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

Schoeneckers, Inc,
Petitioner,

v

MTT Docket No. 450419

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

Administrative Law Judge Thomas A. Halick issued a Proposed Order Denying Petitioner's Motion for Summary Disposition and Proposed Order Granting Respondent's Motion for Summary Disposition on December 27, 2013. The Proposed Opinion and Judgment states, in pertinent part, "[t]he parties have 20 days from date of entry of this Proposed Order to notify the Tribunal **in writing and by mail** if they do not agree with the Proposed Order and to state in writing why they do not agree with the Proposed Order (i.e., exceptions)." [Emphasis in original.]

On January 16, 2014, Petitioner filed exceptions to the Proposed Order. In the exceptions, Petitioner states:

> The Proposed Order finds that there are two separate transactions . . . . Petitioner contends . . . that there is only one contract in this case . . . . [and] there are only two parties to th[at] contract, Petitioner and its customer. The program participant may be a recipient of tangible personal property under the contract, but the program participant is not a party to the contract . . . . [Accordingly,] there is only one transaction . . . and the six part test outlined . . . in *Catalina Marketing Sales Corporation v Michigan Department of Treasury* . . . should be applied to determine whether the transaction is the sale of a service . . . . [The Proposed Order] applies the same consideration to two separate transactions . . . . [T]he first transaction is between Petitioner and its customer for services. Petitioner performs services under the contract . . . and invoices its customer for award points that are deposited in the program participant's account. Petitioner receives consideration from its customer for those points that are deposited . . . . The Proposed Order found this transaction to be a contract for services and thus no tax was due. The second transaction . . . is purportedly between Petitioner and the

> program participant. The program participant redeems points for merchandise. The Proposed Order states that the consideration for this second transaction was the dollar amount of points redeemed for merchandise. As discussed previously, there is no dollar amount associated with the program participant's points . . . . [N]o cash was transferred from the program participant to Petitioner . . . . The same consideration cannot be fully utilized for two separate transactions. If, as asserted in the Proposed Order, there are two separate transactions, then the consideration needs to be allocated among the two transactions.

On January 29, 2014, Respondent filed a response to Petitioner's exceptions. In the response, Respondent states:

> Petitioner claims that there cannot be two separate transactions because there is only one written contract. But such a characterization is inaccurate because it ignores that there are two distinct transactions involved. First, Petitioner provides a service to its clients. It designs, arranges, manages and administers performance improvement programs for its clients—no tangible personal property is transferred. This transaction . . . is not subject to tax. Second, Petitioner transfers award merchandise . . . directly to the program participants in exchange for award points. No tangible personal property is ever transferred from Petitioner to its clients. This second transaction is subject to sales tax under MCL 205.52, it being a transfer of tangible personal property for consideration, and is due in the amount of the price paid by program participants for the tangible personal property that was transferred . . . . Petitioner claims the award points have no dollar value to the program participant, so it is inaccurate for the proposed order to state that the award points have a stated value. This position misses the point. Petitioner's sales tax liability is not triggered by the program participant's knowledge of the dollar amount associated with the award points he or she redeems . . . . [S]ales tax is due on the transfer of tangible personal property (awards merchandise) when consideration is given (points are redeemed) and the amount of sales tax due is calculated by multiplying 6% times the amount paid for the tangible personal property (the value of the tangible personal property ta redemption). The awards points are consideration and sales tax is due based on the amount paid by program participants for the tangible personal; property and not the amount for which the Petitioner acquired the tangible personal property.

The Tribunal has considered the exceptions, response, and the case file and finds that the Administrative Law Judge ("ALJ") properly considered the testimony and evidence provided in the rendering of the Proposed Order. More specifically, the ALJ properly concluded that Petitioner was engaged in the business of making sales at retail such that it is liable for sales tax on the gross proceeds of said sales. As noted by both Respondent and the ALJ, sales tax is due from "all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration . . . equal to 6% of the gross proceeds

of the business." MCL 205.52. "Sale at retail" is defined as the sale of tangible personal property for any purpose other than resale, sublease, or subrent. See MCL 205.51(1)(b). "Gross proceeds" means sales price, and "sales price" is defined as "the total amount of consideration . . . for which tangible personal property or services are sold . . . whether received in money or otherwise, and applies to the measure subject to sales tax." MCL 205.51(1)(c)-(d). Petitioner asserts that the contract in this case is an agreement between Petitioner and its customer for the performance of services, with only an incidental sale of tangible personal property to the customer's program participants, and as such, the "incidental to service test" set forth in *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004) should be applied. As noted in the Proposed Order, however, that test applies only "[w]hen a single transaction . . . involves both the provision of services and the transfer of tangible personal property . . . ." *Id.* Here, there are two separate and distinct transactions: (1) the provision of services from Petitioner to its customers, and (2) the transfer of award merchandise to the program participants in exchange for award points. The fact that there is only one contract between Petitioner and its customer does not preclude a second transaction between Petitioner and the program participants as Petitioner contends; the participants need not be a party to the contract for there to be a sale at retail from Petitioner to said participants. This transaction is contemplated in the contract for services, but as explained by the ALJ, the participants had sole control over the redemption of the points for the chosen merchandise. The customer was not involved in this transaction, which occurred after the services were completed. As for Petitioner's consideration argument, the Tribunal notes that in the first transaction, Petitioner earns the right to receive compensation from the customer by performing a service. The compensation is based on the number of points earned by a third party participant. If the participant earns points, the contract equates that to a dollar amount, which the customer pays to Petitioner in consideration of the services. However, the contract obligates Petitioner to issue points to the participant -- the points are associated with a dollar value that is determined by Petitioner. The participant can lose them, never use them, redeem them for taxable and non-taxable items. And it is a fact that Petitioner has associated a gross dollar value to the points. It is irrelevant that the participant does not know that value, but only knows the points he or she has and the points required (cost) of the merchandise that they can exchange the points for. This exchange between Petitioner and the participant is best characterized – consistent with the Sales Tax Act – as a sale at retail; and the sale price is the retail value assigned by Petitioner, and not Petitioner's cost for the item.

Given the above, Petitioner has failed to show good cause to justify the modifying of the Proposed Order. See MCL 205.762. As such, the Tribunal adopts the Proposed Order as the Tribunal's final decision in this case. See MCL 205.726. As a result:

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.

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

By: Steven H. Lasher

Entered: Dec 27, 2013
ejg