of the objects does not make them affixed to realty. Petitioner further contends that *Healey* supports its position that "the furniture, fixtures, cabinets, shelves and decorative panels might benefit the realty, but it is really there for the benefit of employees."[4]

PETITIONER'S ADMITTED EXHIBITS

P-1 LARA Corporate Entity Details
P-2 Photographs of Manufacturing Facility
P-3 Photographs of Raw Material Inventory
P-4 Photographs of Manufacturing Machinery, Equipment and Paint Booth
P-5 Photographs of Finished Product Installed
P-6 Audit Confirmation Letter
P-7 August 19, 2010 Notice of Preliminary Audit Determination
P-8 September 22, 2010 Final Audit Determination Letter
P-9 September 28, 2010 Intent to Assess
P-10 December 7, 2010 Final Assessment
P-11 May 28, 2014 Use Tax Audit Schedules
P-12 Use Tax Audit Report of Findings (Post Audit)
P-19 2006 Total Material Invoices
P-20 2007 Total Material Invoices
P-21 2008 Total Material Invoices
P-22 2009 Total Material Invoices

[1] Pet. Brief at 2.
[2] *Granger Land Development Co v Dep't of Treasury*, 286 Mich App 601; 780 NW2d 611 (2009).
[3] *Healey Fire Protection, Inc v Dep't of Treasury*, Court of Claims, Docket No. 10-44-MT (July 21, 2011).
[4] Pet. Brief at 5.

P-32 2006 Fabrication Labor Summary
P-33 2007 Fabrication Labor Summary
P-34 2008 Fabrication Labor Summary
P-35 2009 Fabrication Labor Summary
P-36 2006 Check Recap Report by Employee
P-37 2007 Check Recap Report by Employee
P-38 2008 Check Recap Report by Employee
P-39 2009 Check Recap Report by Employee
P-40 2006 Union Detail Report for Millmen (Shop Employees)
P-41 2007 Union Detail Report for Millmen (Shop Employees)
P-42 2008 Union Detail Report for Millmen (Shop Employees)
P-43 2009 Union Detail Report for Millmen (Shop Employees)
P-45 Response to Petitioner's Second Discovery Requests

PETITIONER'S WITNESSES

Brian J. Brunt

Petitioner's first witness was Brian J. Brunt, manager of Brunt Associates, Inc. Mr. Brunt testified that: (i) Petitioner is a "finish carpentry contractor"[5] and most of its products are custom office equipment, like reception desks, nurses stations, cabinets, and break rooms; (ii) Petitioner does all the interior finishes for a project and the installation; (iii) all services provided are pursuant to a written contract with the general contractor or owner; (iv) Petitioner manufactures the items in its shop and delivers them to the site, with larger pieces being disassembled and then reassembled and installed; (v) he never met the auditor and to his knowledge, the auditor never toured the facility and never talked to any employees; (vi) he provided percentages to the auditor on how the labor was allocated by looking at the job reports; (vii) the differences between the original discovery responses and amended responses were because the original responses were "not as complete"[6] and "[t]he definition of the word[s]"[7] changed.

Mr. Brunt testified to the equipment used by Petitioner and located at its office warehouse at 48953 Wixom Tech Drive, as shown in P-2 through P-4, and as stated in the audit work papers in P-11. He also testified as to the items depicted in the photographs in P-5, and for each photograph, indicated who the owner/client was, what the specific items were, how the

[5] Tr at 18
[6] *Id* at 90
[7] *Id* at 91

items were used, and whether the items were affixed and by what means they were affixed. He testified that in working with the general contractor and designers, there was never an intent to make the items permanently affixed to realty and nothing that Petitioner does requires engineering drawings or structural approval; all of Petitioner's "stuff is decorative functional furniture."[8] Mr. Brunt explained, for example, that the lecture hall tables depicted in P-5.2 could be moved very easily in about five minutes, by taking out the two bolts on each support leg; given the size of the tables, it would require more than one person to take them out of the room. He further stated "[t]here's nothing serious about removing these things . . . . If somebody knew where the bolts were, it would be very simple. Anyone could take the bolts out."[9] He also testified that P-5.5 shows a reception desk for Blue Cross/Blue Shield that, due to its size, had to be transported to the site in four pieces and then assembled there. He stated that both P-5.5 and 5.7 are not affixed with screws, but would stay in place because of their size.

