Michigan Bell Telephone Company,
Petitioner,

v

Michigan Department of Treasury,
Respondent.

MICHIGAN TAX TRIBUNAL

MOAHR Docket No. 19-002613

Presiding Judge
Peter M. Kopke

PROPOSED ORDER DENYING
PETITIONER'S MOTION FOR SUMMARY DISPOSITION

PROPOSED ORDER GRANTING
RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

As a result of a telephonic status conference, the Tribunal entered an Order on November 4, 2019, establishing dates for the filing of Cross-Motions for Summary Disposition and Responses to those Motions. In compliance with that Order, the parties filed Cross-Motions on April 3, 2020 and Responses on May 8, 2020.

The Tribunal has reviewed the Motions, the Responses, and the case file and finds that there are no genuine issues of material fact and that the granting of Respondent's Motion Summary Disposition is warranted and that the denial of Petitioner's Motion for Summary Disposition is also warranted.

PETITIONER'S MOTION

In its Motion, Petitioner contends that it is entitled to summary disposition in its favor under MCR 2.116(C)(10). Petitioner also contends that:

1. "This case involves an appeal filed by Michigan Bell of a partial refund denial issued by the Michigan Department of Treasury ('Treasury') on April 9, 2019. Michigan Bell appeals the denial of $2,124,999.62 for the period of May 1, 2009 through February 28, 2017."

2. “Michigan Bell claims that set top boxes and similar equipment provided to U-Verse television subscribers qualify for the use tax exemption in MCL 205.94q because they were purchased for use in the rendition of a combination of services that included services taxable under MCL 205.93a(1)(a) or (c), would be placed on customer premises, and a percentage would be directly used in 2-way interactive communications.”

3. “Michigan Bell’s claim must succeed as a matter of law because there are no genuine issues of material fact and MCL 205.94q contains an irrebuttable presumption that 90% of the total use of the type of equipment referenced in Paragraph 2 above is for exempt purposes, and so is 90% exempt from use tax.”

RESPONDENT’S RESPONSE TO PETITIONER’S MOTION

In its response to Petitioner’s Motion, Respondent contends that (i) “the plain language of the statute requires a finding against Petitioner,” (ii) “Petitioner’s argument in support of its position is based on its faulty analysis of a previous appellate decision and misreading of the Legislature’s response to same,” and (iii) “Petitioner’s brief contains factual inaccuracies.”

RESPONDENT’S MOTION

In its Motion, Respondent contends that summary disposition in its favor is appropriate under MCR 2.116(C)(8) and (C)(10). Respondent also contends that:

1. “The underlying facts are undisputed, and the outcome of this case depends solely on a legal determination: which party has correctly interpreted the use tax exemption provided for in MCL 205.94q.”

2. “Treasury maintains that the property at issue is not eligible for the exemption when there is no dispute that it was not used by Petitioner’s customers to receive the type of service that would trigger the exemption.”

3. “Petitioner’s reading of the statute requires words to be read into the statute that are not there and would result in an impermissible expansion of the availability of the exemption.”

PETITIONER’S RESPONSE TO RESPONDENT’S MOTION

In its response to Respondent’s Motion, Petitioner contends that (i) “Michigan Bell Telephone Company (‘Michigan Bell’) is entitled to summary disposition because it purchased the equipment at issue for use in providing telecommunications services and because the irrebuttable presumption in MCL 205.94q(2) conclusively establishes the

percentage of exempt use of such equipment," (ii) "[t]he Michigan Department of Treasury ('Treasury') has already agreed that this type of equipment qualifies for the exemption by granting a partial refund to Michigan Bell for identical equipment," (iii) "in its motion for summary disposition, Treasury unlawfully attempts to apportion the exemption based on the extent to which the equipment is actually used in exempt activities," (iv) "Treasury errs because the Legislature conclusively decreed through an irrebuttable presumption that the extent to which such equipment would be used in exempt activities would be 90%," and (v) "Treasury cannot ignore the irrebuttable presumption in order to deny Michigan Bell the refund to which it is entitled under the law."

