

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

Proman Inc,
Petitioner,

v

MTT Docket No. 15-002163

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Preeti P. Gadola

ORDER GRANTING PETITIONER’S MOTION TO SET ASIDE DEFAULT

ORDER DENYING RESPONDENT’S MOTION FOR INVOLUNTARY DISMISSAL

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Proman, Inc, appeals Final Assessment No. UI94952 levied by Respondent, Michigan Department of Treasury, on April 23, 2015. The Final Assessment established that Petitioner owes tax in the amount of \$4,679, plus interest in the amount of \$779.10 and penalties in the amount of \$0 for tax year 2010, pursuant to the Michigan Business Tax Act (“MBTA”). Petitioner’s representative was Dileep Tiwari, in pro per, and Jessica McGivney, Attorney, represented Respondent.

Pursuant to MCL 208.1201(1) under the MBTA, “there is levied and imposed a business income tax on every taxpayer with business activity within this state.” The MBTA, however, allows a taxpayer to deduct from its gross receipts, “purchases from other firms,” which for a staffing company, as Petitioner alleges it is, includes “compensation of personnel supplied to customers of staffing companies.”¹ There is also an allowable deduction for contractors. The aforementioned deductions are the subject of this case.

A hearing on this matter was held on January 26, 2017. Prior to the commencement of the hearing, Petitioner filed a Motion to Set Aside the November 17, 2016 order placing Petitioner in default. Petitioner properly paid the Motion fee and had previously sent its responses to the discovery requests that gave rise to the default, to Respondent. Given the

¹ MCL 208.1113(6)(d).

Motion, albeit untimely, the Tribunal found good cause to set aside the default and conduct the hearing in this case. Petitioner's representative, Mr. Dileep Tiwari, manager of Petitioner, in proper, testified on behalf of Petitioner. Respondent's sole witness was Lenise Glanton, Auditor, Michigan Department of Treasury. Based on the evidence, testimony, and case file, the Tribunal finds that Petitioner has failed to meet its burden of proof to demonstrate that the assessment was improper and the assessment shall be affirmed.

PETITIONER'S CONTENTIONS AND PETITIONER'S WITNESS

Petitioner, through its representative, Mr. Dileep Tiwari, its sole witness, contends it is a staffing company which provides IT staff to its employer customers. In that regard, Petitioner filed a 2010 Michigan Business Tax ("MBT") Return, prepared by its CPA, taking deductions as a staffing company and also as a contractor. Line 16 of the MBT return relates to the staffing company deduction and line 17 to the contractor deduction.

Petitioner alleges the notices and letters it received from Respondent put forth that line 17, only, was being adjusted by Respondent, however, line 16 is now under contention.² Petitioner contends, relating to line 17, that the standard industrial classification ("SIC") code used on the return may be in error³, however, a deduction for employee wages is appropriate as Petitioner is a staffing company and does not engage in product development.⁴

Mr. Tiwari admits that he did not provide any contracts or other documentary evidence to Respondent and the Tribunal during the course of these proceedings.⁵

PETITIONER'S ADMITTED EXHIBITS

As noted above, Petitioner did not submit any exhibits.

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner has failed to meet its burden to demonstrate that it is entitled to the disputed deductions and that Petitioner may misunderstand the statutory

² Tr. 14.

³ Per MCL 208.1113(6)(e), to be eligible for the contractor deduction, a taxpayer must be "included in major group 15, 16, or 17 under the standard industrial classification code as compiled by the United States department of labor."

⁴ Tr. 13.

⁵ Tr. 22-23.

requirements. The MBTA specifies the industry codes the taxpayer must be subject to in order to qualify for the deductions as a contractor or staffing company, and Petitioner is not a building construction company or an employment agency. As such, the deductions were properly recalculated.

