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

Great Lakes Hydrodemolition Services Inc,
Petitioner,

v MTT Docket No. 461232

Michigan Department of Treasury, Tribunal Judge Presiding
Respondent. Steven H. Lasher

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING PETITIONER'S MOTION FOR COSTS

ORDER GRANTING RESPONDENT'S CROSS-MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On October 23, 2014,[1] Petitioner filed motions requesting that the Tribunal (i) enter summary judgment in its favor and (ii) award it costs in the above-captioned case.[2] In its Motions, Petitioner contends that it is an industrial processor, as defined in MCL 205.94o, and, as such, Final Assessment No. TP73433, levying use tax on its equipment used in conjunction with its hydro-demolition services, should be canceled, and the Tribunal should award it costs in this case because "Respondent was totally out of control . . . ."

On October 20, 2014, Respondent filed a response to Petitioner's Motions and a cross-motion requesting that the Tribunal grant summary disposition in its favor pursuant to MCR 2.116(C)(10). In its Response and Cross-Motion, Respondent contends that Petitioner does not qualify for the exemption under MCL 205.94(o), as Petitioner is not an industrial processor or engaged in an industrial processing activity on behalf of an industrial processor. Respondent, therefore, contends that the equipment Petitioner purchased for use in its hydro-demolition

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[1] Although Petitioner initially filed its Motions on September 30, 2014, the Motions were not accompanied by the required filing fee and, as such, were not properly pending until October 23, 2014, when Petitioner remitted the required filing fee.
[2] Petitioner also filed a response to Respondent's Motion to Hold Petitioner in Default and Motion to Extend Discovery on September 30, 2014. Petitioner's Response, however, is untimely, as it was filed more than 21 days after service of Respondent's Motions, which were filed with the Tribunal and served on Petitioner on July 15, 2014. See TTR 225(4). As such, Petitioner's Response will not be taken into consideration. See also *Pars Ice Cream Co, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued August 14, 2012 (Docket No. 305148). Further, the Tribunal already denied these Motions on August 15, 2014, thereby negating any need to further discuss the same.

services is not exempt from use tax, and Petitioner's Motions, including its Motion for Costs, must be denied.

Petitioner has not filed a response to Respondent's Cross-Motion for Summary Disposition.

The Tribunal, having reviewed the Motions, Response, and the evidence properly submitted in this case, finds that denying Petitioner's Motion for Summary Disposition and Motion for Costs and granting Respondent's Cross-Motion for Summary Disposition is appropriate.

PETITIONER'S CONTENTIONS

In support of its Motions, Petitioner contends that it is not a contractor as it "does not construct, alter, repair or improve real estate."[3] Rather, Petitioner contends that it is akin to "an infrastructure contractor" as discussed in *Green Thumb Lawnscaping Inc v Dep't of Treasury*, 17 MTT 73 (Docket No. 342253), issued July 31, 2009. Petitioner further contends that it is an industrial processor because "it reclaims concrete to be remanufactured and reprocessed for subsequent use by Prime Contractors," and "[c]utting the concrete from the roadbed and using water to vacuum the reclaimed concrete into a vactor machine changes the form, composition, quality[,] combination[,] or character of the property." Petitioner states that, "[a]s the owner will testify, the reclaimed concrete is in different sizes and shapes that does not have any consistency, thus it requires further processing by a Crushed Concrete Company in order to meet specifications for other Prime Contractor jobs." Petitioner further contends, in reliance on *Elias Bros Restaurants Inc v Dep't of Treasury*, 452 Mich 144; 549 NW2d 837 (1996), that MCL 205.94o "does not require the Petitioner to own the reclaimed concrete in order to be an Industrial Processor[n]or does the statute require the Petitioner to make the sale at retail." Lastly, Petitioner contends that the service that it provides (i.e., hydro-demolition) is documented by pictures and videos attached to its Motions, and the Tribunal should award it costs in this case, "including representation fees of $20,000[,] as Respondent was totally out of control issuing liens and disrupting the Petitioner's business and threatening to shut it down."