David F. Rea

David F. Rea, certified public accountant, was called as Petitioner's second witness and testified as follows: (i) his firm has been working for Petitioner since 1984 and prepares the annual financial statements and annual tax returns; (ii) based on his knowledge, Petitioner "is a manufacturer/retailer, not a manufacturer/contractor . . . ;"[10] (iii) Petitioner is a manufacturer "[b]ecause they take the raw products and hardware and everything else that they have in their shop to produce such things as desks . . . and then they take those to the job sites and install them;"[11] (iv) Petitioner is an industrial processor because they sell retail; they do not carry inventory and do not affix anything to the realty; (v) his understanding is that Petitioner sells and installs tangible personal property that remains tangible personal property under the definitions in the Sales and Use Tax Acts; (vi) Petitioner keeps track of what jobs are taxable and every month sales tax is paid to the State of Michigan; (vii) Petitioner also retains the exemption certificates for tax exempt customers.

With respect to the audit, Mr. Rea testified: (i) he does not agree with the statement in the audit that Petitioner should be registered for and reporting use tax, instead of sales tax, because

[8] *Id* at 50
[9] *Id* at 68
[10] *Id* at 114
[11] *Id* at 116

Petitioner is a retailer, not a contractor; (ii) he does not recall the auditor asking him for permission to tour the facility or speak with employees; (iii) he does not remember seeing a Form 4707 request for tax compliance information and documents or a Form 4692 tax compliance bill of records request; (iv) he provided, on behalf of Petitioner, all records requested by the auditor; (v) he agrees that if Petitioner was a contractor, they would be a Type 2 manufacturing contractor as used in the audit, but he does not agree that the calculations in the audit are correct *even if* Petitioner was a Type 2 and his calculation of the tax due would have been approximately $140,000 less; (vi) using the federal income tax Schedule A for costs of goods sold could include other costs, like hardware supplies, small tools, or anything that could be consumed at Petitioner's shop; (vii) the auditor computed labor by looking at the schedule of 2010 wages, but 2010 was not part of the audit period; (viii) only eight employees were used to get the labor values, and Petitioner has as many as 50 employees at one time.

Denise M. Maciok-Brunt

Denise M. Maciok-Brunt, Petitioner's office manager, testified as follows: (i) she is responsible for accounting, bookkeeping, payroll and invoicing, and also handles the weekly and quarterly payroll taxes; (ii) the accounting software allows her to job cost everything that comes in and relate it to a specific job; (iii) Petitioner uses purchase orders and invoices, with all purchases being logged into the computer system and 99% of the purchases being paid by check; (iv) the project manager or estimator tells her if a job is tax exempt and that gets put in the system; (v) she is not aware of whether or not the project managers or estimator have received any training on how to determine if a job is tax exempt; (vi) Petitioner does retain exemption certificates for customers and those certificates were made available during the audit; (vii) she does not recall what documentation was specifically provided to the auditor, but if something was requested by David Rea, she would provide it; (viii) she never met the auditor and is not aware of the auditor ever touring the facility or talking to employees; (ix) clients are sent a monthly invoice that reflects how the contractor wants to see the billing; it does not reflect all the work that may have occurred on that job for the particular month; (x) each invoice will have the total contract amount on the bottom, and eventually, the monthly invoices will add up to the contract price.

RESPONDENT'S CONTENTIONS

Respondent contends: (i) Petitioner conceded in discovery that it was a contractor engaged in making improvements to the real property of others; (ii) Respondent's auditor made the assessment based on the information available at the time; (iii) additional documentation was provided by Petitioner during discovery and submitted as exhibits for hearing, but these are merely summary documents; (iv) a taxpayer in the business of being a real property contractor cannot try to recharacterize themselves as a retail seller.

