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

Pennsylvania Tool Sales & Service Inc,
Petitioner,

v

MTT Docket No. 448536
Assessment No. *Refund Claim*

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

ORDER DENYING RESPONDENT'S REQUEST FOR COSTS AND ATTORNEY FEES

ORDER DENYING PETITIONER'S CROSS-MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(I)(2)

FINAL OPINION AND JUDGMENT

INTRODUCTION

On June 28, 2013, Respondent filed a Motion for Summary Disposition. On August 5, 2013, the parties filed a Joint Stipulation of Facts. On August 19, 2013, Petitioner filed its Brief in Opposition to Respondent's Motion and a Cross-Motion for Summary Disposition.[1]

[1] TTR 225(4) states, "Written opposition to motions, other than motions for which a motion for immediate consideration has been filed or motions for reconsideration, shall be filed within 21 days after service of the motion, *unless otherwise provided by the tribunal*." [Emphasis added.] Pursuant to the Tribunal's July 16, 2013 Prehearing Summary, Petitioner was given until August 19, 2013, to file a response to Respondent's Motion for Summary Disposition.

Respondent requests summary disposition under MCR 2.116(C)(10) because it contends that Petitioner is not entitled to an exemption from sales tax, and the tangible personal property that Petitioner sold or rented to Washington Midwest LLC ("WMW"), in connection with the construction of the Monroe Environmental Project, was not installed as a component part of an air pollution control facility or used by an industrial processor or a person engaged in industrial processing. As a result, Respondent requests that the Tribunal deny Petitioner's sales tax refund claim. Respondent also contends that Petitioner's claim for refund is barred by the four-year statute of limitations period to the extent that the refund claim relates to any period prior to May 2005. Finally, Respondent also requests that it be awarded costs and attorney fees.

Petitioner contends that it is entitled to a refund of sales tax paid because the cost of tangible personal property used in the services and equipment it provided for WMW qualified for exemption from sales tax under the air pollution control exemption contained in MCL 205.54a(1)(*l*) and MCL 324.5904(2), or alternatively, qualified for exemption under the industrial processing exemption contained in MCL 205.54t. Petitioner requests that the Tribunal grant judgment in its favor pursuant to MCR 2.116(I)(2).

Oral Argument on the parties' Motions for Summary Disposition was heard on September 11, 2013.[2] Lynn A. Gandhi, attorney at Honigman Miller Schwartz and Cohn LLP, appeared on behalf of Petitioner, and Randi M. Merchant, Assistant Attorney General, appeared on behalf of Respondent.

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[2] Petitioner's counsel filed separate petitions to the Tribunal (MTT Docket Nos. 448531, 448532, 448534, 448535, and 448536) on behalf of five different suppliers of tools, supplies, or equipment to Washington Midwest raising the same arguments regarding exemption from sales tax. Respondent filed similar motions for summary disposition in all five cases. The Tribunal conducted simultaneous oral argument on Respondent's separate motions filed in these five cases.

The Tribunal finds that there is no genuine issue of material fact that Petitioner is not entitled to an exemption from sales tax for the tax periods at issue under MCL 205.54a(1)(*l*), MCL 324.5904(2), or MCL 205.54t. As a result, the Tribunal grants Respondent's Motion for Summary Disposition under MCR 2.116(C)(10), denies Petitioner's Cross-Motion for Summary Disposition under MCR 2.116(I)(2), and denies Petitioner's refund request. The Tribunal further finds no basis upon which to award costs and attorney fees to Respondent.

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner is not entitled to an exemption from sales tax, and the tangible personal property that Petitioner sold or rented to WMW in connection with the construction of the Monroe Environmental Project, was not installed as a component part of an air pollution control facility or used by an industrial processor or a person engaged in industrial processing. As a result, Respondent requests that the Tribunal deny Petitioner's sales tax refund claim. Respondent further contends that a portion of Petitioner's claim for refund of sales tax paid is barred by the four-year statute of limitations period pursuant to MCL 205.27a(2).

Respondent states that (i) during the tax periods at issue, Petitioner was a subcontractor for WMW and engaged in supplying tools for the convenience of workers during the construction of the Monroe Environmental Project to WMW, (ii) WMW was the general contractor for Detroit Edison Company ("DTE") with regard to DTE's Monroe Environmental Project, (iii) the Monroe Environmental Project was issued several exemption certifications, including the exemption of sales tax on tangible personal property installed as a component part of the air pollution control facility under MCL 205.54a(1)(*l*), (iv) Petitioner charged WMW for tools and supplies that were used in the construction of the Monroe

Environmental Project, in addition to sales tax and miscellaneous charges, (v) Petitioner's request for informal conference was granted and held on January 10, 2012, (vi) the hearing referee at the informal conference denied Petitioner's refund claim, concluding that Petitioner had failed to adequately demonstrate that it was entitled to such refund, which was upheld by Respondent in its Decision and Order of Determination, (vii) "[w]hen interpreting a statute, the primary goal is to give effect to the intent of the Legislature by construing the language of the statute itself" (Respondent's Brief in Support at 8), (viii) MCL 205.54a(1)(*l*) "specifically requires that, in order to be exempt from sales tax, property must satisfy two requirements: (1) the property must constitute a component part of a pollution control facility covered by an appropriate exemption certificate and (2) the property must be installed" (Respondent's Brief in Support at 8, 9), (ix) "it is apparent that the Legislature intended to grant an exemption from sales tax for only that property which was actually assembled and incorporated into the pollution control facility, rather than all property associated in any way with the construction of a pollution control facility" (Respondent's Brief in Support at 9), (x) Petitioner supplied "tools and other items that are not incorporated into the subject pollution control facility" (Respondent's Brief in Support at 11) and therefore do not satisfy the requirements set forth under MCL 205.54a(1)(*l*), (xi) it "can't think of anything in the invoices [Petitioner provided] that . . . would have remained part of the building after the crews were gone and went home" (i.e., "[t]he cranes go to the next location . . . [and] don't become incorporated into the actual facility") (Transcript at 12), (xii) Petitioner's reliance on Revenue Administrative Bulletin 1999-2 ("RAB 1999-2") and informal guidance promulgated by the Department of Environmental Quality ("DEQ") "is misplaced because neither the RAB nor the DEQ guidance can trump the plain language of the controlling statute"