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[3] Petitioner describes its business, in its Motion for Summary Disposition, as follows:

> Great Lakes Hydrodemolition Services, Inc. (GL Hydro) is a company that utilizes highly specialized equipment and computer robots in order to reclaim concrete in a way that does not disturb the underlying infrastructure. GL Hydro uses techniques and experience it has mastered by using high pressure water in the cutting process. Once the concrete is removed from the roadbed, it is effectively washed and removed from the jobsite through a special vacuum process. Depending upon the specific project, some or all of the reclaimed concrete will be immediately reused on the jobsite, some or all of the reclaimed concrete is left on a jobsite for future use by the Prime Contractor, and some or all of the reclaimed concrete is delivered to a local crushed concrete yard by either GL Hydro or the Prime Contractor.

RESPONDENT'S CONTENTIONS

In its Response, Respondent contends that there are "factual inaccuracies" in Petitioner's Motions that "need to be addressed." In relevant part,[4] Respondent contends, with regard to the foregoing, that Petitioner is a subcontractor, "in the business of altering real estate for others," not an "infrastructure contractor," which Petitioner, "without citing any evidence," is now claiming despite its prior representations, to the State and other third parties, that it is a subcontractor. Respondent additionally contends that Petitioner's Motion for Summary Disposition fails to meet the required standards for the same, under the Michigan Court Rules, and should therefore be facially denied for its procedural deficiencies for three reasons: (1) "Petitioner's motion fails to state with particularity the grounds upon which its motion is based . . . ;" (2) "Petitioner has not adequately supported its motion with the type of evidence required under the Court Rules;" and (3) "the brief references testimony that, according to Petitioner, will occur at some point in the future." Respondent further contends that Petitioner's Motion for Costs must be denied because Petitioner (i) "fails to cite the relevant Tax Tribunal Rule governing the award of costs . . . ," (ii) fails to demonstrate its entitlement "to such a substantial award," (iii) relies on evidence not previously provided to Respondent during the course of discovery, (iv) "misapplies applicable . . . rules," and (v) fails to meet "its burden to refute the assessment at issue in this case or prove that it is entitled to the industrial processing exemption."

In its Response and Cross-Motion, Respondent contends that Petitioner does not qualify for the industrial processing exemption under MCL 205.94o because Petitioner is not an industrial processor or engaged in an industrial processing activity on behalf of an industrial processor.[5] Specifically, Respondent contends that Petitioner is not an industrial processor because Petitioner performs demolition services on real property, not tangible personal property, and Petitioner does not convert or condition tangible personal property, for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail, but, "[a]t best," creates new tangible personal property (i.e., concrete rubble), as a by-product of its hydro-demolition services. Respondent also argues that Petitioner is not engaged in an industrial processing activity because "Petitioner does not change the form, composition, quality, combination, or character of tangible personal property." Respondent further contends that "[t]he Tribunal should not give any serious consideration to Petitioner's assertion that concrete reused by a prime contractor on site is the same as a sale of retail [because] . . . Petitioner's assertion that concrete is reused on site conflicts with Petitioner's responses to Treasury's discovery requests[, and] . . . Petitioner . . . [provides] no legal authority to support its contention that on-site consumption is the same as a sale at retail [leaving Respondent] and this Tribunal to guess as to what Petitioner's position actually is." Additionally, Respondent argues that "industrial processing does not begin until tangible personal property begins movement from raw materials storage[, and] Petitioner never removes tangible personal property from raw material storage." Respondent states that the concrete rubble that Petitioner delivers is "not in raw materials storage until sometime after it is delivered to the concrete yard, indisputably a time after [Petitioner] has used the property for

[4] As Petitioner's Response to Respondent's Motions, filed on July 15, 2014, was untimely and the substance of such Response was not discussed in this, or any, Order or considered by the Tribunal, no further discussion, regarding Respondent's first factual inaccuracy, is, likewise, necessary.
[5] Respondent's contentions in its Response regarding this issue (i.e., the main issue) are discussed here for readability purposes.