In its post-hearing brief, Respondent contends that Petitioner does not qualify as an industrial processor because it "does not convert or condition tangible personal property for ultimate sale at retail."[12] Respondent contends that based on Mr. Brunt's testimony, submitted photos, and discovery responses, Petitioner is a contractor that is altering the real estate of others, within the definition of contractor found in Mich. Admin. Code R 205.71. As a contractor, Respondent argues that Petitioner is considered to be the consumer of the material used and is, therefore, responsible for use tax. Respondent cites to MCL 205.92(5) and Mich. Admin Code R205.71(2) and R205.81(1)(a) as supportive of its position. Respondent further cites to *Miedema Metal Bldg Systems, Inc v Dep't of Treasury*,[13] arguing that the grain bins in that case were found to be affixed to the real estate, even though they were merely bolted to the foundation. Although related to an agricultural production exemption, Respondent asserts that the reasoning in *Miedema* is still applicable to the present case.

Respondent also argues that even if the Tribunal were to find that Petitioner does make retail sales, MCL 205.94o(5)(a) excludes tangible personal property affixed to real estate from being eligible for the industrial processing exemption. Respondent again points to *Miedema,* as well as, the Tribunal's decision in *Greystone International, Inc v Dep't of Treasury*,[14] finding that theater seats bolted to the floor were affixed to real estate, even though they can be easily removed.

RESPONDENT'S ADMITTED EXHIBITS

R-1 August 19, 2010 Notice of Preliminary Audit Determination Letter
R-2 Intent to Assess

[12] Res. Brief at 4.
[13] *Miedema Metal Bldg Systems, Inc v Dep't of Treasury*, 127 Mich App 533; 338 NW2d 924 (1983).
[14] *Greystone International, Inc v Dep't of Treasury*, Docket No. 429973 (May 10, 2013).

R-3 Final Assessment
R-4 September 22, 2010 Final Audit Determination Letter
R-5 Photographs of examples of Petitioner's custom carpentry jobs
R-6 Petitioner's response to Respondent's first written discovery requests
R-7 Audit Diary
R-8 Audit Report of Findings
R-9 Audit workpapers/schedules
R-10 Amended Audit Report of Findings
R-11 Amended Audit workpapers/schedules
R-12 Revenue Administration Bulletin 1993-5

RESPONDENT'S WITNESS

Stephanie R. Mitchell

Stephanie R. Mitchell, auditor, was called as Respondent's sole witness and testified that: (i) her only contact during the audit was with David Rea and the audit was conducted at his office; (ii) a records request was included with the audit confirmation letter and this request lists the documents necessary for the review; (iii) she received some of the requested records, but not all of them; (iv) if it is determined that a taxpayer is not an industrial processor, it is not found necessary for the auditor to visit the facility; (v) the determination of whether or not a taxpayer is an industrial processor is made "based on the business description, the initial interview with the taxpayer and/or the representative . . . [and] the type of business that the taxpayer is engaged in"[15] and was a joint determination between her and her supervisor; (vi) the additional use tax assessed as a result of the audit related to fixed expenses or material purchases; (vii) Petitioner does not qualify for the industrial processor exemption "[b]ecause the products that the taxpayer fabricates . . . [are] not ultimately offered for resale"[16]; (viii) the fabrication labor portion of the tax base should have included payroll taxes and employee benefits; (ix) because invoices for all fixed asset acquisitions during the audit period were not received at the time of the initial meeting, she used the book asset depreciation report instead; (x) this list was given to Mr. Rea and the list would have been updated if additional invoices or support were provided by Petitioner; (xi) some numbers from Petitioner's federal income tax return were used for materials for costs of goods sold because that was the only information available at the time of the audit;

[15] *Id* at 217
[16] *Id* at 246

(xii) the audit schedule[17] states materials per costs of goods sold and this references the federal Form 1120 for material purchases; (xiii) she indicated that several requests had been made of Petitioner for this information; (xiv) the audit does recognize that Petitioner did engage in some tax exempt jobs and those jobs were accounted for; (xv) her findings, after review of Petitioner's website, conversations with Mr. Rea, and review for sales tax was that Petitioner does not make sales at retail and is a real property contractor.

Ms. Mitchell also testified to modifications made after the audit had been completed. Specifically, she stated: (i) after the Tribunal appeal was filed, Petitioner provided additional expenses for materials consumed on exempt jobs, as well as information for fabrication labor that was not previously made available; (ii) the revised audit report of findings contained adjustments for additional exempt jobs, fixed assets, and fabrication labor costs; (iii) "fabrication labor was not even reviewed"[18] at the time of the audit based on conversations with Mr. Rea "that fabrication costs were included in the total material costs . . ."[19]; (iv) the fabrication labor cost was based on the provided schedules of employee wages and percentage of time doing fabrication for the 2010 year; (v) the fabrication labor was not reduced for labor included on tax exempt projects because she did not have that information available; (vi) even if provided, she would not have relied on Petitioner's summary charts because the source documents are not part of it; (vii) based on the additional payroll information provided, she believes that the estimated labor cost in the audit was too low.

