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

Beacon Industrial Staffing, Inc.,
Petitioner,

v

MTT Docket No. 409419

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER PARTIALLY GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER PARTIALLY GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

On August 18, 2011, Respondent filed its Motion for Summary Disposition pursuant to MCR 2.116(C)(10), contending that Petitioner was liable for Michigan Single Business Tax ("SBT") as a professional employer organization ("PEO") for tax periods January 1, 2003, through December 31, 2007 (see Assessment No. Q764422). Petitioner filed its Brief in Opposition to Respondent's Motion for Summary Disposition and its Motion for Summary Disposition Pursuant to MCR 2.116(C)(8), (C)(10), and (I)(2) on September 8, 2011, contending that it is a payroll processor and not a professional employer organization. Respondent filed a Response to Petitioner's Motion for Summary Disposition on September 29, 2011. Oral argument was held on October 17, 2011. [1] Petitioner was represented by Jack L. Van Coevering and Respondent was represented by Amy M. Patterson and Jessica A. McGivney. The Tribunal finds that Respondent's characterization of Petitioner as a PEO was correct and, accordingly,

[1] Because the issues in the subject case and in a companion case, Beacon Enterprises, Inc. (MTT Docket No. 371782) are the same, oral argument included both cases.

affirms the assessment issued by Respondent. However, the Tribunal finds that the 10% negligence penalty imposed by Respondent should be waived.

RESPONDENT'S ARGUMENT

In support of its Motion, Respondent contends that the terms of contracts entered into by Petitioner with its trucking clients clearly support Respondent's position that Petitioner is a PEO, as that term is defined by MCL 208.4 and, as such, all compensation paid to employees leased by Petitioner to its trucking clients should be added back to the SBT tax base.

Relying on applicable statute and *Mid America Mgt Corp v Michigan Department of Treasury*, 153 Mich App 446, 463; 395 NW2d 702 (1986), Respondent contends in its Brief[2] and Reply Brief that:

1. Petitioner was the "employer" of the employees at issue pursuant to MCL 208.5, as Petitioner had the right to control and direct the individual employees pursuant to the Client Services Agreements with its trucking clients.
2. Petitioner satisfied the two-part test established by the Michigan Court of Appeals in *Mid America* to determine who was the actual employer for SBT purposes as Petitioner was responsible for the withholding of federal income tax for employees leased to its trucking clients and Petitioner had the ultimate right to direct and control the manner and method of providing services under the Client Services Agreements.

[2] The pages of Respondent's Brief in Support of its Motion for Summary Disposition are not numbered and cannot be referenced accordingly.

3. The contracts between Petitioner and its trucking clients are clear and unambiguous and must be enforced as written. (*Coates v Bastian Bros, Inc*. 276 Mich App 498, 503; 741 NW2d 539 (2007))

4. Provisions of the contracts between Petitioner and its trucking clients that establish that Petitioner is the employer for purposes of the SBT include (a) Petitioner is the "Employer" for purposes of the contract, (b) Petitioner provides the service of "employee leasing" to its trucking clients, (c) Petitioner will designate supervisors to perform all administrative and personnel matters on the premises of its trucking clients, (d) Petitioner's supervisors shall determine procedures to be followed by employees and shall implement policies and procedures relating to employees, (e) Petitioner is responsible for the payment of employment taxes, worker's compensation insurance and fringe benefit programs for its employees, (f) Petitioner "shall retain the sole and exclusive right" to determine which of its employees "shall be designated to fill" the job function positions of its trucking clients, (g) Petitioner "shall have the sole responsibility of hiring, evaluating, supervising, disciplining and firing" individuals assigned to fill positions at its trucking clients, and (h) Petitioner "shall have full control" over all personnel decisions.

5. Petitioner's contention that the "twenty-factor test" under IRS Revenue Ruling 87-41 should apply to the facts of this case is not supported by the terms of the contract, Michigan statute and case law.

6. Petitioner's reliance on parol evidence for purposes of varying or contradicting the written contracts with its trucking clients is not applicable where the writing is not a sham, is not illegal or fraudulent, is not lacking essential elements or reflects the complete understanding of the parties. (*NAG Enterprises, Inc. v All State Industries, Inc,* 407 Mich 407, 410; 285 NW2d 770 (1979))

7. Parol evidence in the form of affidavits "cannot be permitted here to negate or diminish the plain language of Petitioner's client services agreements.

8. Petitioner is a PEO as defined by MCL 208.4(4) because Petitioner (a) has the right to direct and control the employees, (b) pays the wages and employment taxes of the employees leased to its trucking clients, (c) reports, collects and deposits employment taxes for the employees leased to its trucking clients, and (d) retains the right to hire and fire employees.

9. Respondent contends that Petitioner's equal protection and due process arguments cannot succeed because it applied the correct standards to the SBT and did not apply an "uneven" use of the parol evidence rule in its audit of Petitioner.