(Respondent's Brief in Support at 11), and Petitioner has "overstated what the RAB says" (Transcript at 9), (xiii) even if RAB 1999-2 was binding, "Petitioner is a supplier, as opposed to a contractor, and therefore is not relieved of its obligation to collect and remit sales tax when . . . the items at issue were not incorporated into the pollution control facility" (Respondent's Brief in Support at 12), (xiv) contrary to Petitioner's contentions, Petitioner "did not rely on . . . RAB [1999-2], they paid the tax ahead of time and only now are seeking a refund," and "necessary" is not the standard for tangible personal property to qualify for exemption under MCL 205.54a(1)(*l*) (Transcript at 13, 53-54), (xv) "the Michigan DEQ has no authority to issue guidance related to tax policy or tax law administered by Treasury" (Respondent's Brief in Support at 13), (xvi) WMW is not an industrial processor, as defined by MCL 205.54t, (xvii) "while WMW was admittedly performing work on behalf of DTE, the latter which may qualify as an industrial processor for some purposes, . . . Petitioner has failed to allege or demonstrate that the tangible personal property at issue in this case was actually used as part of an industrial processing activity" (Respondent's Brief in Support at 16, 17), (xviii) Petitioner only addressed the generation of electricity in its petition with regards to its request for an industrial processing exemption, but "seemed to be changing [its] argument a bit and talking about the production of gypsum" in its response to our Motion for Summary Disposition (Transcript at 14), (xix) Mr. Fahrer's affidavit should not be considered by the Tribunal because he was not identified during discovery or in Petitioner's prehearing statement, (xx) "[b]ecause the construction of the Monroe Environmental Project is specifically precluded as an industrial processing activity [under MCL 205.54t(6)(d)], the tangible personal property sold or used in relation to that activity would not qualify for the exemption" (Respondent's Brief in Support at 17), (xxi) "[t]o the extent that DTE qualifies as an industrial processor,

it is in relation to its activities as a generator of electricity for ultimate resale[; t]he construction of the Monroe Environmental Project is not part of the electricity generating process, but is instead the construction of real property" (Respondent's Brief in Support at 17), (xxii) "[a]n Equal Protection Argument was not pleaded, and we would ask this Court to disregard those statements" (Transcript at 15-16), and (xxiii) "the informal conference proceedings were held in compliance with the requirements set forth in statute and administrative rule" (Respondent's Brief in Support at 18).

In conclusion, Respondent contends that there is no genuine issue of material fact that (i) the items rented or sold to WMW are not exempt from sales tax under MCL 205.54a(1)(*l*), MCL 324.5904(2), or MCL 205.54t and (ii) the informal conference regarding this matter was conducted in accordance with applicable statutes and rules.

PETITIONER'S CONTENTIONS

Petitioner contends that it is entitled to a refund of sales tax paid because the cost of tangible personal property used in the services and equipment it provided for WMW qualified for exemption from sales tax under the air pollution control exemption contained in MCL 205.54a(1)(*l*), MCL 324.5904(2), or alternatively, under the industrial processing exemption contained in MCL 205.54t.

More specifically, Petitioner states that (i) it charged WMW sales tax, which WMW paid, for the cost of tangible personal property used in connection with its activities at the Monroe Environmental Project, (ii) air pollution control tax exemption certificates were issued for the project, (iii) it supplied construction-related materials and supplies including industrial, hydraulic, electric, air, welding and hand tools, abrasives, cables, rope and accessories, chisels, wedges, hoists, ladders, tool boxes, lighting, extension cords, pipe and conduit tools, safety and

protective gear, as well as various accessories ("Tangible Personal Property") in connection with the project, (iv) "[a]t the informal conference [held on January 10, 2012], it was agreed that the proceedings would be suspended, as the Department was unsure as to the claims that had been filed, and requested additional information from Petitioner" (Petitioner's Response and Cross-Motion at 8), (v) it supplied additional information on February 17, 2012, and March 29, 2012, (vi) "[o]n August 9, 2012, absent a continuation of the informal conference as to the legal issues, the Department issued a Decision and Order of Determination . . . , dismissing Petitioner's refund claim based on the hearing referee's informal conference recommendation" (Petitioner's Response and Cross-Motion at 8, 9), (vii) under MCL 205.54a(1)(*l*) and MCL 324.5904, tangible personal property purchased and installed as a component part of an air pollution control facility is exempt from sales tax, (viii) "[t]here is no requirement that *each item* of Tangible Personal Property used or consumed in the installation of the SCR and FGD systems actually control air pollution, as alleged by the Respondent" (Petitioner's Response and Cross-Motion at 10) [Emphasis included], (ix) "[w]hat is required under the pollution control exemption, as interpreted by the state's regulatory agencies, is that all the necessary tangible personal property used to install the complex systems meets the statutory requirements of emission control" (Petitioner's Response and Cross-Motion at 10), (x) in RAB 1999-2, "the Department has specifically recognized that *property that is used or consumed in connection with the construction of a pollution control facility qualifies* for the Sales Tax exemption" (Petitioner's Response and Cross-Motion at 11) [Emphasis included], (xi) "contrary to Respondent's argument, the Department has unambiguously acknowledged that the exemption for tangible personal property used in constructing air pollution control facilities is *not* restricted to property that