FINDINGS OF FACT

1. Petitioner has been in business since 1984. Petitioner is a contractor that provides fabrication and installation of custom carpentry, such as desks, receptionist stations, and lecture hall seating.
2. Some of the custom carpentry installed by Petitioner is affixed to the real property via clips, screws, fasteners, and/or bolts.
3. Respondent conducted a use tax audit for the November 1, 2005, to December 31, 2009, tax periods.

[17] P-11.8
[18] Tr at 232
[19] *Id*

4. The Audit Report of Findings indicated that Petitioner had been remitting sales tax, but no use tax during the tax periods under the audit.
5. The Audit Report of Findings stated "The taxpayer does not make any sales at retail and is strictly a real property contractor."[20]
6. An Intent to Assess was issued on September 28, 2010, as follows:

Assessment No.	Tax	Penalty	Interest
S298373	$284,082	$0	$43,989.46

7. The Final Assessment was issued on December 7, 2010, as follows:

Assessment No.	Tax	Penalty	Interest
S298373	$284,082	$0	$45,081.04

8. The Final Assessment was sent via certified mail to Petitioner at 48953 Wixom Tech Drive, Wixom, Michigan 48393.
9. The Final Assessment was not sent to David F. Rea, Petitioner's authorized representative during the audit.
10. Petitioner filed this appeal with the Tribunal on October 9, 2013.
11. The audit was adjusted on May 5, 2014, based on receipt of additional information from Petitioner. The audit was adjusted for additional exempt jobs at $273,725, a reduction of $3,659 for fixed asset exceptions, replacement of prorated materials in cost of goods sold for the 2005 tax year with actual numbers from Petitioner's records, and an estimated cost of fabrication labor at $751,285. The adjustments resulted in an additional tax due of $21,152.52.
12. Following the August 25, 2014 Prehearing Conference, Petitioner filed an Amended Petition on September 5, 2014, adding a claim that it is an industrial processor under MCL 205.54t(7)(b) and that it makes sales at retail of tangible personal property.

CONCLUSIONS OF LAW

Under MCL 205.22(1), "[a] taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days . . ." and under MCL 205.735a(6), an appeal shall be made by filing a written petition with the Tribunal "within 35 days after the final decision, ruling, or

[20] R-8

determination." This appeal was filed on October 9, 2013. The Final Assessment was dated December 7, 2010, and was mailed to Petitioner's address of record via certified mail. The Final Assessment, however, was not sent to Petitioner's authorized representative, David F. Rea. Per the original Petition, Petitioner was made aware of the final assessment via a facsimile received by Petitioner's co-counsel from Rick Roselle, Michigan Taxpayer Advocate Office, on September 19, 2013. The issue regarding service on a taxpayer's authorized representative was recently addressed by the Michigan Supreme Court in *Fradco, Inc v Dep't of Treasury*,[21] in which the Court held the appeal period begins to run upon the Department's compliance with MCL 205.28(1)(a) by giving the taxpayer actual notice of a final assessment through personal service or certified mail *and* under MCL 205.8 by sending a copy of the notice of final assessment to the address of the taxpayer's representative as provided in the taxpayer's written request. Accordingly, the 35 day appeal period under MCL 205.22 and 205.735a did not begin to run until September 19, 2013; Petitioner's appeal was timely filed.