10. Respondent defends the imposition of a 10% negligence penalty pursuant to RAB 2005-3 because Petitioner exhibited a lack of due care in failing to file its SBT returns consistent with what a reasonable and prudent person would have done under similar circumstances.

At oral argument, Respondent reiterated its reliance on the legislative revision of the Single Business Tax to include compensation paid by PEOs in the tax base and the four factors established by the legislature to define PEOs to conclude that Petitioner is a PEO and that compensation paid by Petitioner pursuant to its contracts with its trucking clients is compensation to be added back to Petitioner's tax base. In addition, Respondent dismisses the 20-factor test identified in IRS Rev. Rul. 1987-41, as it is a common law test used to determine the responsible employer for purposes of federal tax withholding, and is not relevant to the issue in this case. Respondent also argued at oral argument that the contracts between Petitioner and its trucking clients are clear and unambiguous and speak to each of the factors identified in MCL 204.4, and includes an integration clause. Therefore, Respondent argues that the Tribunal should not consider the extrinsic evidence presented by Petitioner (i.e., the Affidavits) because of the parol evidence rule, because of MCL 205.21, which allows Treasury to rely on the best evidence available in the course of audits, because MCL 208.4 requires a review of the contract to determine the establishment of a PEO, and the Tribunal may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men (MCL 205.746(1)).

Respondent further contends at oral argument that the issue is not what actually happened under the contract, but instead, Petitioner's rights under the contract to control, and hire and fire employees leased to its trucking clients. Thus, Respondent contends that the affidavits as to what actually occurred under the contract are irrelevant. But, in the event that the Tribunal allows extrinsic evidence such as the affidavits, Respondent argues that summary disposition should not be granted, as issues of fact remain to the extent that they are contrary to the agreement. (Transcript, p. 59)

Finally, Respondent reiterates its argument that a 10% fraud penalty should apply given Petitioner's failure to exercise due care in filing its tax returns and paying the applicable tax.

PETITIONER'S ARGUMENT

In support of its Motion, Petitioner contends that it is a payroll processor and not a professional employer organization, as it provides payroll services, insurance, and monitors benefit and employment claims on behalf of its clients. (Petitioner's Brief, p. 2) Petitioner further contends that the Service Agreement between Petitioner and Rush Trucking is incomplete, ambiguous, and does not address the actual employment relationship between the two entities. (Petitioner's Brief, p. 2) The agreement(s) proclaim an employment relationship but provide glaring inconsistencies. Finally, Petitioner contends that the 10% fraud penalty is erroneous, as Petitioner filed its SBT returns in good faith. (Petitioner's Brief, p. 2)

Petitioner further contends that the Client Service Agreements between Petitioner and its trucking clients are clear that the "employees" covered by the agreement were hired by and working for its trucking clients before the agreements were entered into, operational matters are handled by its trucking clients, its trucking clients were responsible for verifying time submissions, specifying the job function positions of employees, setting wage rates, hours worked, and otherwise complying with state and federal employment laws. Further, Petitioner received a fee of $12.50 to $16.00 for each check issued, in addition to reimbursement for taxes, insurance, service fees, medical premiums and equipment rental. (Petitioner's Brief, pp. 5, 6)

Petitioner also raises a constitutional issue, arguing that Respondent's use of the parol evidence rule amounts to selective prosecution and unequal treatment of taxpayers. (Petitioner's Brief, p. 10)

Petitioner contends that, by relying on *Mid America* in its Brief, Respondent concludes that the 20-factor common law test used by the Internal Revenue Service to determine the employment relationship should apply to the issues in this case. Petitioner questions whether this reliance on some of the factors in the common law test is inconsistent with Respondent's contention that the agreements between Petitioner and its trucking clients should be accepted on its face. (Petitioner's Brief, pp. 11 - 13)

Petitioner contends that the parol evidence rule does not apply to this case, as (1) the rule does not bar the introduction of extrinsic evidence between a party to the contract and a third party to that contract, namely Respondent, and (2) application of the common law test, which Petitioner contends Respondent has conceded applies in Michigan cases, requires the parties to ignore the agreement as dispositive evidence. Petitioner relies on the standard established in *Connors and Mack Hamburgers, Inc v Department of Treasury,* 129 Mich App 627; 341 NW2d 846 (1983), that external evidence is required to determine how, for tax purposes, the finder of fact should treat a contract. (Petitioner's Brief, pp. 14 - 16)

Petitioner further contends that Respondent has a statutory obligation to evaluate and apply the law to parties to a contract, respecting their contract, but not be bound by it, instead rendering a determination regardless of it. (Petitioner's Brief, p. 17) Extrinsic evidence is required to resolve the question of whether the writing was intended as a complete expression of the agreement, whether it reflects the parties' intent, and to resolve any ambiguity. (*NAG Enterprises, supra*)

