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MTT 2021-1

**MTT OFFICES WILL BE CLOSED JAN 18 IN OBSERVANCE OF MLK DAY
RECENT CASE LAW OF INTEREST
NEW STATUTORY ENACTMENTS
DESIGNATED DELIVERY SERVICE**

Welcome to the first 2021 edition of the MTT Newsletter. The offices of the Michigan Tax Tribunal will be closed Monday, January 18, 2021 in observance of Martin Luther King Jr. Day, and will reopen on Tuesday, January 19, 2021.

- Please note that U.S. Mail and Private package delivery to and from the Ottawa building has been slowed significantly. Therefore, it is strongly suggested that parties utilize either the MTT's e-file system or email.

Recent Cases of Interest

Imagine Entertainment, Inc v Dep't of Treasury, ___ Mich App ___; ___ NW2d ___
(Docket Nos. 350376 & 350881).

Respondent appealed the Tribunal's order granting summary disposition to petitioner on the issue of whether certain sales were exempt from sales tax, and petitioner appealed the finding that it was not entitled to a refund because its customers paid the tax. Petitioner operated a movie theater and sold prepackaged candy, and items such as napkins were available to customers. The Tribunal concluded that the sale of prepackaged candy was exempt from the Michigan General Sales Tax Act, and that Rule 85(5) was invalid because it conflicted with the plain language of MCL 205.54g(4). After a hearing, the Tribunal concluded that petitioner was not entitled to a refund. Respondent argued that the Tribunal erred when it concluded that the Rule 86(5) did not conflict with the statute because the rule merely provided a more precise definition of the statutory terms. Rule 86(5) created a "75%" test, which provided that, if a seller's prepared food percentage was more than 75%, utensils were provided, and the sales tax was applicable, if the utensils were merely made available. The Court explained that the statute provided only that food sold with eating utensils provided by the seller would not be exempt and made no distinction between food sold above or below a particular percentage. Referring to a dictionary definition of the word "with," the Court concluded that food is sold with eating utensils when the utensils are physically handed to customers. Respondent's interpretation of the statute would render parts of it meaningless, because eating utensils being present anywhere in the establishment would render all food excluded from the exemption. Although Michigan is a member of the *Streamlined Sales and Use Tax Agreement*, which allows for the 75% test, Michigan

did not adopt the test by statute and the Agreement cannot be read to amend Michigan law. Petitioner argued that the Tribunal erred when it concluded that it was not entitled to a refund of the erroneously paid sales taxes. The Court explained that the Tribunal's finding that petitioner's customers paid the sales tax were supported by the record. The testimony of petitioner's chair, along with its chief operating officer, supported the conclusion that the customers paid the tax. Petitioner's reference to a previous sales tax case involving a movie theater was unpersuasive because the facts were distinguishable. There was a lack of documentary evidence in the other case, and the Tribunal's factual findings there were based on the testimony of a witness who stated that he did not consider sales tax when setting the prices. In this case, financial records did not support the view that the sales tax was not paid by petitioner's customers. Petitioner also argued that, without notice to customers that they were paying sales tax, they did not pay the sales tax. The Court explained that the case cited by petitioner only stated that there was no presumption that sales tax was always included. The statute does not state that a customer must be explicitly notified that it is paying the sales tax in order for it to be collected from the customer. The Court affirmed.

Landon v City of Flint, unpublished per curiam opinion of the Court of Appeals, issued November 24, 2020 (Docket Nos. 350187 & 350188).

