STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Visiocorp USA, Inc.,
Petitioner,

v MTT Docket No. 367905

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

On December 8, 2010, the Tribunal held a Prehearing Conference with the parties and determined that this matter could be resolved with the filing of respective Motions for Summary Disposition by the parties.

On February 28, 2011, Petitioner filed its Motion for Summary Disposition. Respondent filed its Motion for Summary Disposition on March 1, 2011. Both motions were filed pursuant to MCR 2.116(C)(10).

On March 7, 2011, Respondent filed its response to Petitioner's Motion for Summary Disposition. On March 11, 2011, Petitioner filed its response to Respondent's Motion for Summary Disposition.

PETITIONER'S ARGUMENT

In support of its Motion, Petitioner argues that "the diversion of products to cross dock facilities in Michigan, where they were typically held for 2 days before being shipped to their final destinations outside of Michigan, do not constitute Michigan sales pursuant to MCL 208.52." Specifically, Petitioner contends that because the manufactured products were received and consumed entirely outside of the borders of Michigan, Respondent is not authorized under the statute to subject such sales to the SBT simply because such products were stored in a cross dock facility in Michigan for two to five days.

Petitioner contends that the statute clearly provides that for sales to be "in this state" such sales must be shipped or delivered *to any purchaser within this state* regardless of the conditions of the sales. Here, Petitioner contends that the facts are undisputed that the sales in dispute are limited to just those sales to purchasers outside of Michigan and that the only Michigan connection is the short term storage and consolidation of the products before they are shipped out of state. Petitioner further notes that statutory language similar to MCL 208.52 was included in the

Michigan Business Tax, except that language was added (see MCL 208.1305) that makes it clear that the determination as to whether sales are in-state or not is "based on the ultimate destination at the point that the property comes to rest."

Petitioner further relies on a Letter Ruling issued by Respondent (LR 1988-07) which determined that sales from a company with warehouses in Indiana and Michigan to customers in Michigan were in-state Michigan sales even where customers took legal title and delivery of the product at the company's Indiana warehouse. Here, Petitioner contends that Respondent's position was that the final destination, not the initial delivery point, was the test to be applied in determining whether sales were subject to the SBT.

In further support of its contentions, Petitioner cites several cases from states other than Michigan that have held that the "destination" of the product and the location of the ultimate purchaser is the definitive test for which jurisdiction may tax the sale of a product rather than "place of delivery" of such product.

Finally, in its response to Respondent's motion for summary disposition, Petitioner again focuses on a statutory construction argument that the key phrase contained in MCL 208.52, "property is shipped or delivered to any purchaser within this state," clearly requires that for sales "to be taxable as in-state sales, the goods must have been sold to a *purchaser in Michigan.*" Here, Petitioner contends that the ultimate destinations of the subject products were to purchasers outside of the state of Michigan and that the only Michigan role in the process from manufacturer to purchaser was a short stop at a Michigan third-party freight facility for freight consolidation purposes only. Petitioner further disputes any attempt by Respondent to distinguish a "dock sale" from a "cross dock sale" as such sales relate to LR 1988-07 and the subject appeal, as the single issue in this case is whether the purchase of the goods at issue was made by a "purchaser within this state."

RESPONDENT'S ARGUMENT

In support of its Motion, Respondent argues, as does Petitioner, that the issue in this case is one of statutory interpretation. Here, Respondent contends that MCL 208.52 is plain and unambiguous and judicial construction of the statute is not permitted. Specifically, Respondent contends that in the instant case, the purchaser of the products "directs that the goods be delivered to a person in Michigan who thereafter on behalf of the purchaser causes the goods to be sent to another location." Respondent relies on wording in several bills of lading discovered during its audit of Petitioner that "indicate a delivery by the seller to the purchaser in 'care of' the operator of the designated location which is in Michigan." Respondent further distinguishes its conclusion in LR 1988-07 as inapplicable to the facts in this case, because the taxpayer in that case took possession of the goods in Indiana and immediately transported the goods to Michigan for resale.

