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

CSB Investors, Stuart Urban, and John Kirkpatrick,
Petitioners,

v

MTT Docket No. 441057

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING RESPONDENT'S AUGUST 14, 2013 MOTION FOR IMMEDIATE CONSIDERATION

ORDER PARTIALLY GRANTING RESPONDENT'S AUGUST 14, 2013 MOTION TO NAME A DIFFERENT WITNESS

ORDER GRANTING RESPONDENT'S AUGUST 16, 2013 MOTION FOR IMMEDIATE CONSIDERATION

ORDER PARTIALLY GRANTING RESPONDENT'S AUGUST 16, 2013 MOTION IN LIMINE

FINAL OPINION AND JUDGMENT

Administrative Law Judge Thomas A. Halick issued a Proposed Opinion and Judgment on December 19, 2013. The Proposed Opinion and Judgment states, in pertinent part, "the parties shall have 20 days from date of entry of this Proposed Opinion and Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281)."

On January 8, 2014, Petitioners filed exceptions to the Proposed Opinion and Judgment. In the exceptions, Petitioners state that the Administrative Law Judge committed the following errors in rendering his Proposed Opinion and Judgment in this case:

1. "The POJ committed an error of law by failing to recognize that the only General Sales Tax Act (GSTA) or Use Tax Act (UTA) requirement to document a sale for resale is the keeping of a record of the sales tax license number of the purchaser."

2. "The POJ made a mistake of fact and a palpable error by erroneously identifying the recordkeeping requirement of MCL 205.104(1) . . . as applicable instead of MCL 205.104(a)(1) . . . ."

3. "The POJ committed an error of law by not admitting certain exhibits contrary to the General Sales Tax Act (GSTA) or Use Tax Act (UTA) provision that '[i]f an exemption from the tax under this act is claimed, the seller shall obtain identifying information of the purchaser and the reason for claiming the exemption at the time of the purchase or at a later date." [Emphasis in original.]

4. "The POJ denied the Petitioner's right to amend a Petition under the Tax Tribunal Act . . . and the Tax Tribunal Rules . . . ."

5. "The POJ denied the Petitioner's right to submit evidence to document exemptions under the Tax Tribunal Act . . . and the Tax Tribunal Rules . . . ."

On January 22, 2014, Respondent filed a response to Petitioners' exceptions. In the response, Respondent states:

1. "The filing the Petitioner terms its 'exceptions' is actually primarily devoted to tardily attacking the Tribunal's pre-hearing orders. As such, the filing is a motion for reconsideration that should be denied because it is untimely. Additionally, the exceptions are rife with misinformation and contradictions – even to the extent that the Petitioner asserts facts completely opposite to those it stipulated to before the hearing. As evidenced by the surprise affidavit attached to the exceptions, the Petitioner has struggled for years to first come up with a story and then keep it straight."

2. "The Proposed Opinion and Judgment (POJ), on the other hand, carefully analyzes the admissible evidence and correctly concludes that the Petitioner simply failed to submit enough evidence to refute the Department's assessment. The Tribunal should deny the Petitioner's untrustworthy exceptions, and adopt the POJ."

3. "It does not matter that the POJ slightly mischaracterized the dates during which different statutes applied during the audit period because the statutes share the same relevant legal standards. The audit period was March 1, 2005 – February 28, 2009. The POJ mistakenly states that MCL 205.104 was in effect from the beginning of the audit period until January 9, 2009 when MCL 205.104a went into effect. The Petitioner correctly explains that MCL 205.104 was only in effect until October 1, 2005, and MCL 205.104a was in effect thereafter for the remainder of the audit period. But the Petitioner fails to explain why this distinction matters."

4. "The recordkeeping requirements in both statutes are essentially the same. Both statutes require taxpayers to maintain detailed records of their sales transactions, and both statutes place the burden of proof to refute an assessment on the taxpayer if the taxpayer has failed to maintain or produce sufficient records upon request. The primary difference raised by the Petitioner is that MCL 205.104a requires a seller claiming an exemption for sale at retail to maintain the purchaser's sales tax license number. The Petitioner, however, did not do so."

