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

Midwest Power Line Inc,
Petitioner,

v MTT Docket No. 15-005680

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Midwest Power Line, Inc., appeals a final assessment under the Use Tax Act ("UTA") levied by Respondent, Michigan Department of Treasury, based on an audit for the September 1, 2009, through August 31, 2013 tax period. A hearing on this matter was held on November 1, 2016. Christopher J Micklatcher and James L Juhnke, appeared on behalf of Petitioner, and Emily Zillgitt, represented Respondent. The two witnesses were Brian Monawek, President and Owner of Petitioner and Trisha Berry, Senior Auditor for Respondent. Following the hearing, the parties were requested to submit post-hearing briefs.

Based on the evidence, testimony, and case file, and as discussed in detail below, the Tribunal finds that Petitioner does not qualify for the MCL 205.94k(4) rolling stock exemption, and the assessment is affirmed, as follows:

Assessment No.	**Tax**	**Penalty**	**Interest**
UI18107	$79,365	$0	*

*Interest to be computed in accordance with 1941 PA 122.

PETITIONER'S CONTENTIONS

Petitioner contests Respondent's determination that it does not qualify for the rolling stock exemption, enumerated in MCL 205.94k(4). Petitioner claims it is engaged in the business of carrying persons or property for hire across state lines and the correct interpretation and use of punctuation in the definition of "interstate fleet motor carrier" shows Petitioner qualifies for the exemption. Even though the purpose of Petitioner's business is to repair downed power lines, Petitioner argues hauling the materials is just as an important aspect of the job. Finally, Petitioner

contends hauling the materials is not incidental to the contract performance because "the hauling was required," and crossing state lines was required given the "many states which they have hauled through . . . ."[1]

PETITIONER'S ADMITTED EXHIBITS

P-A Pictures of vehicles and utility company storeyard
P-E Contract between Petitioner and National Grid USA Service Company

PETITIONER'S WITNESS

Petitioner presented the testimony of Brian J. Monaweck, Petitioner's owner. Mr. Monaweck testified that: (i) he is the President and owner of Petitioner, (ii) Midwest Power Line Inc is in the business of providing labor and equipment to restore power in areas hit by natural disasters, (iii) Petitioner contracts with customers to provide power-restoration services, (iv) When Petitioner's services are needed by a customer, Petitioner will "get a call" and "mobilize from Michigan with [] trucks empty, just our employees and stuff, [and] travel to where they want us to go,"[2] (v) when a unit is mobilized they "pick up materials at one of their [customer's] store yards and haul it out to the job site, do the work and then head back home when it's done,"[3] (vi) Petitioner's trucks cross state lines as Petitioner's customers are located throughout the United States, (viii) Aside from the customer's materials, Petitioner's trucks are typically loaded with "minor tools, chainsaws, personal luggage, bolt cutters, [and] wrenches,"[4] "strap pulleys, . . . traffic cones, harness . . . ."[5] (x) his father was advised by an agent at the Secretary of State that Petitioner "qualified for rolling stock and that [they] should seek that."[6]

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner does not qualify for the rolling stock exemption because it "is not engaged in the business of carrying persons or property, other than their own

[1] Petitioner's post-hearing brief.
[2] Transcript at 12.
[3] *Id.*
[4] *Id.* at 21-22.
[5] *Id.* at 43.
[6] *Id.* at 29.

property and employees, for hire across state lines."[7] Thus, Respondent argues, Petitioner does not meet the definition of "interstate fleet motor carrier," because it "is not hired to carry people or property of others across state lines."[8] Petitioner may carry the property of their customers across state lines but this is incidental to its business services. Respondent specifies that Petitioner travels in its own vehicles, carrying its own tools to complete the restoration services and "no utility company has ever hired Midwest Powerline solely to carry the utility's materials across state lines."[9] Simply, Respondent argues the exemption "is intended to cover . . . the transportation business."[10]