At the start of the hearing, the Tribunal addressed Petitioner's October 23, 2014 Motion requesting that it be permitted to withdraw its original discovery responses and amend the responses. In its Motion, Petitioner argues that the requests included undefined terms and were answered by Brian Brunt based on the terms' commonly understood meaning, which "have entirely different meanings when applied to tax law."[22] Respondent objected to withdrawal of the responses, but agreed that Petitioner is entitled to supplement its responses. The Tribunal held at the hearing that the request to withdraw the original discovery responses would be denied and that the revised discovery responses submitted on October 23, 2014, would be treated as a supplement to the original responses.[23]

Turning to the Final Assessment in dispute, the Tribunal finds that the assessment at issue was imposed under the Use Tax Act ("UTA"), MCL 205.91 *et seq.* The use tax is a "specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property. . . ."[24] MCL 205.97(1) provides that "[e]ach person storing, using, or consuming in this state tangible personal property or services is liable for the

[21] *Fradco, Inc v Dep't of Treasury*, 495 Mich 104; 845 NW2d 81 (2014).
[22] Petitioner's Motion at 3.
[23] See MCR 2.312(D)(1) (amending an admission for good cause).
[24] MCL 205.93(1)

tax levied under this act and that liability shall not be extinguished until the tax levied under this act has been paid to the department." Petitioner argues it is not liable for any of the use tax under the assessment as it is a retailer and pays sales tax unless an exemption certificate is provided and is entitled to claim the industrial processing exemption.

The central dispute between the parties is whether Petitioner is a "retailer" or a "contractor." "Sale at retail" is defined in MCL 205.51(1)(b) as "a sale, lease, or rental of tangible personal property for any purpose other than for resale, sublease, or subrent." Tangible personal property is defined in MCL 205.51a(q) as "personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses . . . ."

"Contractor" is not defined in statute. Mich Admin Code, R 205.71 provides the following guidance:

> (1) "Contractor" includes only prime, general, and subcontractors directly engaged in the business of constructing, altering, repairing, or improving real estate for others.
> (2) Contractors are consumers of the materials used by them. All sales to or purchases by contractors of tangible personal property are taxable, except when affixed and made a structural part of real estate for a qualified exempt nonprofit hospital or a nonprofit housing entity qualified as exempt under the sales and use tax acts. All materials consumed in the performance of such contracts and not affixed and made a structural part of real property are taxable. Retailers making exempt sales shall obtain the following exemption certificate . . . .
> (3) Sales and rentals of tools, machinery, and equipment to contractors are taxable.
> (4) Where a contractor is exclusively engaged in the contracting business and makes no direct sales to other contractors or consumers, he does not need a sales tax license. Such nonlicensed contractors are required to maintain a use tax registration and pay the use tax to the state on purchases made from out-of-state sellers.
> (5) Where a contractor is not engaged exclusively in the contracting business but makes sales of tangible property at retail to other contractors and consumers, he shall secure a sales tax license and file returns to report sales on such transactions. Use tax due on out-of-state purchases and on merchandise acquired for resale and later consumed in contract operations shall be reported on the combined sales and use tax return.
> (6) Where a manufacturer affixes his product to real estate for others, he qualifies as a contractor and shall remit use tax on the inventory value of the property at the time the property is converted to the contract which value shall include all costs of manufacturing, fabricating, and processing.

> (7) A contractor purchasing tangible personal property for affixation to realty where delivery is taken in Michigan is subject to sales or use tax on the purchase price whether the improvement or construction of realty takes place within or without Michigan, except as noted in subrule (2).

"Industrial processor" is defined in MCL 205.94o(7)(b) as "a person who performs the activity of converting or conditioning tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state." Further, MCL 205.94o(7)(a) defines "industrial processing" as "the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail . . . ."

The primary factor in the determination of whether Petitioner is a "retailer" or "contractor" is whether the items fabricated and installed by Petitioner are affixed to the real estate. The post-hearing briefs submitted by the parties represented the respective legal positions on this issue. Petitioner asserts that the tangible personal property it manufactures and installs falls into two categories "(1) furniture and fixtures that were not affixed to the realty but held in place by gravity and (2) furniture, fixtures, cabinets, shelves and decorative panels attached in a[n] incidental manner with clips, screws, nuts and bolts."[25] For items under category (1), Petitioner argues that the mere size of these objects does not make them an affixation to realty. Petitioner cites to *Granger Land Dev Co* which involved, in part, the creation and maintenance of "landfill cells" and whether the personal property used in the erection and maintenance of these cells were affixed to and become a structural part of the real property. The Court of Appeals determined:

> [I]f Granger were bringing in similar volumes of soil to fill low areas and shape its property in order to facilitate the property's use for a particular purpose over the same time span, one might readily conclude that the fill became part of the real estate by virtue of its volume and character. However, *under the unique facts of this case*, we conclude that Granger did not actually or constructively annex the cells or their components to its real property.
>
> * * *

[25] Petitioner's Brief at 3.

