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

Reliable Software Resources,
Petitioner,

v MTT Docket No. 14-000497

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment on August 3, 2015. The Proposed Opinion and Judgment states, in pertinent part, "[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal in writing, by mail or by electronic filing, if available, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions)."

On August 19, 2015, Petitioner filed exceptions to the Proposed Opinion and Judgment, stating five specific exceptions to the POJ, which Petitioner summarized as

> [T]he Proposed Opinion starts from a misapplied rule of statutory construction, never follows through with an attempt to construe the statute's actual wording, misidentifies the appropriate legal standard and improperly ignores the actual wording of contracts Reliable Software and its clients negotiated at arms' length. Additionally, the proposed opinion draws improper evidentiary conclusions based on a misunderstanding of immigration law and contains a characterization of witness testimony that may have unintended meaning and requires clarification.

Petitioner also contends that Findings of Fact 20 through 39 should be reviewed "in light of the requirements of the statute once properly identified."

On September 1, 2015, Respondent filed a response to the exceptions. In its response, Respondent states the POJ properly applied the rules of statutory construction and the burden of proof. Respondent further states the POJ properly adopted the SIC definition of help supply services and staffing company. Respondent contends "the POJ clearly did address the issue of supervision and control." Respondent also contends that there is no need to look to dictionary definitions as suggested by Petitioner, as the statutory term is "staffing company" which is defined in the MBTA, and even if Petitioner's dictionary definitions were adopted, the results would not change. Respondent states that the ALJ considered the contracts submitted into evidence and weighed the contracts against the testimony and other evidence presented. Respondent also states that the discussion regarding H-1B visa qualifications was relevant to the analysis of control over employees. Lastly, Respondent states the statement in the POJ regarding Mr. Gone's testimony "does not suggest any unethical behavior, but rather suggests that, in light of all the evidence as a whole, the testimony regarding this specific issue was not credible."

The Tribunal has considered the exceptions, response, and the case file and finds that the Administrative Law Judge properly considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment. Petitioner first argues there is no support for narrowly construing the statute against the taxpayer and the mention of burden of proof "has nothing to do with statutory construction" as it deals with evidence. This particular exception is directed to page 15 of the POJ and Petitioner argues that while Justice Cooley may have stated that "taxation is the rule, and exemption the exception" this assertion does not apply when the word "deduction" is substituted for exemption. The Tribunal finds that this preliminary discussion regarding statutory construction and burden of proof was appropriate. Further, as pointed out by Respondent in its response, the Court of Appeals has recently held that "[t]he burden of proving a deduction is on the party seeking the deduction" and "the rules of construction governing exemptions may be applied to the rules addressing deductions."[1]

Petitioner's second exception relates to the analysis in the POJ regarding the NAICS Code system; Petitioner contends that the statute at issue, MCL 208.1113(6)(d)(ii), expressly incorporates the SIC codes, not the NAICS. Respondent contends "[b]ecause Petitioner reported the NAICS code on its MBT returns, an analysis of the NAICS codes is certainly relevant to the analysis of whether Petitioner qualified for the staffing company subtraction." The Tribunal finds that the POJ contained an explanation of the difference between SIC and NAICS because the NAICS codes are what were required to be reported by Petitioner on its MBT return. The POJ went on to correctly analyze and apply the SIC codes in determining whether or not Petitioner was entitled to the deduction claimed. Petitioner has failed to establish any error on the part of the ALJ in discussing both code systems and how those codes may be related. Related to this exception is Petitioner's argument that the POJ at page 18-19 "adds requirements that do not exist either in the statute or in the language of the SIC Code." Petitioner contends "there is no suggestion in the statute that only workers who perform the client's central business activity qualify." Petitioner also contends that the POJ never answers head on the dispute over whether Petitioner's employees were under direct or general supervision of the client but states that Petitioner does not qualify "because clients do not have the expertise to directly supervise the workers . . . ." Petitioner argues that in order to construe the plain meaning of the statute, the Tribunal should look to the dictionary definitions of "supervise," "direct," and "general" as used in the SIC code when defining the "Help Supply Services" category. Respondent disagrees, stating that the POJ clearly addressed the issue of supervision and control and that the applicable statutory term is "staffing company" which is defined in the MBTA as "a taxpayer whose business activities are included in industry group 736 . . . ." Respondent argues "[t]here is no need for the Tribunal to engage in a potentially endless exercise of defining words within definitions." The Tribunal finds that the POJ did not add requirements that did not exist within the statute or relevant SIC code. In order to qualify for the deduction, Petitioner must be a "staffing company" under MCL 208.1113(6)(d)(ii) which incorporates SIC code 736. The ALJ determined that Petitioner's business activities are not those included in SIC 736. The ALJ found, after review of all admitted evidence and testimony, that Petitioner's business activities