STANDARD OF REVIEW

As for the Tribunal's review of the instant Motions, there are no specific Tribunal rules governing motions for summary disposition. Thus, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[1]

With respect to the instant Motions, Petitioner moves for summary disposition under MCR 2.116(C)(10), and Respondent moves for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10).

A. *Motions for Summary Disposition under MCR 2.116(C)(8)*.

MCR 2.116(C)(8) provides for summary disposition when "the opposing party has failed to state a claim on which relief can be granted."[2] A motion under this rule "tests the legal sufficiency of the complaint" and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant."[3] Such motions "may be granted **only** where the claims alleged are 'so **clearly unenforceable as a matter of law** that **no** factual development could possibly justify recovery.'"[4] [Emphasis added.] Further, "when deciding a motion brought under this section, a court considers **only** the pleadings."[5] [Emphasis added.]

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[1] See TTR 215.
[2] See *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).
[3] *Id*. (citations omitted).
[4] *Id*. (citations omitted).
[5] *Id*. (citations omitted).

B. *Motions for Summary Disposition under MCR 2.116(C)(10)*.

With respect to summary disposition under MCR 2.116(C)(10), such motions test 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.[6] Further, it has also been held that (i) 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,[7] (ii) the moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider and,[8] (iii) the burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists, (iv) where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving 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,[9] and (v) if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[10]

CONCLUSIONS OF LAW

The Tribunal, having given careful consideration to the Motions and the Responses under MCR 2.116(C)(8) and (C)(10), finds that there are no genuine issues of material fact and that the granting of summary disposition in favor of Respondent under MCR 2.116(C)(10) but not MCR 2.116(C)(8) is warranted at this time. More specifically, MCL 205.94q is a tax exemption statute, and, as such, the Tribunal is required to "strictly construe" that statute "in favor of the taxing authority."[11] That does

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[6] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). See also *Maiden*, *supra* at 120.
[7] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[8] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[9] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[10] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[11] See *Michigan United Conservation Clubs v Lansing Twp*, 423 Mich 661, 664–65; 378 NW2d 737 (1985). See also *TOMRA of North America, Inc v Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___ (June 16, 2020), which provides, in pertinent part:

not, however, mean that the Tribunal "should give a strained construction which is adverse to the Legislature's intent."[12] In that regard, MCL 205.94q provides:

> (1) The tax levied under this act does **not** apply to the purchase of machinery and equipment for use or consumption in the rendition of any combination of services, the use or consumption of which is taxable under section 3a(1)(a) or (c) or 3b **except** that this exemption is limited to the tangible personal property located on the premises of the subscriber and to central office equipment or wireless equipment, **directly used or consumed** in transmitting, receiving, or switching, or in the monitoring of switching of a 2-way interactive communication. As used in this subsection, central office equipment or wireless equipment does **not** include distribution equipment including cable or wire facilities.
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> (2) Beginning April 1, 1999, the property under subsection (1) is exempt **only** to the extent that the property **is used for the exempt purposes** stated in this section. **There is an irrebuttable presumption that 90% of total use is for exempt purposes**.
>
> [Emphasis added.]

Finally, the requested exemption is an established class of exemption and, as a result, Petitioner is required to establish its entitlement to that exemption by a preponderance of the evidence.[13]

Here, Petitioner claims that Respondent "has already agreed" that the equipment at issue qualifies for the exemption by granting a partial refund for the same or identical equipment. Petitioner also claims that (i) the equipment was purchased "for use in rendering a telecommunications service" and "[t]he key element of the exemption is the intended use or consumption of the property at the time of purchase, or in other words

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> We take this opportunity to clarify that because the canon requiring strict construction of tax exemptions does **not** help reveal the semantic content of a statute, **it is a canon of last resort**. That is, courts should employ it only "when an act's language, after analysis and subjection to the ordinary rules of interpretation, presents ambiguity." In the present case, the canon is inapplicable because, as we explain below, the statutes are unambiguous: their ordinary meaning is discernible by reading the text in its immediate context and with the aid of appropriate canons of interpretation. [Emphasis added.]