5. "The Petitioner only seeks a sale-at-retail exemption for Dave Smith – the entity for which the Department has already granted virtually the entire exemption the Petitioner sought. As described more fully below, the Petitioner did not come up with a sales tax license number for Dave Smith until after discovery ended, in violation of the Tribunal's scheduling order, and only two weeks before the hearing. And the exemption certificate is clearly fabricated. Even under the Tribunal's loosened evidentiary standards, the certificate is simply inadmissible."

6. "Moreover, the amendments to MCL 205.104b that went into effect on January 9, 2009 do not apply to *any* of the transactions at issue. [Emphasis in original.] The Petitioner allegedly sold vehicles to Buck Truck in 2005, 2007, and 2008, and to Dave Smith Pontiac in 2005, 2006, and 2007. The version of MCL 205.104b in effect during those years is attached as Dpt's Ex 3."

7. "Nothing in section 104b somehow precluded the Tribunal from putting a deadline on when the Petitioner could attempt to submit evidence in support of its case . . . . Indeed, just like any other trial court, the ability to set such deadlines is inherent to the Tribunal's authority to manage the cases on its docket. The Tribunal's order was especially important because the Petitioner's representative's standard practice (as evidenced forcefully in this case) is to suddenly submit new information after the close of discovery – and in this case, even after the end of the hearing."

The Tribunal has considered the exceptions, response, and the case file and finds that the Administrative Law Judge properly considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment.

To the extent that Petitioners' exceptions include a motion requesting reconsideration of the July 19, 2013 Order,[1] the same shall be denied as being untimely. See TTR 257 and *Pars Ice Cream Co, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued

[1] In the July 19, 2013 Order, the Tribunal, among other things, granted Respondent's June 12, 2013 Motion in Limine and June 28, 2013 Motion to Strike, stating, in pertinent part:

> Petitioner had a duty to disclose all documentary evidence and to identify all of its witnesses during discovery, which closed June 5, 2013. Furthermore, Petitioner was required to disclose all of its witnesses in its prehearing statement that was due July 2, 2013. Petitioner informally announced its desire to call a previously undisclosed expert witness during the prehearing conference. This request, although not presented in a formal written motion, is fairly within the scope of Respondent's Motion in Limine, and Motion to Strike. Petitioner has not demonstrated good cause for its failure to disclose this witness during discovery or in its prehearing statement. Petitioner has previously stated that its sole witness, Mr. Locey, has personal knowledge of all the facts to support its claims. The Tribunal finds that disallowing the proffered expert witness is not fatal to Petitioner's ability to prove its case. On the other hand allowing this witness at this late date, after discovery has closed, and approximately six weeks before the hearing, would be prejudicial to Respondent.

August 14, 2012 (Docket No. 305148). Further, pursuant to the Tribunal's March 6, 2013 Scheduling Order, the parties *all* agreed, at the telephonic scheduling conference held on March 5, 2013, that the cutoff date for the filing and exchange of *all* information and documents would be June 5, 2013. As a result, because Petitioners had sufficient notice and opportunity to timely submit evidence and prepare their case for hearing, and because exceptions are "limited to the evidence admitted at the hearing," Petitioners' attempt to enter new evidence into the record with their exceptions is improper, and the new evidence, except for Petitioners' exemption certificates (i.e., P-33 and P-34), as discussed below, cannot be taken into consideration in the rendering of this Final Opinion and Judgment.

Having said that, and having thoroughly reviewed the arguments presented in Petitioners' exceptions and Respondent's response, the Tribunal finds that the only issues remaining, which necessitate further discussion, are in regards to MCL 205.104(1) versus MCL 205.104a(1) and whether Petitioners should have been allowed to submit exemption evidence (i.e., Exhibits P-33 and P-34) at the hearing, or after, pursuant to MCL 205.104b(1).

Petitioners claim that the Administrative Law Judge "made a critical and palpable error by erroneously identifying the recordkeeping requirement of MCL 205.104(1) as applicable instead of MCL 205.104(a)(1)." Specifically, Petitioners contend that MCL 205.104(a)(1) was applicable during the audit period, and, as such, Petitioners were only required to obtain a purchaser's sales tax license number. Respondent, alternatively, argues that "[t]he recordkeeping requirements in both statutes are essentially the same" in that "[b]oth statutes require taxpayers to maintain detailed records of their sales transactions, and both statutes place the burden of proof to refute an assessment on the taxpayer if the taxpayer has failed to maintain or produce sufficient records upon request." Respondent further states that "[t]he primary difference raised by the Petitioner is that MCL 205.104a requires a seller claiming an exemption for sale at retail to maintain the purchaser's sales tax license number," which Respondent claims "Petitioner . . . did not do . . . ."