is installed as a component part of the facility, but also extends to equipment and other items of tangible personal property used in the performance of the work for which an exemption certificate has been granted" (Petitioner's Response and Cross-Motion at 11) [Emphasis included], (xii) "the MDEQ unequivocally states that costs incurred during the installation of air pollution control equipment are considered part of the cost of the installed equipment itself, and specifically instruct applicants to include such costs as part of installed costs for which the exemption applies" (Petitioner's Response and Cross-Motion at 12), (xiii) "the MDEQ has also unequivocally stated that items not permanently affixed to real property qualify for the air pollution control tax exemption" (Petitioner's Response and Cross-Motion at 12), (xiv) "[t]he Department cannot now claim that such governmental guidance is meaningless, just as it also suggests that its own Revenue Administrative Bulletins are meaningless" (Petitioner's Response and Cross-Motion at 13), (xv) the air pollution control exemption certificate includes tangible personal property not permanently installed, which "is consistent with the guidance contained in both Revenue Administration [sic] Bulletin 1999-2 and the MDEQ guidebook regarding which expenses qualify for exemption" (Petitioner's Response and Cross-Motion at 13), (xvi) the Department is "legally bound" to follow its own guidelines (Petitioner's Response and Cross-Motion at 15), (xvii) "Michigan courts have held that the Department cannot retroactively change its statutory interpretations where there is longstanding reliance on the Department's prior position," citing *In re D'Amico Estate***,** 435 Mich 551; 460 NW2d 198 (1990) (Petitioner's Response and Cross-Motion at 15), (xviii) "[i]t would be a violation of Petitioner's due process and equal protection rights for the Department to treat it differently from taxpayers who have been provided the exemption based on the guidance of RAB 1999-2" (Petitioner's Response and Cross-Motion at 15), (xix)

"install means to set up for service" (Transcript at 23), (xx) "[t]he Tangible Personal Property Petitioner supplied was indisputably used in the installation and maintenance of the SCR and FGD Systems both of which are used by DTE as part of its industrial process, whether generating electricity or producing gypsum" (Petitioner's Response and Cross-Motion at 19), (xxi) "[a]s Elias Brothers tells us, it is the function of the equipment itself" (Transcript at 43), and (xxii) contrary to Respondent's contentions, its tangible personal property is "not, after the job was done, carried and taken onto another job[; t]hey are in fact, as noted in our Tax Statute, consumed in the process," and it did not pay the sales tax "knowingly" (Transcript at 19, 21).

In conclusion, Petitioner contends that (i) there is no genuine issue of material fact and (ii) the Department failed to prove that the tangible personal property that Petitioner supplied to WMW was not exempt under MCL 205.54t, MCL 324.5904(2), or MCL 205.54a(1)(*l*).

STIPULATED FACTS

Although the Tribunal is precluded from making any findings of fact in deciding a motion for summary disposition, *Amerisure Ins Co v Plumb,* 282 Mich App 417, 431; 766 NW2d 878 (2009), the Tribunal is required to render judgment on the basis of the stipulated facts if the same are sufficient to do so. MCR 2.116(A). With that, the following are facts that were stipulated by the parties in their Joint Stipulation of Facts filed on August 5, 2013:

1. Penn Tool is a Pennsylvania company that from January 2005 through December 2007 (the "Periods in Issue") was engaged in supplying construction-related materials and supplies including: industrial, hydraulic, electric, air, welding and hand tools, abrasives, cables, rope and accessories, chisels, wedges, hoists, ladders, tool boxes, lighting,

extension cords, pipe and conduit tools, safety and protective gear, as well as various accessories.

2. Respondent, Department of Treasury, State of Michigan (herein the "Department"), is an administrative department of the State of Michigan and is charged with the duty of administering the Sales Tax Act, MCL 205.51 *et seq*. All references to the Sales Tax Act are to the Sales Tax Act as in effect during the Periods in Issue.
3. The tax in controversy is Michigan sales tax for the Periods in Issue.
4. During the Periods in Issue, Petitioner was a subcontractor for Washington Midwest LLC, an Ohio limited liability company ("WMW").
5. WMW was engaged by Detroit Edison Company ("DTE") to act as general contractor on work to be performed at DTE's power plant located at 3500 East Front Street, Monroe, Michigan (the "Monroe Environmental Project").
6. The Monroe Environmental Project involved the construction of a Selective Catalytic Reduction system (the "SCR System") and a Flue Gas Desulphurization system (the "FGD System").
7. In anticipation of the Monroe Power Project, DTE submitted Air Pollution Control Tax Exemption Applications to the State Tax Commission for exemption certificates related to the construction of the SCR and FGD Systems at the Monroe power plant.
8. The State Tax Commission granted the applications, and issued the following Air Pollution Control Tax Exemption Certificates (the "Certificates") for the construction of the SCR and FGD Systems at the Monroe power plant:

Certificate No.	**Date Issued**	**System**	**Total Amount Available for Exemption**
#1-2881	December 28, 2000	SCR System	$94,956,500
#1-2920	October 16, 2001	SCR System	$241,195,000
#1-2921	October 16, 2001	SCR System	$101,465,000
#1-3494	October 27, 2008	FGD System	$610,648,936
#1-3507	October 27, 2008	FGD System	$29,000,000
#1-3317	September 25, 2008	FGD System	$860,730,581[3]

9. The issuance of the pollution control certificates identified above is not contested for purposes of this litigation.
10. WMW contracted with a number of subcontractors, including Petitioner, to perform certain activities as part of the Monroe Environmental Project. WMW provided the subcontractors copies of the applicable Air Pollution Exemption Certificates.
11. As a subcontractor on the Monroe Environmental Project, Petitioner supplied fire blankets, electrical tape, grinders, welding lead (cable), allen wrenches, levels, come-a-longs, chokers, electric extension cords, duct tape, crescent wrenches, channel lock pliers, burning torches/tips, pneumatic grinders, c-clamps, gloves, ear plugs, ratchet sets and other associated equipment and safety supplies.