[12] See *Inter Co-op Council v Dep't of Treasury*, 257 Mich App 219, 223; 668 NW2d 181 (2003) citing *Cowen v Dep't of Treasury,* 204 Mich App 428, 431; 516 NW2d 511 (1994), which provides, in pertinent part, "[w]hile tax-exemption statutes are strictly construed in favor of the government, **they are to be interpreted according to ordinary rules of statutory construction**." [Emphasis added.]

[13] See *ProMed Healthcare v Kalamazoo*, 249 Mich App 490, 494-495; 644 NW2d 47 (2002).

whether the equipment was purchased 'for use' in an exempt activity," (ii) "[t]he extent to which the equipment is used for exempt purposes is not at issue in this case," and (iii) "the law deems Michigan Bell to use the equipment in exempt activities 90% of the time, and thus Michigan Bell qualifies for a 90% exemption on its equipment."

Contrary to Petitioner's claim that Respondent agrees or has agreed that the equipment at issue qualifies for the exemption, the facts presented demonstrate that Respondent granted a partial exemption based on the admitted actual use of a portion of the equipment for exempt telecommunication services and not its purchase or potential use.[14] As for Petitioner's claims that the exemption is based on the intended use or consumption of the property at the time of purchase and that the equipment's use for exempt purposes is not at issue in this case, said claims are also erroneous, as they ignore basic rules of statutory construction and existing law.[15] More specifically, the plain language of MCL 205.94q(1) clearly indicates that the exemption "is **limited** to the tangible personal property located on the premises of the subscriber and to central office equipment or wireless equipment, **directly used or consumed** in transmitting,

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[14] See Respondent's letter to Petitioner dated December 15, 2017, which provides, in pertinent part, "[t]he Department must deny your refund request in its entirety." (Respondent's Exhibit No. 1.) See also Respondent's letter to Petitioner dated May 23, 2018, which provides, in pertinent part, "[t]he taxpayer bears the burden of showing what portion of the boxes were utilized in providing taxable telecommunications, and only a portion of that box that provided taxable telecommunications would quality for the exemption." (Respondent's Exhibit No. 2.) Further, see Respondent's Informal Conference Recommendation. (Respondent's Exhibit No. 3.)

[15] See *Spartan Stores, Inc v City of Grand Rapids*, 307 Mich App 565, 569; 861 NW2d 347 (2014) citing *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 560; 837 NW2d 244 (2013). See also *Michigan Bell v Dep't of Treasury*, 229 Mich App 200, 208; 581 NW2d 770 (1998), which provides, in pertinent part:

> **There is no dispute that the purchase of the equipment in question**, **but for** any exemption afforded by § 4(t), **is subject to use tax**. Under § 4(t), the use tax exemption **applies if** the equipment is deployed to provide a service that is taxable under MCL § 205.93a(a); MSA § 7.555(3a)(a). The **only other conditions of eligibility** are that the equipment be necessary exchange equipment or be tangible personal property and located on the premises of the subscriber. M.C.L. § 205.94(t); M.S.A. § 7.555(4)(t). Again, the **applicability of these conditions** to the equipment in question is **not** challenged. **On the face of the exemption**, it does **not** appear that the Legislature intended the use tax exemption to be apportioned, such that the exemption applies only to that portion of the equipment's value attributable to the provision of services actually consumed or used that are themselves subject to the use tax. [Emphasis added.]

MCL 205.94(1)(t) was, as indicated herein, replaced by the statute at issue after the issuance of the decision in the *Michigan Bell* case (i.e., MCL 205.94q).

receiving, or switching, or in the monitoring of switching of a 2-way interactive communication."[16] [Emphasis added.] In that regard, the plain language of MCL 205.94q(2) also clearly indicates that "the property under subsection (1) is exempt **only** to the extent that the property **is used for the exempt purposes**." [Emphasis added.] Nevertheless, the Legislative did provide an "irrebuttable presumption that 90% of total use is for exempt purposes" and, such presumptions are conclusive despite evidence to the contrary.[17] In that regard, the succinct claim raised in Petitioner's unique, albeit improper,[18] pleading (i.e., "Petition Memo") provides, in pertinent part, "[i]f equipment is designed to carry taxable telecommunications services, and is purchased for that purpose, it is 90% exempt." Even though said claim is, as indicated above, erroneous, the application of the presumption has not been previously addressed and, as such, the claim is not, on its face, so "clearly unenforceable as a matter of law that no factual development could possibly justify recovery." More specifically, the presumption must, under rules of statutory construction, "be read in relation to the statute as a whole and