which it claims the exemption." Respondent further explains that "[i]ndustrial processing would begin after the concrete was removed from a debris pile and placed into a chipper, crusher, or other machine that performs a conversion process." Further, Respondent contends that "Petitioner did not engage in an industrial processing activity on behalf of an industrial processor[, as t]he challenged assessment relates solely to equipment Petitioner used to perform demolition jobs for various prime contractors[, and t]hose prime contractors were in the business of constructing real property for others." In furtherance of the foregoing, Respondent contends that, pursuant to MCL 205.94o(6)(d), "[i]ndustrial processing does not include '[d]esign, engineering, construction, or maintenance of real property . . . ;' " and even if the Tribunal were to conclude otherwise and find that Petitioner engaged in industrial processing activity, several of Petitioner's equipment are not eligible for an industrial processing exemption pursuant to MCL 205.94o(5)(g) and "[r]e-using concrete on site is by no means a sale at retail." Lastly, Respondent contends that Petitioner's reliance on *Green Thumb Lawnscaping Inc* is "misplaced," and Petitioner has failed to offer any formula to Respondent, as required under MCL 205.94o(2).

APPLICABLE LAW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions. See TTR 215. In this case, both parties move for summary disposition under MCR 2.116(C)(10).[6]

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. See *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 (C)(10) will be denied. See *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 non-moving party. See *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. See *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 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. See

[6] Although Petitioner failed to specify the grounds on which its Motion for Summary Disposition is based, in contravention to the requirements set forth in MCR 2.116(C), the Tribunal will postulate, based on the arguments presented in Petitioner's Motion for Summary Disposition, in conjunction with Respondent's Response and Cross-Motion, that Petitioner is seeking summary disposition pursuant to MCR 2.116(C)(10).

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. See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

CONCLUSIONS OF LAW

As a preliminary matter, despite Petitioner's procedural defects in its Motion for Summary Disposition, such defects are not fatal, as the Tribunal is able to infer that Petitioner is seeking summary disposition pursuant to MCR 2.116(C)(10), and Petitioner's Motion for Summary Disposition is, albeit lacking in legal sophistication, presented in a form that the Tribunal can decipher and consider. However, and as stated above,"[a] motion under MCR 2.116(C)(10) tests the *factual* sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (emphasis added). In that regard, because materials submitted in support of, or in opposition to, a motion under MCR 2.116(C)(10) can only be considered to the extent that such evidence would be admissible at trial, see *Maiden*, Petitioner's contention regarding future testimonial evidence and evidence that was not previously furnished to Respondent during the course of discovery will not be considered in rendering a decision with regard to the parties' cross-motions for summary disposition in this case.

With that being said, Respondent's assessment is deemed to be prima facie correct, and Petitioner has the burden of proof to refute it. See *Vomvolakis v Dep't of Treasury*, 145 Mich App 238, 242-243; 377 NW2d 309 (1985). Further, " '[t]ax 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*, 302 Mich App 153, 164-165; 838 NW2d 195 (2013). As such, it is also Petitioner's burden to establish, by a preponderance of the evidence, that it is entitled to an exemption from use tax for the tax periods at issue. See *ProMed Healthcare v City of Kalamazoo***,** 249 Mich App 490, 495; 644 NW2d 47 (2002).

Here, the assessment at issue in this case is the result of a use tax audit conducted by Respondent of Petitioner's business for the period from January 1, 2008, to November 30, 2011,[7] and the issue that the Tribunal must decide is whether Petitioner's equipment, used in conjunction with its hydro-demolition services, is exempt from use tax under MCL 205.94o.[8]

Pursuant to MCL 205.93(1), and unless otherwise exempt, every person is subject to use tax "for the privilege of using, storing, or consuming tangible personal property in this state . . . ." One exemption to the foregoing is codified in MCL 205.94o which states, in relevant part:[9]

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[7] The audit period initially spanned from January 1, 2005, to November 30, 2011, but was later revised following the enactment of 2012 PA 211. See Respondent's Exhibit K at 2 (i.e., the Informal Conference Recommendation).
[8] The equipment at issue in this case was purchased outside of Michigan and, as such, was not subject to sales tax, and no use tax was remitted.
[9] See 2012 PA 474, which retroactively amended sections of the Use Tax Act, including Section 4o, to reflect that as quoted herein, effective January 1, 2006.