[3] Air Pollution Control Tax Exemption Certificate No. 1-3317 was originally issued on November 29, 2006 for a total tax exempt cost amount of $230,818,000.

12. Petitioner's purchases of materials were made in connection with the Monroe Environmental Project as documented in WMW's books and records and substantiated in the spreadsheet provided to the Department.
13. Petitioner charged WMW for the materials and supplies, including sales tax, that were purchased by Petitioner in connection with the Monroe Environmental Project.
14. WMW then paid the sales tax amounting to $71,232.44, as charged by Petitioner in and included in WMW's payments to Petitioner for its work on the Monroe Environmental Project.
15. Petitioner remitted the sales tax that was collected from WMW to the Department.
16. On June 15, 2009, Petitioner requested that the Department refund the previously remitted sales tax, and claimed that the materials and supplies used at the Monroe Environmental Project qualified under MCL 205.54a(1)(l); or, in the alternative, also qualified for the industrial processing exemption contained at MCL 205.54t.
17. The Department denied Petitioner's refund request via letter dated July 20, 2009.
18. Petitioner requested and was granted an informal conference, which was held on January 10, 2012 before Hearing Referee Angela Emlet-Dardas.
19. On February 17, 2012, Petitioner provided Petitioner's original sales tax returns for the Periods in Issue, corrected amended worksheets (Form 165) showing Petitioner's claimed entitlement to a refund and a detailed spreadsheet containing information extracted from WMW's books and records that provided detailed payment and sales tax information for all of Petitioner's sales to WMW during the Periods in Issue.

20. On March 29, 2012, Petitioner submitted additional information, including a number of invoices issued to WMW from Petitioner or other similarly situated subcontractors, substantiating that WMW was charged sales tax on work relating to the Monroe Environmental Project.

APPLICABLE LAW

Respondent seeks summary disposition under MCR 2.116(C)(10). In *Occidental Dev LLC v Van Buren Twp*, Docket No. 292745 (March 4, 2004), p 9, 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 Ins Co*, 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 nonmoving party under MCR 2.116(C)(10). *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals, Inc*, 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 USA, Inc*, 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 (1993).

Petitioner, on the other hand, seeks judgment in its favor pursuant to MCR 2.116(I)(2). MCR 2.116(I)(2) states, "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

CONCLUSIONS OF LAW

The Tribunal has carefully considered the Motions and finds that Respondent's Motion for Summary Disposition under MCR 2.116(C)(10) should be granted and Petitioner's Cross-Motion for Summary Disposition under MCR 2.116(I)(2) should be denied.

"'Tax exemptions are disfavored, and the burden of proving an entitlement to an exemption is on the party claiming the right to the exemption. Tax exemptions are strictly construed against the taxpayer because they represent the antithesis of tax equality.'" *Podmajersky v Dep't of Treasury*, ___ Mich App ___, ___; ___ NW2d ___ (2013). As such, it is Petitioner's burden to establish, by a preponderance of the evidence, that it is entitled to an exemption from sales tax for the tax periods at issue. *ProMed Healthcare v Kalamazoo***,** 249 Mich App 490, 495; 644 NW2d 47 (2002).

Petitioner's primary argument in this case, that it is entitled to an exemption from sales tax for the tax periods at issue, is premised upon the following statutes:

MCL 205.54a(1)(*l*) (i.e., the Pollution Control Exemption), in conjunction with MCL 324.5904(2), and MCL 205.54t (i.e., the Industrial Processing Exemption). Alternatively, Respondent argues that Petitioner is not entitled to either.

Pollution Control Exemption

MCL 205.54a(1) states that the following are exempt from sales tax:

* * *

> (*l*) A sale of tangible personal property installed as a component part of . . . an air pollution control facility for which a tax exemption certificate is issued pursuant to part 59 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.5901 to 324.5908.

* * *

Further, MCL 324.5904(2) states that "[t]angible personal property purchased and installed as a component part of the facility is exempt from . . . [s]ales . . . [and u]se taxes . . . ."

A review of the statutes shows that neither provides a definition for further clarification as to what these applicable portions really mean. More specifically, although "facility" is defined within section 5901 of the Natural Resources and Environmental Protection Act ("NREPA"),[4] Act 451 of 1994, neither the General

[4] MCL 324.5901 states:

> As used in this part, "facility" means machinery, equipment, structures, or any part or accessories of machinery, equipment, or structures, installed or acquired for the primary purpose of controlling or disposing of air pollution that if released would render the air harmful or inimical to the public health or to property within this state. Facility includes an incinerator equipped with a pollution abatement device in effective operation. Facility does not include an air conditioner, dust collector, fan, or other similar facility for the benefit of personnel or of a business. Facility also means the following, if the installation was completed on or after July 23, 1965:

Sales Tax Act ("GSTA"), 1933 PA 167, nor the NREPA define "installed as a component part of."