RESPONDENT'S ADMITTED EXHIBITS

R-1 Audit pre-confirmation letter dated March 12, 2013
R-2 Tax Compliance Bureau Records Request
R-3 Audit confirmation letter dated August 6, 2013
R-4 Audit Report of Findings
R-5 Auditor use tax workbook from use tax audit
R-6 Notice of preliminary audit determination cover letter and notice of preliminary audit determination dated July 3, 2014
R-7 Final Audit Determination Letter dated January 5, 2015
R-8 Printouts from Midwest Powerline website, www.midwestpowerline.com
R-9 Contract between Entergy Gulf States Louisiana and Midwest Powerline
R-10 Contract between Nisource Corporate Services Company and Midwest Powerline
R-11 Contract between National Grid USA Service Company, Inc. and Midwest Powerline
R-12 National Grid invoice dated 3/28/2010
R-13 Pictures of Midwest Powerline trucks

RESPONDENT'S WITNESS

Respondent presented the testimony of Trisha M. Berry, Auditor for the Michigan Department of Treasury. Ms. Berry testified that: (i) initially, she sent Petitioner an audit preconfirmation letter and after receiving a response from Doug Jackson, she sent out an audit confirmation letter and a records request, (ii) she received most of the records sought in the records request; however, she did not receive some invoices, (iii) the total of the expense exceptions for the sample period (1/1/12 to 12/31/12) was $82,465, (iv) if expenses were attached to a qualified truck, particular expenses would qualify for a tax exemption under the

[7] Respondent's post-hearing brief.
[8] *Id.*
[9] *Id.*
[10] *Id.*

rolling stock exemption, (v) she determined Petitioner is not entitled to claim the rolling stock exemption because it is "engaged in the business of repairing power lines,"[11] (vi) she sent the notice of preliminary audit determination and Petitioner did not respond, (vii) a final audit determination letter was issued and she participated in the subsequent informal conference.

FINDINGS OF FACT

1. Petitioner is an electric utility contractor whose business operates a power-restoration service.
2. Petitioner purchased vehicles and incurred expenses attached to the purportedly qualified trucks for use in its business.
3. Petitioner did not pay use tax on the purchase of the vehicles or related expenses, believing that the rolling stock exemption applied.
4. Petitioner is appealing the assessment of use tax and interest, assessed by Respondent, for the September 1, 2009, through August 31, 2013 tax period.
5. The Final Assessment was issued on August 25, 2015 as follows:

Assessment No.	Tax	Penalty	Interest
UI18107	$79,365	$0	$9,593.90

6. Petitioner is in the business of providing emergency response services to its customers throughout the United States.
7. Petitioner hauls its customers' materials across state lines in order to perform its emergency response (restoration) services.

CONCLUSIONS OF LAW

The assessment at issue was imposed under the UTA, MCL 205.91 *et seq.* 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. . . ."[12] MCL 205.97(1) provides that "[e]ach person storing, using, or consuming in this state tangible personal property or services is

[11] Transcript at 65.
[12] MCL 205.93(1).

liable for the 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." The statute excludes from the UTA "the storage, use, or consumption of rolling stock used in interstate commerce and purchased, rented, or leased by an interstate fleet motor carrier."[13] The UTA defines "interstate fleet motor carrier" as "a person engaged in the business of carrying persons or property, other than themselves, their employees, or their own property, for hire across state lines, whose fleet mileage was driven at least 10% outside of this state in the immediately preceding tax year."[14]

The issue in this case, whether Petitioner is entitled to the rolling stock exemption, is dependent upon the meaning and interpretation of MCL 205.94k(6)(d). The parties' interpretations differ and it is up to the Tribunal to determine whether Petitioner is an "interstate fleet motor carrier". The primary goal in statutory interpretation is to give effect to the Legislature's intent.[15] When interpreting a statute, the statute must be considered as a whole and the words used are to be given their plain meaning.[16] "When the plain and ordinary language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted."[17]