> Although the cells are erected on Granger's land, Granger takes no affirmative steps to actually attach the cells to its real property. Likewise, even though the enormous mass of waste material involved implicates constructive annexation, Granger takes significant steps to insulate the waste from the underlying real property . . . . Moreover, there is no evidence that Granger erects the cells in order to improve the land or make it more valuable in and of itself; rather, Granger erects the cells to facilitate the processing of waste material into gas that it can sell to third parties. *Given these unique facts*, we conclude that Granger has neither actually nor constructively attached the landfill cells to its real property. [26] [Emphasis added.]

In *Granger*, the Court of Appeals went out of their way to make clear that the holding was based on the unique facts present in that case. *Granger* is not instructive under the facts in the present appeal, as the furniture, fixtures, cabinets, shelves and decorative panels fabricated and installed by Petitioner are in no way similar in size, shape, design, or functionality to the "landfill cells" in that case.

Petitioner also cites to *Healey Fire Protection, Inc*, a decision issued by the Court of Claims. Court of Claims' decisions are not published, binding, or precedential, and are not required to be followed by the Tribunal.[27] Further, Petitioner has indicated that *Healey* related to installation of sprinkler systems, control panels and other fire protection equipment, which the Court of Claims found where installed to benefit personal items. The facts and circumstances of *Healey* are not similar to the present case and do not support a determination that the items fabricated and installed by Petitioner are not affixed to the real estate.

Respondent, on the other hand, asserts that *Miedema Metal Bldg Systems, Inc* is applicable. In *Miedema*, the Court of Appeals upheld the Tribunal's determination that grain bins were affixed to the real estate and the taxpayer was a "consumer" under the UTA.[28] In addition, Respondent contends that the Tribunal has previously held that theater seats were affixed to the real estate, even though they were attached by bolts that could easily be removed.[29] Because Petitioner is a contractor, Respondent asserts that Petitioner is also considered to be the

---

[26] *Granger Land Dev Co v Dep't of Treasury*, 286 Mich App 601, 611, 612; 780 NW2d 611 (2009).
[27] See *People v Hunt*, 171 Mich App 174; 429 NW2d 824 (1988).
[28] "The bins are bolted onto "J"-shaped anchor brackets which are imbedded approximately ten inches into the concrete. All of these bins have concrete foundations which are poured by petitioner. Although the bins are resold separately, they are often sold as a part of the farm as well. Thus, because the bins are affixed to realty, petitioner is liable for the use tax." *Miedema*, 127 Mich App at 537.
[29] See *Greystone International, Inc v Dep't of Treasury*, Docket No. 429973 (May 10, 2013).

consumer of the materials it uses and is liable for use tax. "Consumer" is defined under the UTA as "[a] person acquiring tangible personal property if engaged in the business of constructing, altering, repairing, or improving the real estate of others."[30] Respondent also argues that *even if* the Tribunal were to find that Petitioner was a retailer, Petitioner is still not entitled to an industrial processing exemption based on the items affixed to the real estate. Under MCL 205.94o(5)(a), "[t]angible personal property permanently affixed and becoming a structural part of real estate in this state . . ." is not eligible for the industrial processing exemption.

In the present case, the Tribunal finds Mr. Brunt testified that some items are attached by screws to hold them to the studs and drywall, by clips to mount items to the wall, and by bolts that hold them to the floor. The only damage to the realty would be the holes for where the clips, screws, and bolts were, which Mr. Brunt indicated would be smaller than a quarter of an inch.[31] He also stated that the screws, clips, and bolts would not be difficult to remove for one person, but that based on the size of some items, more than one person would be required to move it once the fasteners were removed.[32] The Tribunal finds the decisions in *Miedema* and *Greystone* instructive in determining whether the items Petitioner secures to the realty of its customers are "affixed" to realty. In *Miedema*, the Court of Appeals held "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."[33] This determination was made even after Petitioner's expert testified that "the bins are merely bolted onto the foundation."[34] In *Greystone*, the Tribunal analyzed whether theater seating was affixed to the realty and found that, just like in *Miedema*, Petitioner was a "consumer" as the seating was affixed through the use of anchor bolts that remain in the floor. The Tribunal finds the circumstances of the present case to be similar to both *Miedema* and *Greystone*. Petitioner affixes items to the realty of its customers via screws, clips, fasteners, or bolts, which would require removal before the items could be moved. Further, while minimal, there is some damage to the walls and floors that would need to be repaired if the items were removed.