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[16] In that regard, MCL 205.94(1)(t) provided:

> The purchase of machinery and equipment for use or consumption in the rendition of an combination of services, the use or consumption of which is taxable under section 3a(a) or (c) **except that this exemption is limited** to the tangible personal property located on the premises of the subscriber and to central office equipment or wireless equipment, **directly used or consumed** in transmitting, receiving, or switching or the monitoring of switching of a 2-way interactive communication. As used in subdivision, central office equipment or wireless equipment does not include distribution equipment including cable or wire facilities. [Emphasis added.]

[17] See *In re Blanchard's Estate*, 391 Mich 644, 652; 218 NW2d 37 (1974), which provides, in pertinent part, "[a]n irrebuttable presumption leaves no room for reason to fall upon fact nor for common sense to bring the application of the law into the world of reality."

[18] See TTR 227(1), which provides, in pertinent part:

> A petition shall contain a statement of facts, without repetition, upon which the petitioner relies in making its claim for relief. **The statement shall be made in separately designated paragraphs**. **The contents of each paragraph shall be limited, as far as practicable, to a statement of a single fact**. Each claim shall be stated separately when separation facilitates the clear presentation of the matters set forth. See also R 792.10221.
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> [Emphasis added.]

work in mutual agreement."[19] As such, the presumption is, by virtue of the plain language of the statute, limited to "the **tangible personal property** and to central office equipment or wireless equipment, **directly used or consumed** in transmitting, receiving, or switching, or in the monitoring of switching of a 2-way interactive communication," which would be the property or equipment that is "used for the exempt purposes." Although Petitioner argues that the Legislature intended to apply the irrebuttable presumption to all of its equipment given the use of some of its equipment (i.e., 48.5%) for exempt purposes,[20] the Michigan Supreme Court in *TOMRA*, *supra* stated, in pertinent part:

> . . . with regard to tax exemptions, the oft-repeated rule is that they must be strictly construed in favor of the government, i.e., against the finding of an exemption. Stated more fully, this canon of construction provides that "'[a]n intention on the part of the legislature to grant an exemption from the taxing power of the State will **never** be implied from language **which will admit of any other reasonable construction**. Such an intention must be expressed in **clear and unmistakable terms**[] or must appear by **necessary implication** from the language used . . . .'" [Emphasis added.]

In the instant case, MCL 205.94(1)(t) was stricken and MCL 205.94q added to the Use Tax Act by Act 117 of the Public Acts of 1999 to address the *Michigan Bell* case and Respondent's practice of apportioning equipment between exempt and non-exempt uses "before April 1, 1999" and "beginning April 1, 1999."[21] As indicated in the House Legislative Analysis Section analysis:[22]

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[19] See *Spartan Stores*, *supra* at 569 citing *US Fidelity & Guarantee Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009).

[20] See Response No. 4 in "Petitioner's Response to Respondent Michigan Department of Treasury's Request for Admissions to Petitioner" dated February 17, 2020. (Respondent's Exhibit No. 4.)

[21] See the Enacting Section 1 of 1999 Act 117, which provides, in pertinent part:

> For telecommunications equipment taxed under section 3a of the use tax act, 1937 PA 94, MCL 205.93a, this amendatory act **clarifies** that for periods **before April 1, 1999**, the tax **shall not be apportioned** and for periods **beginning April 1, 1999**, the tax **shall be apportioned**. This amendatory act **clarifies** that existing law **as originally intended** provides for a **prorated** exemption. This amendatory act takes effect for all periods beginning March 31, 1995 and all tax years that are open under the statute of limitations provided in section 27a of 1941 PA 122, MCL 205.27a. [Emphasis added.]