Petitioner appealed the Tribunal's Final Opinions and Judgment concerning two valuation appeals. In both cases, petitioner submitted a summary of comparable properties and photographs, and respondent submitted sales comparison analyses. The Tribunal rejected petitioner's evidence because it was unorganized and lacked sufficient data. It found respondent's evidence credible and relied on several of respondent's comparable sales. Petitioner did not raise issues of whether the Tribunal correctly applied the market approach and whether its calculations were supported by competent, material, and substantial evidence in the Tribunal, and thus the Court reviewed the case for plain error. Petitioner argued that the Tribunal completely ignored his evidence. The Court explained that the Tribunal considered all the evidence submitted by the parties before concluding that respondent's evidence was more credible. Petitioner failed to submit "a rational or usable sales analysis," and failed to adjust the properties. The Tribunal also rejected some of respondent's evidence, and thus the Tribunal evaluated the evidence submitted by both parties. Petitioner argued that the Tribunal erred when it implemented the market approach. The Court explained that the Tribunal evaluated the properties before concluding that respondent's evidence allowed an accurate comparison and calculation of the true cash value for the subject properties. Further the Tribunal's calculation of true cash value was supported by competent, material, and substantial evidence because it considered the most comparable properties. Petitioner also argued that the Tribunal ignored the "bulk of the evidence." The Court explained that, although petitioner submitted a large amount of evidence, the Tribunal correctly found respondent's evidence to be more credible. The Court affirmed.

Daoud v Dep't of Treasury, unpublished per curiam opinion of the Court of Appeals, issued December 3, 2020 (Docket No. 351087).

Petitioner appealed the Final Opinion and Judgment of the Tribunal that affirmed that petitioner was a “responsible person” under the corporate officer tax liability statute. Petitioner’s brother, Sam, wished to open a bar and restaurant, but was ineligible for a liquor license. Petitioner placed the business in his name and applied for the liquor license, forming TK of Canton, LLC (TK). Petitioner then executed an Operating Agreement and Articles of Organization, naming petitioner as sole member with 100 percent ownership and designated Sam as manager. In addition, Petitioner signed the form titled Registration for Michigan Taxes as president. Petitioner, TK, and Sam also executed a Management Agreement that provided, in part, that Sam would assume responsibility for the payment of taxes. Without petitioner’s knowledge, Sam did not pay sales and withholding taxes for the 2015 tax year. Under the corporate officer tax liability statute, respondent sought to hold petitioner liable for the unpaid taxes as the sole member of TK. Following a hearing, the Tribunal concluded that respondent had established a prima facie case and that petitioner intentionally or recklessly failed to pay the taxes, thus becoming liable for the taxes. Petitioner argued that the Tribunal erred when it concluded that he was liable for the taxes. The Court explained that respondent established a prima facie case, thus shifting the burden of providing rebuttal evidence to petitioner. Petitioner was the sole member of TK, registered it for Michigan sales and withholding taxes as its president, and executed a power of attorney during the period of default. Thus, the Tribunal’s finding that petitioner maintained supervision, control, and responsibility over TK’s taxes was supported. Petitioner argued that the Operating Agreement and Managing Agreements rebutted respondent’s evidence because these documents delegated the authority to Sam. The Court explained that petitioner cited no caselaw, and the law is such that a corporate officer cannot escape liability by delegating the duty to pay taxes. Further, the agreements reserved power to petitioner, and as such there was an intent that petitioner controlled TK. Petitioner argued that the Tribunal erred by considering petitioner’s signature on the power of attorney and Registration for Michigan Taxes form as a “prima facie case,” and that only a signed return or negotiable instrument for payment of taxes during the default period is acceptable. The Court explained the petitioner misconstrued the statute, stating that respondent could either provide prima facie evidence in the form of a signed return or negotiable instrument, or make a prima facie case relying on other evidence. Respondent could rely on this evidence to establish the elements of a “responsible person.” Petitioner’s construction would render nugatory the provisions for proving a prima facie case. Petitioner also argued that the Tribunal erred in construing the willfulness requirement, effectively holding that delegation is *ipso facto* reckless. The Court explained that the Tribunal did not hold that delegation was reckless in and of itself. Rather, it considered the delegation to be a risk, and that petitioner did not take any steps to ensure that taxes had been paid. Petitioner also failed to distinguish a case relied upon by the Tribunal, because in both instances, the person responsible for the payment of taxes took no steps to find out whether taxes were being paid but did not do so. The Court affirmed.

Grace Baptist Church of Gaylord v Bagley Twp, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2020 (Docket No. 352460).