Finally, Respondent stated that it relies on its motion for summary disposition as its response to Petitioner's motion for summary disposition.

FINDINGS OF FACT

Although the parties did not submit a Joint Stipulation of Facts, the Tribunal has reviewed the respective briefs filed by the parties, and finds the following facts:

1. As a tier-one supplier for the automotive industry, Petitioner manufactures vehicle parts and accessories which are shipped to assembly plants throughout the world.
2. Parts and accessories manufactured by Petitioner in Michigan are shipped to customers as they are needed, on a "just in time" basis.
3. Customers of Petitioner may require Petitioner to ship products to third party staging locations in Michigan, where they are held temporarily for final shipment to locations outside of Michigan.
4. Freight consolidation occurs at these "staging locations" and are referred to as "cross dock" locations.
5. Only "cross dock sales" with a final destination outside Michigan are at issue in this appeal.
6. Most of Petitioner's products remain at Michigan cross dock locations for less than two days and "never" remain at these locations for more than five days.
7. Petitioner's products are specifically manufactured "for use at plants that are located outside of" Michigan.
8. Petitioner is not paid for manufactured products until these products reach their final destination outside of Michigan.
9. Respondent conducted an audit of Petitioner's Michigan Single Business Tax returns for the tax years 2001, 2002 and 2003, and determined (Intent to Assess O047597) that deliveries of manufactured products to these cross dock locations constituted Michigan sales subject to the SBT and should, therefore, be reflected as such in the sales factor of the apportionment formula applied to Petitioner.

STANDARD OF REVIEW

Both parties move for summary disposition pursuant to MCR 2.116(C)(10). In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004), the Tribunal stated "[a] motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact." Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most

favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

CONCLUSIONS OF LAW

The Tribunal has carefully considered the parties' respective Motions for Summary Disposition and Responses under MCR 2.116(C)(10). Respondent's Motion for Summary Disposition is not supported by the applicable statute. Petitioner's Motion for Summary Disposition is supported by the applicable statute.

The parties' arguments rely solely on the statutory interpretation of MCL 208.52. MCL 208.52 provides that "[s]ales of tangible personal property are in this state in any of the following circumstances: . . (b) [f]or tax years beginning on and after January 1, 1998, the property is shipped or delivered to any purchaser within this state regardless of the free on board point or other conditions of the sales." Respondent bases its argument on the fact that the property is shipped to a third party staging location in Michigan and is therefore shipped to a purchaser within this state. Petitioner contends that Respondent's interpretation is erroneous because Petitioner ships the products to an in-state third party staging location but because the purchaser is outside Michigan and the product ultimately reaches the out-of-state purchaser it is an out-of-state sale. Thus, Petitioner contends it is not liable for the Single Business Tax (SBT) deficiency.

The Tribunal's primary goal in interpreting a statute is to determine and give effect to the Legislature's intent. *Kmart Mich Prop Servs, LLC v Dep't of Treasury*, 283 Mich App 647, 650; 770 NW2d 915 (2009). The analysis must begin with an examination of the language used. "If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible." *City of Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). "[A] provision of the law is ambiguous only if it 'irreconcilably conflicts' with another provision . . . or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Serv Comm*, 470 Mich 154,166; 680 NW2d 840 (2004) (emphasis in original).

Here, the plain meaning of the statute is not clear and the language of the statute is ambiguous. Specifically, the excerpt of the statute pertaining to shipment or delivery to a purchaser within

this state is ambiguous because it is susceptible to multiple meanings. The statute does not clearly identify whether it is the delivery place or the location of the purchaser that determines whether the sale was within Michigan. If the statute is interpreted to mean that a sale is in Michigan if the property is delivered within this state to a purchaser (albeit through a third party freight consolidator), then Respondent is correct and the sales at issue are within Michigan. Alternatively, if the statute is interpreted to mean that a sale of personal property is not in Michigan if the property is ultimately delivered to a purchaser located outside the state, then Petitioner's construct is correct and Petitioner is not liable for the assessed SBT deficiency.