[1] *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 473-474; 838 NW2d 736 (2013).

and services are "qualitatively different"[2] than the examples in SIC 7261 and 7363 and Petitioner is not contracted to provide temporary employees but was hired to provide "data analytics, data warehousing, and other services that Petitioner's employees are specially equipped to provide."[3] The analysis regarding whether the client had direct or general supervision over these employees did not add requirements not found in the statute or the SIC code but rather looked to the language of the statute and the categories in SIC 736 and found that Petitioner's primary business is that of a professional consulting firm and along with that, the *client* did not have the expertise to supervise the specialized services provided by Petitioner's employees. The ALJ further found that the testimony of Mr. Gone reflected that the type of supervision provided by clients was "in the nature of feedback and input from the customer to assist Petitioner's employees in carrying out their data analytics function."[4] Again, this analysis, along with the remaining analysis regarding the direct or general supervision element, did not add language to the statute; the ALJ was providing an explanation and reasoning for why the client could not have the requisite direct or general supervision, given the specialized nature of the services being provided by Petitioner's employees. The Tribunal does not find that the ALJ should have looked to dictionary definitions for the terms "supervise," "direct" or "general" as contended by Petitioner and reference to such dictionary definitions, even if consulted, would not change the result reached by the ALJ.

Petitioner's third exception is that the contracts between Petitioner and its business clients call for Petitioner "to provide workers, not specific project results" and "the only specific result called for under the contracts is the provision of workers, and the client decides . . . what it wants the workers to do." Petitioner points to the TEKsystems and Meijer Great Lakes Limited Partnership contracts and argues that it provides the workers under these contracts and "the client provides the general supervision." Respondent contends that the POJ considered all evidence, including the submitted contracts, and "determined that Petitioner's employees were hired to provide data processing services." Respondent further states that Mr. Gone testified that Petitioner entered into contracts with all 120 clients but only a small fraction of those contracts were submitted as evidence in the appeal. The Tribunal again finds that the ALJ properly reviewed and considered all admitted evidence and testimony, including the contracts submitted by Petitioner. The POJ contains an analysis of a contract entered into between Petitioner and a major department store[5] as well as an analysis of the TEKsystems sub-contract. The ALJ found that in the TEKsystems sub-contract it was arguable that Petitioner acted like a "help supply service" but this single contract is not indicative of the overall nature of Petitioner's business. Petitioner has failed to establish any error in the POJ regarding the determination the contracts between Petitioner and its clients and the type of services Petitioner was providing.

In its fourth exception, regarding H-1B visa status of some workers, Petitioner contends that "[d]ual control is not inconsistent with H-1B visa qualification." Respondent argues that

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[2] POJ at 19.
[3] *Id*.
[4] *Id* at 21.
[5] See exhibit P-9; POJ at 22.

"control over its employees for H-1B visa requirements is certainly relevant to this case" and "Petitioner did walk a fine line in arguing that its client had control over employees for tax purposes but not for immigration purposes." The Tribunal finds that the circumstances involving qualification for H-1B status were discussed in the POJ, but there was no ultimate conclusion that Petitioner would or would not qualify for the deduction based on this issue. Rather, the ALJ merely observed that on one hand, Petitioner is attempting to claim a staffing company deduction, which requires direct or general supervision by the client while on the other hand, H-1B status "requires a common law employer-employee relationship between Petitioner and the computer specialists."[6] Petitioner has failed to establish a reversible error with respect to this particular analysis in the POJ.