[22] See the House Legislative Analysis Section "Business Taxes: Gov.'s Proposal" for House Bills 4744 and 4745 as enrolled and Senate Bill 544 as enrolled dated July 16, 1999 and the Senate Fiscal Agency

"Enrolled Analysis" for Senate Bill 544 and House Bill 4744 dated July 19, 1999. In that regard, see also Michigan Bell, supra at 208-212, which provides, in pertinent part:

> Our construction of the exemption is bolstered by the fact that when the Legislature has intended to apportion tax on the basis of underlying use**, it has clearly and expressly so indicated**. By way of example, MCL § 205.52(2); MSA § 7.522(2) requires, for sales tax purposes, that a retailer keep separate accounts for taxable and nontaxable transactions. Indeed, in *Michigan Allied Dairy, supra,* our Supreme Court was confronted with a similar mixed use and apportionment issue. In declining to apportion the sales and use tax exemptions applicable to industrial processing and agricultural production equipment where that property was subject to mixed use, the Court held:
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> > Where an article has more than one use, one or more (but not all) of which are within the agricultural producing or industrial processing exemptions, the [L]egislature **could have provided** that the portion of the value of the article representing its nonexempt use should bear the tax, **but it has not done so**. We have repeatedly held that the scope of the tax laws may **not** be extended by implication. [*Id.* at 650, 5 NW2d 516].
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> > Were we to conclude that apportionment is appropriate under MCL § 205.94(t); MSA § 7.555(4)(t), despite the absence of authorizing language, we would run afoul of our Supreme Court's admonition that we should neither contract nor expand the scope of a tax exemption by construing it according to implication. *Michigan Allied Dairy, supra* at 650, 5 NW2d 516. A construction permitting apportionment clearly would be contrary to the plain language of the statute.

The Department of Treasury concedes that in *Michigan Allied Dairy, supra,* the Supreme Court held that, despite a partial nonexempt use (delivery) of the equipment in question (milk bottles and cans), the equipment was totally exempt from the general sales and use taxes. Nevertheless, the Department of Treasury, citing *Kress v Dep't of Revenue,* 322 Mich 590, 34 NW2d 501 (1948), argues that the concept of apportionment has been recognized by the Supreme Court. In *Kress,* the plaintiff sought a use tax exemption under the industrial processing exemption, which exempted from the use tax "[p]roperty sold to a buyer for consumption or use in industrial processing or agricultural producing." MCL § 205.94(g); MSA § 7.555(4)(g).

The plaintiff in *Kress* rented water softener units to its customers for both residential use and industrial/commercial use. The Supreme Court held that, under § 4(g), only those units distributed to industrial/commercial users were eligible for a use tax exemption. Although the Supreme Court referenced a specific percentage of units that were eligible for the exemption, we do **not** read *Kress* as authorizing an "apportionment." Rather, *Kress* merely recognized that only some portion of the total number of units were subject to exempt use.

The most salient and distinguishing fact of *Kress* is that the water softeners at issue were individual units, never subject to a unified industrial process. Rather, they were distributed independently into two user-channels, one exempt and one nonexempt. The central importance of the character of the equipment and its distribution to the manner in which the Supreme Court resolved the use tax question in *Kress* was made clear when on remand the Supreme Court reconsidered the case the following year. *Kress v Dep't of Revenue,* 326 Mich 15, 39 NW2d 235 (1949) (*Kress II*). Rather than repudiate *Michigan Allied Dairy, Kress II* focused on the different character of the means by which the equipment was utilized in that case: "We think the *Dairy Case* distinguishable in that

> In *Michigan Bell v Department of Treasury*, a 1998 Michigan Court of Appeals case, the court ruled that the treasury department had no statutory authority for its practice of apportioning the exemption for telecommunications equipment based on exempt and non-exempt uses of the equipment. It supported the reasoning of the Michigan Tax Tribunal, which had said the equipment should be entirely exempt because 'the equipment used from the very outset and constantly thereafter for exempt purposes and the exempt use is substantial." State tax officials have expressed concern about the effect of this reasoning, especially if it is applied beyond telecommunications equipment to the industrial processing exemption generally. Equipment used in industrial processing is exempt from the sales and use taxes. Some equipment is used for both exempt and non-exempt purposes, and the Department of Treasury's longstanding practice has been to apportion the exemption for that equipment based on its use. The state could be faced not only with a significant loss of future revenue from this decision, but also would have to pay large amounts of refunds immediately for the years covered by the decision. Further, the industrial provisions in the two acts are themselves in need of revision.