Because the language of the statute is ambiguous, the Tribunal shall interpret the language according to the available and relevant authority. The Tribunal has determined that there is no case law in the State of Michigan that considers the applicability of MCL 208.52 to a factual situation similar to the facts of the above-captioned appeal. Because the Michigan Legislature adopted its language defining in-state sales of tangible personal property from the Uniform Division of Income for Tax Purposes Act of 1957 ("UDITPA"), the Tribunal finds that seeking guidance from other states that have also adopted this language is necessary. As such, the Tribunal shall look to courts of other states for guidance in interpreting Michigan law in cases of first impression.

Petitioner cites *McDonnell Douglas Corp v Franchise Tax Board*, 33 Cal Rptr 2d 129 (1994), a California Court of Appeals case regarding a business tax provision in the California Tax Code very similar to that at issue in this appeal. The Court of Appeals of California affirmed the trial court's determination that aircraft delivered in California, which were intended for out-of-state use, were considered out-of-state sales because the goods were ultimately destined for use in another state. The Court stated that ". . . a deliberate policy decision [was made] to recognize the contribution of the 'consumer' states to the production of income by allocating sales to those states that produce the buyer.'" *Id*. at 133. Because of this policy, the Court found that the appropriate rule was the "'destination' rule rather than the 'place of delivery' rule," because it was the location of the purchaser and not the place of delivery that was dispositive. *Id*. The Court relied on court opinions from seven other states which considered similar provisions and also found that "within this state" referred to the location of the purchaser and not the delivery site. See *Department of Revenue v Parker Banana Co*, 391 So 2d 762 (Fla 1980); *Pabst Brewing Co v Wis Dept of Revenue*, 130 Wis2d 291; 387 NW2d 121 (1986); *Olympia Brewing Co v Com'r of Revenue*, 326 NW2d 642 (1982); *Lone Star Steel Co v Dolan*, 668 P2d 916 (Colo 1983); *Dupps Co v Lindley*, 62 Ohio St2d 305; 405 NE2d 716 (1980); *Texaco Inc v Groppo*, 215 Conn 134; 574 A2d 1293 (1990); *Strickland v Patcraft Mills Inc*, 251 Ga 43; 302 SE2d 544 (1983).

Although decisions of sister states, whether reported or unreported, are not binding upon this Court, nonetheless we find the *McDonnell Douglas* analysis to be persuasive in this case of first impression. The Tribunal finds that consideration of the totality of the circumstances must be given to interpret the statute consistently with its uniform meaning. Further, MCL 208.52 must be interpreted in conformity with other state provisions that also adopted the uniform language of UDITPA.

In applying the adopted interpretation to the facts of the above-captioned case, the Tribunal determines that Petitioner's sales are not in the State of Michigan and are therefore not subject to SBT. First, when Petitioner ships products to the purchaser the shipping is completed in two distinct steps. Initially, Petitioner ships the product to a cross dock facility in Michigan where they are held before shipment to the final destination outside of Michigan. Respondent would like the Tribunal to believe that when the product is first shipped to the cross dock facility the shipment is complete and the sale was therefore in Michigan. However, the product is ultimately shipped to the purchaser, an out-of-state entity. The mere fact that the product is first transported to a cross dock facility in Michigan for consolidation of shipment does not render the sale of the property within Michigan and thus subject to SBT. The sale of the product was made to a purchaser outside of Michigan and the property and was ultimately shipped to the out-of-state purchaser. As such, Petitioner has proven there are no genuine issues of material fact and judgment shall be rendered in its favor as the sales at issue were not within the State of Michigan and are thus not subject to SBT. Accordingly, cancellation of Final Assessment No. O047597 is appropriate. Therefore,

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

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

IT IS FURTHER ORDERED that Respondent's Final Assessment No. O047597 is CANCELLED.

MICHIGAN TAX TRIBUNAL

Entered: April 14, 2011 By: Steven H. Lasher