---

[30] MCL 205.92(g)(i)
[31] Tr at 71
[32] Tr at 67
[33] *Miedema*, 127 Mich App at 537
[34] *Id* at 535

While the Tribunal finds that items attached to the realty by screws, clips, fasteners, or bolts are affixed, there is still a question as to the correct treatment of those items Petitioner indicated were not attached or affixed in any way. In the sixteen examples contained in P-5, Mr. Brunt identified seven (P-5.5, 5.7, 5.10, 5.11, 5.12, 5.13, and 5.14) that were not secured or affixed in any way, testifying that they would stay in place because of their size.[35] There is no information from either party as to what percentage of the work performed by Petitioner during the audit included items that were somehow affixed or secured versus items that were not secured in any way; however, Mr. Brunt did testify that P-5 is "very representative" of the work Petitioner does.[36] In *Granger*, the Court of Appeals stated "[t]here are innumerable ways that a person can affix personal property to real estate; some items may be physically attached to the real estate whereas other items may be put in place with the intent that the property will become part of the real estate through its size and character."[37] The Tribunal finds that the overall nature of Petitioner's business is as a "contractor" and accordingly, Petitioner would be liable for use tax on all items, whether secured by screws, bolts, fasteners, or otherwise, or remaining in place based on their size, design, and construction. Further, Mr. Brunt testified that Petitioner is "a finish carpentry contractor" that supplies "custom equipment" pursuant to a written contract.[38] Accordingly, Petitioner is liable for use tax as it is not a "retailer," but is a "manufacturer" and "contractor" who "affixes his product to real estate for others" and is "directly engaged in the business of constructing, altering, repairing, or improving real estate for others" under Mich Admin Code, R 205.71. Petitioner does not qualify for the industrial processing exemption.

Even if liable for use tax, Petitioner has alleged that there were errors in the audit. Specifically, Petitioner indicated that the amounts for material and labor costs were calculated incorrectly. Under MCL 205.68(4):

> The department may assess the amount of the tax due from the taxpayer based on an indirect audit procedure or any other information that is available or that may become available to the department. That assessment is considered prima facie

[35] Tr at 41 - 48
[36] Tr at 49
[37] *Granger*, 286 Mich App at 610, referencing, e.g. *Velmer v Baraga Area Schools*, 430 Mich 385, 395; 424 NW2d 770 (1988) (noting that the milling machine at issue was constructively "affixed" to the real property by reason of its weight).
[38] Tr at 18, 20

> correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer.

The auditor testified that the tax liability was calculated based on the information provided by Petitioner, but that she had to use information from Petitioner's federal tax return for material costs because that was the only information she had available.[39] Petitioner has now provided summary charts reflecting material purchases; however, Respondent's auditor testified that she would not have been comfortable adjusting the audit based on this documentation because "[t]he source documents aren't a part of it. These are just summary totals, and generally our procedure is to review the invoices that are associated with the summary documents."[40] The costs for fabrication labor were determined *after* this appeal had been filed and additional information was received from Petitioner. At the hearing, it was established that the figure used by the auditor for labor was *lower* than the actual amount.[41] The Tribunal finds that Petitioner did not provide the source documentation regarding what is contained in the summary charts, and the summary charts are not sufficient to require any further modifications to the calculations contained in the audit. The audit and post-audit calculations were made, using the best information available, and Petitioner has failed to refute the assessment.

JUDGMENT

IT IS ORDERED that Petitioner's Motion to Withdraw Responses to Respondent's First Discovery Requests is DENIED. The additional discovery responses filed October 23, 2014, shall be treated as supplemental responses.

IT IS FURTHER ORDERED that Final Assessment No. S298373 is AFFIRMED, as later modified May 5, 2014, and contained in the Post Audit Report of Findings.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Opinion within 28 days of entry of this Final Opinion and Judgment.

---

[39] Tr at 218, 219, 225
[40] Tr at 236
[41] Tr at 236

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

By: Steven H. Lasher

Entered: May 16, 2015