The House Legislative Analysis Section analysis also provided, more importantly:

> The bills would specify that property granted an exemption in either the sales tax or the use tax statute is exempt **only to the extent that the property was used for exempt purposes**. The bills also would specify that **they intended to clarify that existing law as originally intended provides a prorated exemption**. However, in the case of certain telecommunications equipment (that taxed under Section 3a of the Use Tax Act), the provision that property would be exempt only to the extent it was used for exempt purposes **would be effective beginning April 1, 1999**. **Prior to that there would be no apportionment**. [Emphasis added.]

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there each of the units involved was from the very outset and constantly thereafter used in industrial processing as well as otherwise." *Id.* at 18, 39 NW2d 235. It was on that basis that the Court in *Kress II* rejected the plaintiff's argument that, like the plaintiff in *Michigan Allied Dairy,* it was entitled to a full exemption because all the water softener units were recycled and eventually put to exempt commercial use.

In sum, we find no basis in the holdings of *Kress* or *Kress II* for concluding that, **in the absence of explicit authorizing statutory language**, apportionment is appropriate under § 4(t) **when the equipment involved is put to mixed use**, **but in a unified process**. Therefore, we conclude that Michigan Bell is entitled to a full use tax exemption with respect to its purchase of the communications equipment in question.

[Emphasis added.]

Despite the fact that a legislative analysis "is feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction," "legislative bill analyses do have probative value in certain, limited circumstances."[23] In the instant case, the Use Tax Act was, as indicated by the enacting section and analyses, clearly amended to address the apportionment issue raised by the Court of Appeals in *Michigan Bell* and to "clarify" that the apportionment of exempt versus non-exempt use under MCL 205.94q was intended on a prospective basis beginning April 1, 1999. Said intent is, however, inconsistent with a finding that 90% of Petitioner's equipment is exempt because of the irrebuttable presumption inasmuch as only 48.5% of the U-Verse boxes located on the premises of U-Verse subscribers were admittedly directly used or consumed for an exempt purpose. A more "reasonable" interpretation would be to apply the irrebuttable presumption to each piece of tangible personal property or equipment such that the total use of each piece or box would be 90% for exempt purposes if that piece or box is being used or consumed for both exempt and non-exempt uses, as such application would be consistent with the plain language of the statue and facilitate Respondent's apportionment or calculation of the prorated exemption. Therefore,

PROPOSED JUDGMENT

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

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

EXCEPTIONS

This is a **proposed** decision ("POJ") prepared by the Michigan Administrative Hearings System and **not** a final decision.[24] As such, **no** action should be taken based on this decision, as the parties have 20 days from date of entry of this POJ to **notify** the Tribunal **in writing if they do not agree with the POJ and** to **state in writing** why they do not agree with the POJ (i.e., exceptions).

[23] See *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001) and *Kinder Morgan, LLC v City of Jackson*, 277 Mich App 159, 170; 744 NW2d 184 (2007).

[24] See MCL 205.726.

Exceptions are **limited** to the evidence submitted and any matter addressed in the POJ. There is no fee for filing exceptions and the opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions.[25]

Exceptions and responses filed by **e-mail or facsimile** will **not** be considered in the rendering of the Final Opinion and Judgment. A copy of a party's written exceptions or response **must** be sent to the opposing party **by mail or email, if** email service is agreed upon by the parties**,** and proof must be submitted to the Tribunal demonstrating that the exceptions or response were served on the opposing party.

After the expiration of the time period for the opposing party to file a response to the exceptions, the Tribunal will review the case file, including the POJ and all exceptions and responses, if any, and:

1. Issue a Final Opinion and Judgment (FOJ) adopting the POJ as the final decision.
2. Issue an FOJ modifying the POJ and adopting the Modified POJ as the final decision.
3. Issue an Order vacating the POJ and ordering such other action as is necessary and appropriate.

Entered: September 21, 2020 By Peter M. Koglin

pmk

[25] See MCL 205.762(2) and TTR 289(1) and (2).