During the audit period, MCL 205.104 stated as follows:

> (1) A person in the business of selling tangible personal property and liable for any tax imposed under this act shall keep accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires. If an exemption from this tax is claimed by reason of any of the exemptions or deductions granted under this act, a record shall be kept of the name and address of the person to whom the sale is made, the date of the sale, the article purchased, the use to be made of the article, and the amount of the sale, and if that person has a sales tax license issued under the provisions of the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, that number shall also be included. . . . If the taxpayer fails to file a return or to maintain or preserve proper records as prescribed in this section, or the department has reason to

> believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the department may assess the amount of the tax due from the taxpayer based on information that is available or that may become available to the department. That assessment shall be considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment shall be upon the taxpayer.
>
> (2) This section does not apply if this state becomes a member of the streamlined sales and use tax agreement.

Likewise, during this same time, MCL 205.104a stated:

> (1) A person in the business of selling tangible personal property and liable for any tax under this act shall keep accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires. If an exemption from use tax is claimed by a person because the sale is for resale at retail, a record shall be kept of the sales tax license number if the person has a sales tax license. . . .
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> * * *
>
> (4) If a taxpayer fails to file a return or to maintain or preserve proper records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the department may assess the amount of the tax due from the taxpayer based on information that is available or that may become available to the department. That assessment is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer.
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> * * *
>
> (6) This section applies when this state is a member state of the streamlined sales and use tax agreement.

Although Petitioners are correct that the applicable statute regarding recordkeeping in this case was MCL 205.104a, as opposed to MCL 205.104, since Michigan became a member of the streamlined sales and use tax agreement on July 1, 2004,[2] with the implementation of the amendments above effective on September 1, 2004,[3] the Administrative Law Judge's error, while corrected in this Final Opinion and Judgment, was *de minimis* in nature. Specifically, both

[2] See 2004 PA 174.
[3] See 2004 PA 172. See also Michigan Department of Treasury, *Effective Dates* <http://www.michigan.gov/taxes/0,1607,7-238-43519_43521-155374--,00.html> (accessed June 19, 2014).

statutes, during the audit period, mandated that a person, involved in the business of selling tangible personal property, who was liable for use tax, was required to keep accurate and complete records. Here, *regardless* of whether or not Petitioners kept a record of the sales tax license number of Buck Truck, Dave Smith Pontiac, or any other sale, to a purchaser, which was exempt from use tax, Petitioners still failed to maintain accurate and complete records with respect to their sales of vehicles to Buck Truck and further failed to rebut the statutory presumption of the validity of the assessment at issue based on their *properly* submitted evidence in this case. See *Vomvolakis v Dep't of Treasury*, 145 Mich App 238, 242-243; 377 NW2d 309 (1985).

Next, Petitioners argue that the Administrative Law Judge "committed an error of law by not admitting certain exhibits contrary to [MCL 205.104b(1)] . . . ." Petitioners further argue that pursuant to 2008 PA 439, which amended MCL 205.104b, it "can provide documentation for an exemption at a minimum before the date of a final order of the Michigan Tax Tribunal." Respondent, conversely, argues that "the amendments to MCL 205.104b that went into effect on January 9, 2009 do not apply to *any* of the transactions at issue" since "[t]he Petitioner allegedly sold vehicles to Buck Truck in 2005, 2007, and 2008, and to Dave Smith Pontiac in 2005, 2006, and 2007." [Emphasis in original.] Respondent further argues that "[n]othing in section 104b somehow precluded the Tribunal from putting a deadline on when the Petitioner could attempt to submit evidence in support of its case . . . ."

During the audit period, MCL 205.104b(1) stated:

> If an exemption from the tax under this act is claimed, the seller shall obtain identifying information of the purchaser and the reason for claiming the exemption at the time of the purchase or at a later date. The seller shall obtain the same information for a claimed exemption regardless of the medium in which the transaction occurred.