In that regard:

> "[T]he intent of the Legislature governs the interpretation of legislatively enacted statutes." The intent of the Legislature is expressed in the statute's plain language. When the statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required. . . .
>
> If a statute specifically defines a term, the statutory definition is controlling. When "terms are not expressly defined anywhere in the statute, they must be interpreted on the basis of their ordinary meaning and the context in which they are used." However, technical words and phrases that have acquired a peculiar and appropriate meaning in law shall be construed and interpreted in accordance with that meaning. Additionally, when a term is not defined in a statute, the dictionary definition of the term may be consulted or examined. The court's reliance on dictionary definitions assists the goal of construing undefined terms in accordance with their ordinary and generally accepted meanings. *People v Lewis*, ___ Mich App ___, ___; ___ NW2d ___ (2013). [Citations omitted.]

As stated above, the phrase "installed as a component part of" or the individual terms "installed" and "component part" are not defined in the NREPA

(a) Conversion or modification of a fuel burning system to effect air pollution control. The fuel burner portion only of the system is eligible for tax exemption.

(b) Installation of a new fuel burning system to effect air pollution control. The fuel burner portion only of the system is eligible for tax exemption.

(c) A process change involving production equipment made to satisfy the requirements of part 55 and rules promulgated under that part. The maximum cost allowed shall be 25% of the cost of the new process unit but shall not exceed the cost of the conventional control equipment applied on the basis of the new process production rate on the preexisting process.

or GSTA.[5] As such, the Tribunal finds that consulting a dictionary is appropriate to ascertain the ordinary and generally accepted meaning of the words "installed as a component part of."

Taking each word individually, as "installed as a component part of" is likewise not defined in its entirety in any dictionary, according to Webster's New World Dictionary, "installed," "component," and "part" are defined as follows: (1) "Installed" is defined as "to fix in position for use," (2) "component" is defined, as an adjective, as "serving as one of the parts of a whole; constituent," and (3) "part" is defined, as "an essential element or constituent; integral portion which can be separated, replaced, etc." Webster's New World Dictionary (Third College Edition) at 285, 699-700, & 984.

As a result, the Tribunal finds that because "installed as a component part" is not defined in the NREPA or GSTA, and because the same is not a technical phrase, or does not include technical words, the ordinary and generally accepted meaning of "installed as a component part" for purposes of MCL 205.54a(1)(*l*) and MCL 324.5904(2) is to fix a constituent or essential element into position for use.

Applying this definition to the applicable statutes, the Tribunal finds that Petitioner's tangible personal property was not fixed as a constituent or essential element into position for use at the Monroe Environmental Project. While Petitioner's tangible personal property assisted in the *installation* of component parts, the Tribunal finds that this assistance and any equipment "necessary and required" to fulfill such process does not render the same to be exempt from sales tax under MCL 205.54a(1)(*l*) or MCL 324.5904(2), as the statutes do not set forth a "necessary and required" standard for tangible personal property or an exemption

[5] The Tribunal further notes that it can find no case law to shed light on the meaning of this phrase either.

for "ancillary items" used to install component parts, as proffered by Petitioner,[6] but rather explicitly state that tangible personal property must be "installed as a component part" in order to qualify for exemption from sales tax. If the Legislature, knowing how to include and exclude specific terms in its statutes, intended to include tangible personal property used *to install* component parts within the purview of MCL 205.54a(1)(*l*) or MCL 324.5904(2), the Legislature would have so artfully crafted the statutes to include the same.[7]

Here, although the statute unambiguously requires tangible personal property to be installed as a component part of an air pollution control facility to qualify for exemption, Petitioner relies on administrative interpretations of MCL 205.54a(1)(*l*) and MCL 324.5904(2) to support its position. More specifically, Petitioner relies on RAB 1999-2 and DEQ guidance entitled Tax Exemptions for Air Pollution Control (August 2009).

Petitioner cites RAB 1999-2 at 11 for the following:

> The State Tax Commission grants exemption through issuance of a certificate for qualified water or air pollution control facilities. This exemption may include portions of real property *as well as equipment and other items of tangible personal property*. Petitioner's Response and Cross-Motion at 11. [Emphasis included.]

In relying on this statement, Petitioner argues:

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[6] Petitioner agreed with Respondent that install means to set up for service but argued "how do we not set something up for service if we do not use other ancillary items." Transcript at 23. In furtherance of this statement, Petitioner analogized that "[i]f you can't get from A to Z without all the other letters in between then those letters are just as necessary and pertinent . . . ." Transcript at 24. Petitioner, however, drew the line of what type of personal property would not qualify for exemption under MCL 205.54a(1)(*l*) or MCL 324.5904(2) at styrofoam cups for coffee at a work site. Transcript at 26.

[7] See *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009), which held that "[t]he omission of a provision should be construed as intentional."

> The Department has unambiguously acknowledged that the exemption for tangible personal property used in constructing air pollution control facilities is *not* restricted to property that is installed as a component part of the facility, but also extends to equipment and other items of tangible personal property used in the performance of the work for which an exemption certification has been granted. Petitioner's Response and Cross-Motion at 11. [Emphasis included.]

With regard to DEQ's guidance, Petitioner contends that, in relying on the section entitled "Miscellaneous Costs," "the MDEQ unequivocally states that costs incurred during the installation of air pollution control equipment are considered part of the cost of the installed equipment itself, and specifically instruct applicants to include such costs as part of installed costs for which the exemption applies." Petitioner's Response and Cross-Motion at 12. Petitioner further maintains that although "the MDEQ is not the administrative agency charged with interpreting tax exemptions, it is the state agency granted primary responsibility for the evaluation of all air pollution control tax exemption certificate applications and carries out its responsibilities in harmony with the other state agencies." Petitioner's Response and Cross-Motion at 12.