Michigan Bell Telephone Company,
Petitioner,

MICHIGAN TAX TRIBUNAL

v

MOAHR Docket No. 19-002613

Michigan Department of Treasury,
Respondent.

Presiding Judge
Steven M. Bieda

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment (POJ) on September 21, 2020. The POJ 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 October 12, 2020 Petitioner filed exceptions to the POJ. In the exceptions, Petitioner states that Petitioner disagrees with the rule of statutory construction that the Tribunal used in reaching its decision. The POJ states that "MCL 205.94q is a tax exemption statute, and, as such, the Tribunal is required to 'strictly construe' that statute 'in favor of the taxing authority'." Petitioner states this rule of statutory construction does not apply in every case. It only applies after an affirmative finding that the statute being interpreted presents ambiguity, in accordance with the *Tomra* case.[1] The correct rule in the absence of such a finding is to give the words their ordinary meaning, discernable by reading the text in its immediate context, construed in favor of neither the taxpayer nor the taxing authority.

On October 26, 2020, Respondent filed a response to the exceptions. In its response, Respondent states that Petitioner has failed to establish that good cause exists to modify the POJ. Petitioner's sole complaint is based on a reference to a rule of statutory construction that was recently clarified. A complete reading of the POJ demonstrates that the recommended outcome was based on a finding that the statutory language was clear and unambiguous. As the *Tomra* decision was quoted in the POJ, there can be no error of law when the Tribunal recognized and applied this recent development in Michigan jurisprudence. Respondent states that, when read as a whole, the decision

[1] *TOMRA of North America, Inc v Dep't of Treasury*, ___ Mich App ___; ___NW2d ___ (June 16, 2020).

demonstrates that the "correct rule" advocated by Petitioner was in fact applied. It was not necessary for the POJ to include a specific finding that an ambiguity existed that would warrant strictly construing the statute in Respondent's favor because the POJ, when read as a whole, demonstrates that the outcome was based on the unambiguous, plain language of the statute.

The Tribunal has considered the exceptions, response, and the case file and finds that the Administrative Law Judge (ALJ) properly considered the evidence submitted in the rendering of the POJ. More specifically, Petitioner objects to the Tribunal's use of the rule of statutory construction in this case, indicating the Tribunal strictly construed the exemption statute against Petitioner without first finding that the statutory language presents ambiguity. As previously indicated in the POJ, the plain language of MCL 205.94q(2) limiting the exempt percentage of the property is presumed to be 90% only to the extent the property at issue is used for the exempt purpose, which is not supported by the undisputed evidence in this case. The Tribunal finds that Petitioner's exceptions about strict construction of a tax exemption under *Tomra* was properly considered and weighed in the POJ analysis. Specifically, it stated that, "[i]n the present case, the canon is inapplicable because, as we explain below, the statutes are unambiguous: their ordinary meaning is discernible by reading the text in its immediate context and with the aid of appropriate canons of interpretation."[2] The Tribunal finds that the ALJ's thorough analysis of the exemption statute and application to the facts of this case does not unfairly prejudice Petitioner or mis-construe the plain language of the statute.

Given the above, Petitioner has failed to show good cause to justify the modifying of the POJ or the granting of a rehearing.[3] As such, the Tribunal adopts the POJ as the Tribunal's final decision in this case.[4] The Tribunal also incorporates by reference the Conclusions of Law contained in the POJ in this Final Opinion and Judgment.

IT IS SO ORDERED.

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

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

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

[2] POJ at footnote 11.
[3] See MCL 205.762.
[4] See MCL 205.726.

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 Tribunal with the required filing fee within 21 days from the date of entry of the final decision.[5] 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 petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[6] You are required to serve a copy of the motion 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.[7] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[8]

A claim of appeal must be filed with the Michigan Court of Appeals 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."[9] You are required to file a copy of the claim of appeal with filing fee with the Tribunal in order to certify the record on appeal.[10] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[11]

By _____

Entered: November 18, 2020
ssm

[5] See TTR 261 and 257.
[6] See TTR 217 and 267.
[7] See TTR 261 and 225.
[8] See TTR 261 and 257.
[9] See MCL 205.753 and MCR 7.204.
[10] See TTR 213.
[11] See TTR 217 and 267.