Petitioner's fifth exception relates to page 26 of the POJ, in which the ALJ characterizes a portion of Mr. Gone's testimony as "well-rehearsed and self-serving." Petitioner objects to any implication that this type of unethical witness preparation occurred, stating that Mr. Gone was interviewed in advance and "speaks English as a second language and with a heavy accent" which meant that his testimony "required preparation so that it would be clear for the judge and court reporter." Respondent argues that the ALJ had the duty to assess credibility and the statement objected to in the POJ "does not suggest any unethical behavior, but rather suggests that, in light of all the evidence as a whole, the testimony regarding this specific issue was not credible." The Tribunal finds, as cited by Respondent in the response, that as the trier of fact, the ALJ was charged with determining the credibility of both the witnesses and evidence.[7] The statement Petitioner references on page 26 of the POJ did not relate to Mr. Gone's testimony as a whole, but rather, to his statements regarding how the business is described and the essential nature of Petitioner's business. The Tribunal finds no error on the part of the ALJ in determining the credibility given to this particular testimony.

Lastly, Petitioner asks the Tribunal to review Findings of Fact 20 – 39 "in light of the requirements of the statute once properly identified." Petitioner fails to state any specific issue with any or all of these Findings and fails to indicate with specificity what it believes may be wrong with the Findings. Further, as the Tribunal finds the statutory requirements were properly identified and analyzed by the ALJ in his decision.

Given the above, Petitioner has failed to show good cause to justify the modifying of the Proposed Opinion and Judgment or the granting of a rehearing.[8] As such, the Tribunal adopts the Proposed Opinion and Judgment as the Tribunal's final decision in this case.[9] The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgment in this Final Opinion and Judgment. As a result:

[6] POJ at 24.
[7] See MCR 2.613(C), *Wright v Wright*, 279 Mich App 291, 299; 761 NW2d 443 (2008), *Gorelick v Dep't of State Highways*, 127 Mich App 324, 333; 339 Nw2d 635 (1983).
[8] See MCL 205.762.
[9] See MCL 205.726.

a. The taxes, interest, and penalties, as levied by Respondent, are as follows:

Assessment Number: UA66485

Taxes	Interest	Penalties
$43,632	$5,872.99	$0

Assessment Number: UA33180

Taxes	Interest	Penalties
$7,359	$1,174.74	$0

b. The final taxes, interest, and penalties are as follows:

Assessment Number: UA66485

Taxes	Interest[10]	Penalties
$43,632	$5,872.99	$0

Assessment Number: UA33180

Taxes	Interest[10]	Penalties
$7,359	$1,174.74	$0

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as finally shown in the Proposed Opinion and Judgment 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 Order within 28 days of entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves the last pending claim and closes this case.

APPEAL RIGHTS

If you disagree with the Tribunal's final decision in this case, you may either file a motion for reconsideration with the Tribunal or a claim of appeal directly to the Michigan Court of Appeals ("MCOA").

A motion for reconsideration with the Tribunal must be filed, by mail or personal service, with the $25.00 filing fee, if applicable, within 21 days from the date of entry of this final decision.[11]

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[10] Interest accruing and to be computed in accordance with sections 23 and 24 of 1941 PA 122.
[11] See TTR 257 and TTR 267.

A copy of a party's motion for reconsideration must be sent by mail or electronic service, if agreed upon by the parties, to the opposing party and proof must be submitted to the Tribunal that the motion for reconsideration was served on the opposing party.[12] However, unless otherwise provided by the Tribunal, no response to the motion may be filed, and there is no oral argument.[13]

A claim of appeal to the MCOA must be filed, with the appropriate entry fee, unless waived, within 21 days from the date of entry of this final decision.[14] If a claim of appeal is filed with the MCOA, the party filing such claim must also file a copy of that claim, or application for leave to appeal, with the Tribunal, along with the $100.00 fee, if applicable, for the certification of the record on appeal.[15]

By: Steven H. Lasher

Entered: September 25, 2015
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[12] See TTR 225.
[13] See TTR 257.
[14] See MCR 7.204.
[15] See TTR 213 and TTR 267.