RESPONDENT'S ADMITTED EXHIBITS

- R-1 2010 Michigan Business Tax Return
- R-2 Proman 2010 US Corporate Tax Return
- R-3 First Letter of Inquiry, dated February 6, 2014
- R-4 Second Letter of Inquiry, dated May 16, 2014
- R-5 MBT Notice of Additional Taxes Due, dated December 12, 2014
- R-6 Intent to Assess, dated February 12, 2015
- R-7 Final Assessment, dated April 23, 2015
- R-8 North American Industry Classification System Definitions ("NAICS")
- R-9 Occupational and Health Administration ("OSHA") Description for SIC Code 7371
- R-10 OSHA Description for SIC Code 7361
- R-11 Spreadsheet for NAICS to SIC Code Numbers (pages 1-93 only)

RESPONDENT'S WITNESS

Respondent's sole witness Lenise Glanton, is an auditor for the Michigan Department of Treasury. Ms. Glanton testified that an initial letter of inquiry was sent to the taxpayer in February 2014, and the second letter of inquiry was issued May 2014.⁶ The original letter of inquiry relates to Line 16 of the MBT return and Petitioner did not respond. After the second letter of inquiry a representative from Petitioner contacted Ms. Glanton indicating that Petitioner had not claimed the contractor deduction, which was not mentioned in the letter.⁷

⁶ Tr. 32-34.

⁷ Tr. 34.

Ms. Glanton testified that Respondent issued the Michigan Business Tax Annual Return Notice of Additional Tax Due and, although it contained a typographical error, it reflects the revision of both Lines 16 and 17 to zero.⁸ Respondent then issued an Intent to Assess with information about how to request an Informal Conference, and Petitioner did not respond.⁹ As such, Ms. Glanton testified a Final Assessment was issued and in response to the Final Assessment, Petitioner's representative submitted three contracts to support the deductions claimed.

Ms. Glanton testified that during the course of her audit, she reviewed the tax returns themselves, documentation from Petitioner, and Petitioner's website to determine eligibility.¹⁰ She put forth that the face of Petitioner's MBT return clearly indicates its principal business activity is project business management. Further, industries in Michigan, for MBT purposes, are categorized into SIC and/or NAICS codes as compiled by the United States Census and United States Department of Labor.¹¹ In order to be eligible for the contractor deduction, which Petitioner claimed on the face of its 2010 MBT return, an organization must fall within major SIC groups 15, 16, or 17 which is within construction-related business activity.¹² The SIC code Petitioner used on its return, however, is 7371 relating to computer programming services. Overall, the review indicated Petitioner was not entitled to a contractor deduction.¹³

To qualify for the staffing company deduction, Petitioner must fall within SIC code 736, subgroups 7361 or 7363, for personnel supply services or help supply services. Petitioner, however, listed NAICS code 541511 on its return, which is not associated with industry code 736. Ms. Glanton explained that staffing companies are within the SIC code system, however, the MBT return requires an NAICS code, which replaced specific codes a few decades ago. She testified there are cross-reference charts within the U.S. Department of Labor and Census Bureau to correlate the NAICS and SIC codes to each other.¹⁴ In any event, NAICS code 541511 is defined as, "establishments primarily engaged in writing, modifying, testing and supporting

⁸ Tr. 35-38.

⁹ Tr. 39.

¹⁰ Tr. 42.

¹¹ See Respondent's Exhibits 8-11.

¹² Tr. 44.

¹³ Tr. 47-48.

¹⁴ Tr. 50-53.

software to meet the needs of a particular customer.”¹⁵ Further, cross referencing NAICS code 541511 to its SIC code results in a categorization under SIC code 7371, custom computer programming services.

FINDINGS OF FACT

1. Petitioner failed to submit any documentary evidence.
2. Petitioner’s 2010 Michigan Business Tax Annual Return reflects:
 - a. The Principal Business Activity of “Project Business MGT.”
 - b. The North American Industry Classification System Code (NAICS) of 541511.
 - c. The Standard Industrial Code (SIC) of 7371.
3. Petitioner is in the business of providing computer services.
4. The Letters of Intent clearly identifies that Respondent was reviewing Line 16.
5. The MBT Annual Return Notice of Additional Tax Due clearly identifies that Line 17 was modified.

CONCLUSIONS OF LAW

The Tribunal finds that Petitioner has failed to provide any documentary evidence in support of its contention that it is entitled to the contested deductions at the hearing of this matter.