The Tribunal finds that the plain meaning of MCL 205.94k(6)(d) is unambiguous and the Legislature's intent is clear; thus, judicial construction is not permitted. Here, Petitioner argues it is "in the business of carrying persons or property for hire across state lines."[18] However, this assertion is contrary to the testimony provided and the contracts admitted which evidence the business agreements between Petitioner and its customers. Mr. Monaweck testified that Petitioner's employees keep minimal tools on board the trucks deployed to restore power for its customers. Specifically, Mr. Monaweck testified that minor tools, chainsaws, personal luggage, bolt cutters, wrenches, strap pulleys, traffic cones, and harnesses are typically stored on the trucks. Mr. Monaweck explained that the bulk of the materials used for its jobs are stored at their customer's store yards. Mr. Monaweck adamantly testified that Petitioner is required to drive to the customers' store yard site (outside the State of Michigan), pick up the necessary materials,

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[13] MCL 205.94k(4).
[14] MCL 205.94k(6)(d).
[15] *Menard Inc v Dep't of Treas*, 302 Mich App 467; 838 NW2d 736 (2013), *Mt. Pleasant v State Tax Comm*, 477 Mich 50; 729 NW2d 833 (2007).
[16] *Menard*, supra, *Klooster v City of Charlevoix*, 488 Mich 289; 795 NW2d 578 (2011).
[17] *Moshier v Whitewater Twp*, 277 Mich App 403, 407; 745 NW2d 523 (2007).
[18] Petitioner's post-hearing brief.

and travel onto the job site to complete the work. The key fact in Mr. Monaweck's testimony is not that Petitioner picks up its customer's materials and transports them to the job site. Rather, picking up the materials is what is completed *on the way to the ultimate job site* where Petitioner was hired to restore electric power. Mr. Monaweck testified "[y]ou can't do one without the other," regarding whether Petitioner was ever hired to move a customers' materials without performing the restoration services.[19] Thus, the customer has not hired Petitioner to merely haul its materials in interstate commerce. Petitioner's customers hire Petitioner to restore power in a specific location and the act of picking up the materials necessary to restore power is incidental to the power restoration service and not the purpose of the contract or the reason Petitioner is in business.

As pointed out on direct and cross examination of Mr. Monaweck, Petitioner's contracts require it to provide all tools and equipment necessary for its jobs and the contracts specify the scope of Petitioner's work is emergency response services. Mr. Monaweck explained he interprets this language to mean Petitioner is required to provide the customers' materials at the job site and "not provide them as in pay for them or bring them with us from Michigan."[20] Mr. Monaweck also testified that he does not believe that hauling the materials is an incidental part of what Petitioner does. The Tribunal finds that hauling the materials for the customer may be a vital part of completing the contracted work; however, the contracted work being completed is emergency response services and not the hauling of materials for the customer. Because Mr. Monaweck admits he did not write the contracts and the language in the contracts could be interpreted multiple ways, the Tribunal finds it is best to look at the substance of the contract rather than the form of the contract. It appears that Mr. Monaweck's rendition of Petitioner's responsibilities regarding the hauling of materials is credible and Petitioner is required to pick up its customers' materials at a store yard and haul them to the actual job site. However, as stated above, Petitioner's business purpose is not to haul materials, it is to restore power via its emergency response services. As such, the Tribunal concludes that Petitioner is in the business of providing emergency response services.

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[19] Transcript at 36.
[20] Transcript at 27.

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that Petitioner is not hired to engage in the business of carrying other persons or property across state lines. Petitioner is hired to provide emergency response services and to do this it must haul *its own* employees and *its own* tools and materials (albeit a minimal amount of tools and materials), as well as its customers' materials, across state lines to the ultimate job site. Petitioner is not an "interstate fleet motor carrier" as defined by the UTA and is not entitled to the rolling stock exemption.

JUDGMENT

IT IS ORDERED that Final Assessment Number UI18107 is AFFIRMED.

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.

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

APPEAL RIGHTS

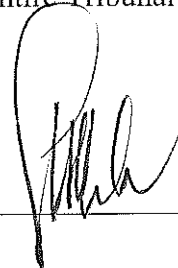
If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[21] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the

[21] See TTR 261 and 257.

petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[22] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[23] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[24]

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[25] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[26] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[27]



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[22] See TTR 217 and 267.
[23] See TTR 261 and 225.
[24] See TTR 261 and 257.
[25] See MCL 205.753 and MCR 7.204.
[26] See TTR 213.
[27] See TTR 217 and 267.