Respondent, on the other hand, argues that Petitioner's reliance on the above guidance is "misplaced" as "neither the RAB nor the DEQ guidance can trump the plain language of the controlling statute." Respondent's Brief in Support at 11. Respondent further argues, with regard to RAB 1999-2, that "Petitioner is a supplier, as opposed to a contractor, and therefore is not relieved of its obligation to collect and remit sales tax when, as is the case here, the items at issue were not incorporated into the pollution control facility." Respondent's Brief in Support at 12. With respect to MDEQ's guidance, Respondent contends that the portion of that guidance that Petitioner relies on "indicates only that the listed costs 'may' qualify for a tax exemption" which "indicates a permissive option, as opposed to

the use of the word 'shall' which indicates a mandatory directive." Respondent's Brief in Support at 13. Additionally, Respondent argues that "the Department of Treasury is the only entity empowered with responsibilities and authorized to perform the duties related [to] administering the Sales Tax Act and collection [of] such taxes due and owing to the State of Michigan." Respondent's Brief in Support at 13.

In that regard, RAB 1999-2 states, in relevant part:

> A contractor is required to pay sales or use tax on all items used to provide his or her service, including equipment, supplies, and materials.
>
> * * *
>
> A supplier is liable for the collection and payment of sales and use tax to the Department of Treasury when selling materials, supplies, tools, equipment, etc. to a contractor. In such a transaction, the contractor is the consumer who pays the sales or use tax to the supplier. *Id.* at 2, 5.

This bulletin, which explains Respondent's position regarding the application of sales and use taxes to the construction industry, also provides guidance specifically in relation to MCL 205.54a(1)(*l*) and MCL 324.5904(2) and states that a pollution control exemption "*may* include portions of real property as well as equipment and other items of tangible personal property." RAB 1999-2 at 11. [Emphasis added.]

MDEQ's guidance states, in pertinent part:

> *. . . the MDEQ must evaluate the equipment covered by the application to determine which equipment meets the definition of an air pollution control facility as contained in Part 59*. Part 59 defines air pollution control facility to mean equipment *installed or acquired for the primary purpose of controlling or disposing of air pollution*

which, if released, would render the air harmful or inimical to the public health or to property within the state.

* * *

Miscellaneous Costs

Various costs incurred during the installation of air pollution control equipment are considered part of the cost of the equipment itself. *To the extent that these costs apply to exempt equipment, they qualify for tax exemption*. The applicant should include these costs as part of the installed costs for the various component parts of the system.

Examples of various costs that *may* qualify for tax exemption include:

• Administrative fees
• Contingency costs
• Engineering costs
• Feasibility costs
• Freight charges
• Installation costs
• Insurance fees
• Interest charges
• Start-up costs
• Legal fees
• Taxes (does not include exempt taxes)

* * *

Non-exempt Equipment

Generally, the following equipment does not meet the definition of an air pollution control facility as contained in Part 59.

1. Equipment used to handle, convey, transport, transfer or store raw materials or finished products. This equipment is necessary to the operation of the process and thus a benefit to business.

> MDEQ, *Tax Exemptions for Air Pollution Control* (August 2009) at 6, 13, & 17. [Emphasis added.]

"'In order for an agency regulation, statement, standard, policy, ruling, or instruction of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule. If it does not, it is merely explanatory.'" *Hanlin v Saugatuck Twp*, 299 Mich App 233, 249-250; 829 NW2d 335 (2013). Further, "[w]hile agency interpretations of statutes are entitled to respectful consideration and should not be overruled without cogent reasons, they are not binding on this Court and cannot conflict with the Legislature's intent as expressed in the language of the statute." *Kelly Services, Inc v Dep't of Treasury*, 296 Mich App 306, 311; 818 NW2d 482 (2012).

Here, although Respondent and the MDEQ have issued guidance regarding their interpretation of the applicability of MCL 205.54a(1)(*l*) and MCL 324.5904(2) to the construction industry, neither guidance is a properly promulgated rule and, as such, is merely explanatory. Further, even if either guidance "unambiguously" or "unequivocally," as advocated by Petitioner, extended the pollution control exemption to tangible personal property "necessary for the pollution control" (i.e., Petitioner's Tangible Personal Property that was purchased and supplied by Petitioner in connection with the Monroe Environmental Project) (Transcript at 36), the same would not be binding on the Tribunal and would conflict with the Legislature's intent in MCL 205.54a(1)(*l*) and MCL 324.5904(2), as the statutes clearly only provide an exemption, relative to air pollution control, for tangible personal property *installed as a component part of an air pollution control facility.*

Furthermore, although Petitioner cites *In re D'Amico Estate*, 435 Mich 551; 460 NW2d 198 (1990), to support its position that "the Department cannot

retroactively change its statutory interpretations where there is longstanding reliance on the Department's prior position" (Petitioner's Response and Cross-Motion at 15), the Tribunal is unconvinced that RAB 1999-2 and MDEQ guidance previously extended an exemption to the type of tangible personal property which Petitioner contends is exempt from sales tax under MCL 205.54a(1)(*l*) and MCL 324.5904(2). More specifically, neither sets forth a bright-line rule that tangible personal property used *to install* component parts or that which may be "necessary and required" for such installation is also exempt from taxation. Rather, both sets of guidance use the word "may," which sets forth an air of possibility seeking further clarification, to which the Tribunal finds in this case does not produce a result in Petitioner's favor.

And lastly, although Petitioner asserts that Respondent has previously issued a refund or provided an exemption for tangible personal property similar to Petitioner's tangible personal property in this case to other taxpayers under MCL 205.54a(1)(*l*) and MCL 324.5904(2), asserting an equal protection claim, Petitioner did not plead this issue in its petition and no evidence or testimony confirming any disparate treatment among taxpayers similarly situated was presented. As such, the Tribunal declines to address this issue further.