2008 PA 439 then expanded subsection 5 and added subsections 6, 7, 8, and 9 to the abovementioned statute. Thus, MCL 205.104b, effective January 9, 2009, was amended to state, in pertinent part:

> (7) If the seller has not obtained an exemption form or all relevant data elements, the seller may either prove that the transaction was not subject to the tax under this act by other means or obtain a fully completed exemption form from the purchaser, by the later of the following:
>
> (a) 120 days after a request by the department.
>
> (b) The date an assessment becomes final.
> (c) The denial of a claim for refund.

> (d) In the instance of a credit audit, the issuance of an audit determination letter or informal conference decision and order of determination.
>
> (e) The date of a final order of the court of claims or the Michigan tax tribunal, as applicable, with respect to an assessment, order, or decision of the department.

While MCL 205.104b(7) was only in effect for a portion of the audit period, and although there is no indication that the Legislature intended for the amendment to have retroactive applicability, the Tribunal will, nevertheless, address MCL 205.104b(7) as it if were in effect for the entire audit period.

In that regard, the portion of subsection 7 that allows a seller to prove that a transaction is not subject to use tax by "[t]he date of a final order of the . . . Michigan tax tribunal . . . ." is problematic since it undermines the Tribunal's rules regarding the submission of evidence (i.e., TTR 237 and TTR 287) by allowing a party to submit evidence after a hearing and, if applicable, after a proposed opinion and judgment is issued. Nonetheless, even if the Tribunal were to admit Petitioners' exemption certificates (i.e., P-33 and P-34) at this time, pursuant to MCL 205.104b(7)(e), the admission of such evidence would have no effect on the Administrative Law Judge's decision in this case. Specifically, while the exemption certificates indicate that all purchases by Buck Truck and Dave Smith Pontiac were exempt from sales and use tax, for the reasons indicated therein, the exemption certificates still do not establish what sales were made to either during the audit period. More specifically, the issue in this case is not whether Petitioners can prove that they acquired vehicles and sold them to an exempt dealer (i.e., for resale at retail). Rather, the issue is whether Petitioners can prove that they sold certain vehicles at all. Therefore, because there is still insufficient information to prove that Petitioners sold vehicles they acquired to Buck Truck, use tax was properly assessed against Petitioners for engaging in the use, storage, or consumption of tangible personal property (i.e., vehicles) in this state. Further, although inconsequential given the preceding, the Tribunal questions why Petitioners' exemption certificate for Dave Smith Pontiac was not produced earlier, given the fact that it was signed December 14, 2011, and because Petitioners' exemption certificate for Buck Truck is not signed, it is arguably not a "fully completed" exemption certificate as specified in MCL 205.104b.

Lastly, although oral decisions, regarding the Motions filed by Respondent on August 14, 2013, and August 16, 2013, were rendered by the Administrative Law Judge at the hearing on August 28, 2013, said decisions were not properly formalized into a written order following the hearing, as required by TTR 211. See also MCL 205.751. As a result, this opinion shall also formally reflect the Administrative Law Judge's ruling on Respondent's August 14, 2013 and August 16, 2013 Motions.

Given the above, Petitioners have failed to show good cause to justify the modifying of the Proposed Opinion and Judgment or the granting of a rehearing. See MCL 205.762. The Tribunal, however, modifies the Proposed Opinion and Judgment, as modified herein, and adopts the

modified Proposed Opinion and Judgment as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgment, as modified herein, in this Final Opinion and Judgment. As a result:

a. The taxes, interest, and penalties as levied by Respondent are as follows:

Assessment Number: R611434

Taxes	Interest	Penalties
$145,841.00	$46,933.76	$0.00

b. The final taxes, interest, and penalties are as follows:

Assessment Number: R611434

Taxes	Interest	Penalties
$46,629.00	*	$0.00

*Interest to be computed pursuant to 1941 PA 122.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent's August 14, 2013 Motion for Immediate Consideration is GRANTED.

IT IS FURTHER ORDERED that Respondent's August 14, 2013 Motion to Name a Different Witness is PARTIALLY GRANTED.

IT IS FURTHER ORDERED that Respondent's August 16, 2013 Motion for Immediate Consideration is GRANTED.

IT IS FURTHER ORDERED that Respondent's August 16, 2013 Motion in Limine is PARTIALLY GRANTED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as finally shown in the Proposed Opinion and Judgment, within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties, or issue a refund as required by this Order, within 28 days of entry of this Final Opinion and Judgment.

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

By: Steven H. Lasher

Entered: July 2, 2014
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