(1) The tax levied under this act does not apply to property sold to the following after March 30, 1999, subject to subsection (2):

(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.

* * *

(5) Property that is not eligible for an industrial processing exemption includes the following:

* * *

(g) Vehicles, including special bodies or attachments, required to display a vehicle permit or license plate to operate on public highways, except for a vehicle bearing a manufacturer's plate or a specially designed vehicle, together with parts, used to mix and agitate materials at a plant or job site in the concrete manufacturing process.

* * *

(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 or affixed to and made a structural part of real estate located in another state. 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 or affixed to and made a structural part of real estate located in another state.

* * *

In this case, although Petitioner argues that it is entitled to the industrial processing exemption under MCL 205.94o, the Tribunal disagrees because Petitioner is not an industrial processor, as defined under subsection (7)(b), nor is Petitioner's tangible personal property (i.e., its equipment) used in industrial processing by an industrial processor or used by Petitioner to perform an industrial processing activity for or on behalf of an industrial processor. Specifically, the activity of industrial processing, which is a vital component to the industrial processing exemption, would not start until *after* Petitioner has completed its services by placing the byproduct of its hydro-demolition services (i.e., concrete rubble) in raw materials storage either on the jobsite or with a local crushed concrete yard for future conversion of that concrete. See MCL 205.94o(7)(a). Further, even if the foregoing was later found to be incorrect, which the Tribunal argues is not the case since Petitioner does not use its equipment to convert or condition tangible personal property, such finding to the contrary would be fruitless because the exclusionary provisions set forth in subsections (5)(g) and (6)(d) would negate any eligibility for Petitioner's equipment to qualify for the industrial processing exemption. Specifically, because Petitioner's equipment is used in connection with constructing and maintaining real property and some of the equipment at issue includes vehicles that are required to display a vehicle permit or license plate to operate on public highways, the exclusionary provisions would preclude Petitioner's equipment from qualifying for the industrial processing exemption.[10]

That being said, although Petitioner relies on *Green Thumb Lawnscaping Inc* to assert that it is an infrastructure contractor, the Tribunal's decisions are not precedential and whether Petitioner is or is not an "infrastructure contractor" is of no relevance because there is no reference or requirement to be an infrastructure contractor in MCL 205.94o, or anywhere, for that matter, within the Use Tax Act. Further, even if Petitioner is not a "contractor," Petitioner is still subject to use tax for the privilege of using, storing, or consuming tangible personal property in this state, unless otherwise exempt. And, although Petitioner relies on *Elias Brothers Restaurants Inc* for the proposition that MCL 205.94o "does not require the Petitioner to own the reclaimed concrete in order to be an Industrial Processor[n]or does the statute require the

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[10] Any discussion regarding whether the second prong of the definition of "industrial processing" is met (i.e., "for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state") would be superfluous at this point given the reasons set forth in this paragraph. In any event, however, this prong would be met for the portion of the concrete rubble that is delivered to a local crushed concrete company as that concrete rubble, after the conversion process by that local crushed concrete company, is "ultimately" sold at retail to third parties.

Petitioner to make the sale at retail," that case is factually distinguishable from this case and was analyzed with respect to a completely different section within the Use Tax Act (i.e., Section 4g). As such, neither *Green Thumb Lawnscaping* nor *Elias Brothers Restaurants Inc* advances Petitioner's position in this case.

Given the above and that there is no genuine issue of material fact based on the evidence properly submitted in this case, Petitioner's Motion for Summary Disposition and Motion for Costs shall be denied and Respondent's Cross-Motion for Summary Disposition shall be granted.

JUDGMENT

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

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

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

IT IS FURTHER ORDERED that Assessment Number TP73433 is AFFIRMED.

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

By: Steven H. Lasher

Entered: Jan 13, 2015
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