Industrial Processing Exemption

MCL 205.54t states, in pertinent part:

> (1) The sale of tangible personal property to the following after March 30, 1999, subject to subsection (2), is exempt from the tax under this act:
>
> > (a) An industrial processor for use or consumption in industrial processing.
> >
> > (b) A person, whether or not the person is an industrial processor, if the tangible personal property is intended

for ultimate use in and is used in industrial processing by an industrial processor.

(c) A person, whether or not the person is an industrial processor, if the tangible personal property is used by that person to perform an industrial processing activity for or on behalf of an industrial processor.

* * *

(4) Property that is eligible for an industrial processing exemption includes the following:

* * *

(b) Machinery, equipment, tools, dies, patterns, foundations for machinery or equipment, or other processing equipment used in an industrial processing activity and in their repair and maintenance.

* * *

(d) Tangible personal property, not permanently affixed and not becoming a structural part of real estate, that becomes a part of, or is used and consumed in installation and maintenance of, systems used for an industrial processing activity.

* * *

(6) Industrial processing does not include the following activities:

* * *

(d) Design, engineering, construction, or maintenance of real property and nonprocessing equipment.

* * *

(7) As used in this section:

> (a) "Industrial processing" means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage.
>
> (b) "Industrial processor" means a person who performs the activity of converting or conditioning tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail.
>
> * * *

Petitioner contends that DTE qualifies as an industrial processor, with regard to DTE's production of gypsum and electricity, and the sales of its tangible personal property were used in an industrial process.

Respondent, alternatively, contends that Petitioner sold its tangible personal property to WMW, WMW does not qualify as an industrial processor, and Petitioner's tangible personal property was not used in an industrial processing activity performed by, for, or on behalf of an industrial processor.

Assuming DTE is an industrial processor, the Tribunal does not find that Petitioner's sale of tangible personal property in this case meets the requirements set forth in MCL 205.54t(1)(a), (b), or (c).[8] More specifically, Petitioner sold its tangible personal property to WMW, not DTE, and WMW is not an industrial

[8] Although MCL 205.54t(1) also includes subsection (d), subsection (d) is not applicable to the tangible personal property at issue in this case as subsection (d) only relates to computers or computer equipment.

processor. Even assuming arguendo that Petitioner ultimately sold its tangible personal property to DTE, as WMW was merely the general contractor for DTE's Monroe Environmental Project, DTE does not use Petitioner's Tangible Personal Property to convert or condition tangible personal property (i.e., electricity or gypsum), such as was the case in *Granger Land Dev Co v Dep't of Treasury*, 286 Mich App 601; 780 NW2d 611 (2009).[9] See MCL 205.54t(1)(a). Further, DTE did not use Petitioner's Tangible Personal Property to generate electricity or produce gypsum. See MCL 205.54t(1)(b). Finally, Petitioner does not perform an industrial processing activity for or on behalf of DTE or another industrial processor. See MCL 205.54t(1)(c).

Although Petitioner relies on *Elias Brothers Restaurants, Inc v Dep't of Treasury***,** 452 Mich 144; 549 NW2d 837 (1996), for its proposition that "it is the function of the equipment itself" that the court must consider (Transcript at 43), the Tribunal finds that such reliance does not change the outcome in this case.

In *Elias Brothers Restaurants, Inc*, the taxpayer owned the Big Boy restaurant chain, and food for its restaurants (franchised and company-owned) was produced at a facility called the Commissary, which the taxpayer owned and operated. In that case, the Michigan Supreme Court was called upon to determine whether the cost of equipment and supplies used at the Commissary, for both its

[9] In *Granger Land Dev Co, supra* at 614, although analyzed under the Use Tax Act as opposed to the Sales Tax Act, the Court of Appeals held that the taxpayer's heavy equipment (i.e., bulldozers, compactors, and trash masters) was used as part of the industrial processing of the waste into landfill cells, as the same was used to "physically transport and process the waste and to erect the cells . . . " and therefore granted a use tax exemption for such equipment. Here, as indicated above, DTE did not use Petitioner's personal tangible personal property to actually convert or condition electricity or gypsum. Rather, Petitioner's personal tangible personal property was used to *construct* the air pollution control facilities, which were not products to be ultimately sold at retail.

franchised and company-owned restaurants, was exempt from use tax, to which the Court found in the affirmative. As part of its analysis, the Court stated that "the application of the industrial processing exemption depends on the use to which equipment is put" and followed up by stating that "it is necessary to consider the activity in which the equipment is engaged and not the character of the equipment-owner's business." *Id.* at 156, 157.

In that regard, following the Michigan Supreme Court's guidance in *Elias Brothers Restaurants, Inc, supra*, by not focusing on the character of Petitioner's business, the Tribunal finds that the activity in which Petitioner's tangible personal property in this case was engaged in was not for industrial processing purposes. Again, as stated above, Petitioner's tangible personal property was used to construct the air pollution control facilities and not used in conjunction with the generation of electricity or the production of gypsum to fall within the exemption prescribed in MCL 205.54t. See also *Beckman Production Services, Inc v Dep't of Treasury***,** 202 Mich App 342, 345; 508 NW2d 178 (1993), wherein the Court of Appeals held that a taxpayer "must prove that it services transform, alter, or modify the property so as to place it in a different form, composition, or character."