The Court of Appeals in *Menard Inc v Dep’t of Treasury*¹⁶ held that:

In practice, the rules of construction governing exemptions may be applied to the rules addressing deductions. See *Detroit Edison Co. v. Dep’t of Revenue*, 320 Mich. 506, 514–515, 31 N.W.2d 809 (1948). In *GMAC LLC*, 286 Mich App at 374–375, 781 N.W.2d 310, this Court set forth the following rules regarding tax exemptions:

Moreover, “[a]n exemption will not be inferred from language of a statute if the words admit of any other reasonable construction.” 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 in derogation of the principle that all shall bear a proportionate share of the tax burden, and therefore, a tax exemption shall be strictly construed. [Citations omitted in the original.]¹⁷

¹⁵ Tr. 55.

¹⁶ *Menard Inc v Treasury*, 302 Mich App 467; 838 NW2d 736 (2013).

¹⁷ 302 Mich App at 474.

Accordingly, tax deductions are now viewed through the same lens as tax exemptions, and the *burden of proving an entitlement to an exemption is on the party claiming the right to the exemption*. Here, although Petitioner has presented no evidence and minimal testimony, the Tribunal finds it will address the merits of Petitioner's claim and will deny Respondent's Motion for an involuntary dismissal¹⁸ given Petitioner appeared in pro per. At issue in this case are the contractor and staffing company deductions. Each deduction is discussed, individually, below.

First, the Tribunal will address Petitioner's contention that the notices and letters from Respondent did not reflect that both Line 16 (staffing company) and Line 17 (contractor) were being modified by the assessment. While Petitioner is correct that not *every* notice references a modification to both Lines 16 and 17. The February 6, 2014, and May 16, 2014 Letters of Inquiry specifically reference Line 16, only.¹⁹ The December 12, 2014 Annual Return Notice of Additional Tax Due clearly shows a modification to Line 17 with the statement "[d]eduction for contractors has been adjusted."²⁰ Further, the "As corrected by Treasury" column states a modification of lines 16 and 17 to \$0. Finally, the Annual Return Notice states, "This notice supersedes prior Michigan Business Tax notifications for this period."²¹

Also, on the Annual Return Notice line 16 puts forth the "as filed" column at \$0, however, the error was explained as a computer glitch and when reviewing Petitioner's original return, it is clear that a \$995,184 deduction was included.²² Moreover, the "Total Subtractions" line clearly shows a value which includes the original deduction modified to \$0 by Respondent.²³

Overall, Petitioner had notice of the modifications made by Respondent which resulted in the Final Assessment.²⁴ In addition to the notice provided, the Tribunal finds that Petitioner has been afforded ample opportunity through this proceeding to object to the modifications to both Lines 16 and 17. Given the above, the Tribunal finds that any defect in the notice was not substantial and did not deprive Petitioner of due process.

¹⁸ See *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636; 534 NW2d 217 (1995) (stating that a motion for "directed verdict" will be considered a motion requesting involuntary dismissal under MCR 2.504(B)(2)).

¹⁹ Exhibits 3 and 4.

²⁰ Exhibit 5.

²¹ *Id.*

²² Exhibit 1.

²³ Exhibit 5.

²⁴ See Exhibit 7.

Contractor Deduction

Per MCL 208.1113(6)(e), to be eligible for the contractor deduction, a taxpayer must be “included in major group 15, 16, or 17 under the standard industrial classification code as compiled by the United States department of labor.” Respondent presented its Exhibit 11 which at pages 87 to 93, is a printout from the United States Department of Labor-OSHA webpage listing the major group numbers. This document delineates “Division C” as “Construction” which consists of Major Groups 15, 16, and 17.²⁵ Major Group 15 is listed as “Building Construction General Contractors And Operative Builders,” Major Group 16 as “Heavy Construction Other Than Building Construction Contractors,” and Major Group 17 as “Construction Special Trade Contractors.”²⁶ At no time did Petitioner present any evidence or testimony to demonstrate that its business fell within any of these construction type groups as required by the statute at issue. As such, the Tribunal finds Petitioner has failed to meet its burden to demonstrate that it is entitled to the contractor deduction under MCL208.1113(6)(e).