Petitioner appealed from an order of the Tribunal dismissing the case for lack of jurisdiction. Petitioner filed a petition with the Tribunal on October 10, 2018, asserting that the properties should have been exempt from taxation for the 2017 and 2018 tax years. Petitioner stated that the exemption status had changed in 2017, but that they had not been notified. In December 2018, petitioner protested to the Board of Review, but the Board stated that it lacked jurisdiction because of the Tribunal action. At hearing before the Tribunal, petitioner testified to its mailing address, which matched the address where the notices of assessment were mailed. Following the hearing, the Tribunal dismissed the case because Petitioner did not file on or before May 31 of 2018, the facts alleged did not establish a clerical error or mutual mistake of fact, and because the Board correctly determined that it lacked jurisdiction to hear petitioner's December 2018 protest. Petitioner argued that the Tribunal had jurisdiction over the petition. The Court explained that petitioner was required to file a petition on or before May 31 of 2018. Although petitioner protested to the Board of Review, the protest did not occur until after it filed its petition, and the filing of a petition must be after the decision of the Board of Review. Petitioner also argued that the Tribunal erred when it agreed with the Board of Review that the Board lacked jurisdiction over petitioner's December 2018 protest. The Court explained that the Tribunal erred in considering this issue because it determined that it lacked jurisdiction and any action taken other than dismissal was void. Petitioner lastly argued that it was denied due process when the Tribunal refused to hear the case after determining it lacked jurisdiction. The Court explained that petitioner had notice of respondent's arguments concerning jurisdiction and an opportunity to respond. Petitioner also cited no authority stating that due process required the Tribunal to hear the case despite having no jurisdiction. The Court affirmed.

Summary of Recent Statutory Changes

The end of the 100th Legislative session saw some significant bills passed and signed into law that pertain to practice before MTT, these include:

PA 253 of 2020, (SB 1234) amends the General Property Tax Act to allow a local assessing unit to permit by resolution a principal residence that was exempt in tax year 2019 or 2020, or both, to remain exempt in tax years 2021, 2022 and 2023 without subsequent reapplication as long as the eligible person's ownership and occupancy were unchanged. Additionally, a principal residence that was exempt in tax year 2019 or 2020, or both, would remain exempt through the 2021 tax year if the local assessing unit's governing body passed a resolution on or before February 15, 2021.

PA 355 of 2020 (SB 1217) and PA 356 of 2020 (SB 1218) exempt real and personal property constituting a public bridge facility that is subject to a public-private agreement under the newly created MCL 211.7xx. It also creates a new exception to taxing users of tax-exempt property. MCL 211.181(2)(f) would be created to except property "that qualifies as a public bridge facility that is used by a concessionaire pursuant to a public-private agreement entered into with a city under... the home rule act." They are tied to the modification of the home rule city act.

PA 272 of 2020 (HB 5824) and PA 273 of 2020 (HB 5825) are retroactively effective and codify extensions made earlier this year by Executive Orders with respect primarily to Board of Reviews and equalization. Additional time is provided for the July 2020 Board of Review to confirm assessment rolls. They modify the deadlines for 2020 only.

Designated Delivery Service

MCL 205.735a(7) provides that a petition is considered filed on or before the statutory filing period if: (a) the petition is postmarked by the U.S. Postal Service on or before the expiration of the applicable time period, (b) the petition is delivered in person on or before the expiration of the applicable time period, or (c) the petition is given to a designated delivery service for delivery on or before the applicable time period. MCL 205.735a(11) provides that a “designated delivery service” means a delivery service provided by a trade or business that is designated by the Tribunal. For the 2021 calendar year, the Tribunal designates DHL Express (DHL), Federal Express (FedEx) and United Parcel Service (UPS) as its designated delivery services.

I trust that you found this issue of the MTT Newsletter of interest. My best wishes to you and your families for a safe and healthy 2021.

Sincerely,



Steven M. Bieda
Chairman, Michigan Tax Tribunal