Further, to the extent that the air pollution control facilities are classified as real property, Petitioner's use of its equipment to construct the same would be precluded from exemption under MCL 205.54t(6)(d).[10]

Informal Conference

Petitioner contends that Respondent was required to resume the January 10, 2012 informal conference at a later date after it submitted additional

[10] This statement is merely to recognize the exception under MCL 205.54t(6)(d) since no testimony or evidence was provided to confirm whether the air pollution control facilities were classified as real or personal property on the taxing jurisdiction's assessment rolls during the tax periods at issue.

documentation since Petitioner argues that the Hearing Referee suspended the informal conference before Petitioner was afforded the opportunity to present its contentions as to why it believed its tangible personal property was entitled to exemption from sales tax under MCL 205.54a(1)(*l*), MCL 324.5904(2), and MCL 205.54t. Although Petitioner submitted additional information, as requested, on February 17, 2012, and March 29, 2012, Petitioner contends that Respondent did not resume the informal conference as previously indicated and instead issued its Decision and Order of Determination on August 9, 2012. As a result, Petitioner contends that Respondent violated its rights under the Revenue Act, 1941 PA 122.

Respondent contends that it complied with applicable statutes and administrative rules. More specifically, Respondent contends that "an additional hearing was not required, nor was it necessary." Respondent's Brief in Support at 18. In particular, Respondent contends that Petitioner had submitted its position prior to the informal conference, and in combination with the additional documentation that was supplied by Petitioner after the informal conference, the Hearing Referee was able to render her determination. As a result, Respondent contends that "it is apparent that Petitioner was permitted to present its legal and factual bases for its position and that [the] same were considered, but ultimately rejected, by the hearing officer." *Id*.

MCL 205.21(c) and (d) provide, in relevant part:

> (c) If the taxpayer serves written notice upon the department within 60 days after the taxpayer receives a notice of intent to assess, remits the uncontested portion of the liability, and provides a statement of the contested amounts and an explanation of the dispute, the taxpayer is entitled to an informal conference on the question of liability for the assessment.
>
> (d) Upon receipt of a taxpayer's written notice, the department shall set a mutually agreed upon or reasonable time and place for the

> informal conference and shall give the taxpayer reasonable written notice not less than 20 days before the informal conference. . . . The informal conference provided for by this subdivision is not subject to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, but is subject to the rules governing informal conferences as promulgated by the department in accordance with the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. The taxpayer may appear or be represented by any person before the department at an informal conference, and may present testimony and argument.

Mich Admin Code, R 205.1010 states:

> (1) The purpose of the informal conference is to informally discuss the positions of the parties, more thoroughly narrow the issues that may not be capable of resolution at this level, and present arguments to the referee in support of the parties' positions, to permit the referee to make a recommendation to the commissioner.
>
> (2) The informal conference is not a contested case proceeding and is not subject to the provisions of Act No. 306 of the Public Acts of 1969, as amended, being §24.201 et seq. of the Michigan Compiled Laws. The provisions of Act No. 267 of the Public Acts of 1976, being §15.261 et seq. of the Michigan Compiled Laws do not apply.
>
> * * *
>
> (6) The referee shall conduct the informal conference in an informal manner that facilitates the exchange of information needed to review and, where applicable, to resolve the tax dispute. The referee shall hear and receive testimony. Generally, testimony is not taken under oath, although matters alleged as fact may be submitted in the form of affidavits or may be declared to be true under penalties of perjury. The department shall provide the reasons and authority for the proposed assessment. The parties shall discuss their respective positions with a view to narrowing the issues and shall present arguments based upon the law in support of their respective positions.

> (7) Instead of attending the informal conference, the parties have the option to have the dispute reviewed and resolved based upon a written statement that contains the facts, a discussion of the law, and the legal arguments that the parties would have presented had they attended the informal conference. A party that chooses to have a dispute reviewed in this manner shall so advise the referee as early as possible in advance of the scheduled informal conference.

Although Petitioner argues that it was not afforded the opportunity to present the merits of its case at the informal conference, a review of the Informal Conference Recommendation, which was adopted by the Decision and Order of Determination, clearly sets forth Petitioner's position, which, as Respondent contends, parallels its position in this case. As such, in accordance with the above applicable statutes and rules, it is evident that there was an exchange of information needed to review and resolve the tax dispute and permit the Hearing Referee to make a recommendation to Respondent's commissioner.

Statute of Limitations

Respondent contends that to the extent that Petitioner's claim for refund relates to any period prior to May 2005, Petitioner's refund claim is barred by the statute of limitations. The Tribunal agrees.[11] Specifically, MCL 205.27a(2) provides that a taxpayer is prohibited from making a claim for refund "after the expiration of 4 years after the date set for filing of the original return." Because Petitioner first requested a refund for previously paid sales tax in June 2009, the Tribunal finds that, in the event Petitioner prevails in its contention that it is due a refund for sales taxes erroneously paid, Petitioner's refund claim must be denied to the extent that such sales relate to periods prior to May 2005.

[11] At oral argument, Petitioner's counsel concurred, stating that "[w]e are not going to argue the four months out of Statute, the amount is actually less than 10 percent of the total claim, so we will concur with the Respondent to that extent." Transcript at 46.

Respondent's Request for Costs

With regard to Respondent's request for costs and attorney fees, although MCL 205.752 states that "[c]osts may be awarded in the discretion of the tribunal," and the Tribunal adopted this statute in its procedural rules, see TTR 209, which allows the Tribunal to award costs in a proceeding, the Tribunal does not find that an award of costs and attorney fees is appropriate under the current circumstances. Therefore,

IT IS ORDERED that Respondent's Motion for Summary Disposition under MCR 2.116(C)(10) is GRANTED.

IT IS FURTHER ORDERED that Respondent's Request for Costs and Attorney Fees is DENIED.

IT IS FURTHER ORDERED that Petitioner's Cross-Motion for Summary Disposition under MCR 2.116(I)(2) is DENIED.

This Final Opinion and Judgment resolves any pending claims in this matter and closes this case.

By: Steven H. Lasher

Entered: October 17, 2013