Staffing Company Deduction

Per MCL 208.1113(6)(d)(ii), the definition of a staffing company is “a taxpayer whose business activities are included in industry group 736 under the standard industrial classification.” Respondent’s witness, Lenise Glanton reliably testified that there are two subgroups under industry group 736; namely, 7361 for employment agencies and 7363 which is for help supply services.²⁷ The description for 7361 was submitted by Respondent as Exhibit 10 and states as follows:

7361 Employment Agencies

Establishments primarily engaged in providing employment services, except theatrical employment agencies and motion picture casting bureaus.

Establishments classified here may assist either employers or those seeking employment. Establishments azakprimarily engaged in operating theatrical employment agencies are classified in Industry 7922; those operating motion picture casting bureaus are classified in Industry 7819; and farm labor contractors are classified in Agriculture, Industry 0761.

- Chauffeur registries
- Employment agencies, except theatrical and motion picture

²⁵ Exhibit 11 at 87.

²⁶ *Id.*

²⁷ Tr. 50.

- Executive placing services
- Labor contractors (employment agencies), except farm labor
- Maid registries
- Model registries
- Nurses' registries
- Ship crew registries
- Teachers' registries

Petitioner has not submitted any evidence or testimony to demonstrate that its business falls within the description for 7361. Although Respondent did not submit the description for 7363, the Tribunal finds that Petitioner did not submit any evidence or sufficient testimony to demonstrate that it falls within that description either.

The best evidence on record of the code under which Petitioner should be classified is Petitioner's 2010 Michigan Business Tax Annual Return. Petitioner's representative testified that he reviewed and signed the document and that it was correct "[t]o the best of [his] knowledge."²⁸ This document lists the SIC code of 7371.²⁹ Respondent submitted a copy of the description matching the code utilized by Petitioner which states:

7371 Computer Programming Services

Establishments primarily engaged in providing computer programming services on a contract or fee basis. Establishments of this industry perform a variety of additional services, such as computer software design and analysis; modifications of custom software; and training in the use of custom software.

- Applications software programming, custom
- Computer code authors
- Computer programming services
- Computer programs or systems software development, custom
- Computer software systems analysis and design, custom
- Computer software writers, free-lance
- Programming services, computer custom
- Software programming, custom³⁰

This description clearly indicates that it falls within Industry Group 737 and not 736 as required by the statute. Petitioner's MBT return also reflects the NAICS code of 541511. Respondent submitted, as Exhibit 8, a printout from the US Census Bureau website listing the definition of this code which is entitled "Custom Computer Programming Services" and includes similar

²⁸ Tr. 16.

²⁹ Exhibit 1 at 1.

³⁰ Exhibit 9.

classifications as the quoted passage above. Although Petitioner's witness now testifies that the codes were entered in error, no documentary evidence was submitted to support this contention or to support a finding that Petitioner's services are more appropriately classified under Industry Group 736. Further, Ms. Glanton credibly testified upon a review of Petitioner's websites and contracts, the services offered by Petitioner are more akin to the Computer Programming Services code than employment services. Although Petitioner contends that no software was sold, Petitioner did not submit confirming documentary evidence. Moreover, the description above does not, necessarily, imply the requirement of a product being sold. Rather, the description clearly indicates that "services" including the modification of custom software and other programming services.

Overall, the Tribunal finds that Petitioner has failed to meet its burden to demonstrate that it is entitled to either the contractor or staffing company deductions. Rather, the only documentary evidence on record indicates that Petitioner's services fell under SIC 7371 and NAICS code 541511, both relating to computer programming services.

JUDGMENT

IT IS ORDERED that Petitioner's Motion to Set Aside Default is GRANTED.

IT IS ORDERED that Respondent's Motion for Involuntary Dismissal is DENIED.

IT IS FURTHER ORDERED that Final Assessment UI94952 is AFFIRMED as set forth in the Introduction section of this Final Opinion and Judgment.

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.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.³¹ Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is \$50.00 in the Entire Tribunal and \$25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.³² A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.³³ Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.³⁴

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."³⁵ A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.³⁶ The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.³⁷

By Preeti P. Gadola

Entered: May 11, 2017

³¹ See TTR 261 and 257.

³² See TTR 217 and 267.

³³ See TTR 261 and 225.

³⁴ See TTR 261 and 257.

³⁵ See MCL 205.753 and MCR 7.204.

³⁶ See TTR 213.

³⁷ See TTR 217 and 267.