Petitioner also relies on *Genesys Group Ltd v Department of Treasury*, MTT Docket Nos. 316458, 290394 (February 24, 2010) and *Bandit Industries, Inc v Department of Treasury,* Hearing No. 20040038 (March 23, 2009), where the Tribunal and Treasury, respectively, relied on extrinsic

evidence to go beyond the plain language of the contract in rejecting the employer – employee relationship. (Petitioner's Brief, pp. 18 – 24)

Relying on its affidavits (Petitioner's Brief, Exhibits R – W), Petitioner contends that Petitioner did not screen or fire employees, did not maintain employees other than the four clerical personnel, has no expertise in human resources management, no expertise, experience or training in transportation, logistics or any of its clients' businesses, and all payments made by Petitioner were reimbursed by its clients. In support, Petitioner provided the Affidavits of Vincent Manzo, Marcel Thirman, Vitalba Ahee, Elizabeth Dimkoski, Sharon McGraw, and Lyn Sengstock:

1. Vincent Manzo is owner of Beacon Industrial and two related companies.[3] All "payroll service entities" have been serviced by the same four employees working out of a single office. They provide payroll services plus insurance. They do not provide human resources management services. They provide no supervision of employees at client sites. They do not evaluate salary increases or decreases, do not advertise to fill jobs, and do not hire or fire employees.
2. Marcel Thirman is a CPA familiar with Petitioner. Petitioner is a payroll services company with four clerical workers who process payroll and insurance matters for clients. Petitioner issues payroll checks and pays applicable withholding taxes. Petitioner bills Client for amount of paycheck and withholding taxes and receives reimbursement for payroll, taxes and a service fee per check issued.
3. For all three companies, Vitalba Ahee inputs hour and salary reports from client companies, processes payroll, issues paychecks to client employees, processes

[3] Beacon Enterprises, Inc. and Better Integrated Systems, Inc.

> insurance and 401k, Elizabeth Dimkoski handles unemployment claims for clients, confirms hiring and termination information received from client, Sharon McGraw processes pay checks, insurance enrollment and termination, and Lyn Sengstock ensures that new employees provide correct information for payroll and tax purposes.

At oral argument, Petitioner again focused on MCL 204.4, which it agrees includes as compensation of a PEO, "payments by the professional employer organization to the officers and employees of an entity whose employment operations are **managed** by the professional employer organization." (Transcript, pp. 27, 28) (Emphasis added) Further, "it's an organization that quote, provides the management and administration of human resources and employer risk of another by contractually assuming substantial employee rights, responsibilities and risks." (Transcript, p. 28) However, Petitioner argues that while the statute is straightforward, its intent in defining a PEO is the focus on "the management and administration of human resources and employer risk of another by contractually assuming, quote, substantial employer rights, responsibility and risk." (Transcript, p. 29) Thus, Petitioner contends that one must look to substance over form; i.e., the specific language of the contracts between Petitioner and its trucking clients does not evidence the "small staff, none of which has any human resource experience at all, none of which has any logistical training, none of which has any experience or expertise in transportation companies," yet somehow manage and control hundreds of truckers operating throughout the Midwest. (Transcript, pp. 30, 31) Petitioner further contended that the "substance" of the contracts between Petitioner and its trucking clients lacks

> an employment arrangement where Beacon managed the staff, directed and controlled the work, determined which truckers would go to where, determined

> how they would drive, determine if their driving record was great or not, determine what education they would get, determine whether they were entitled to a pay raise or penalize them for under-performance. There is no method by which it would receive information regarding its drivers' performance: Were they timely? Were they not timely? None of that is a part of this agreement. (Transcript, p. 33)

Petitioner further relies on Section IV(b) of the trucking client contracts, which provides that "employer is and shall remain responsible for such administrative and employment matters as the payment of all federal and state and local employment taxes, providing workers' compensation coverage, as well as nonobligatory fringe benefit programs for the employee." (Transcript, p. 34) Petitioner further argues substance over form to the extent that

> staff had no expertise in human resource management. It had no training in the transportation industry or logistics or trucking. . . . It was paid a flat fee per paycheck regardless of whether the employee was a part-time employee, whether it was a full-time employee, whether it was an independent contractor. All payments, all payments were reimbursed by clients. (Transcript, p. 36)

At oral argument, Petitioner also reiterated its argument that the common law test of employer and employee summarized in IRS Rev. Rul. 87-41 must be applied in this case to determine whether Petitioner is a PEO. Specifically, Petitioner contends that because the Michigan statute defining employer relies on IRC Section 3401(c) and (d) and its corresponding regulations, the Tribunal cannot deem the Revenue Ruling as irrelevant. Citing *Mid America* as support for the common law test of the employer-employee relationship, Petitioner contends that the central issue here is not whether Petitioner is a PEO, but whether it "manages" employment operations for Rush Trucking.

To support that contention, Petitioner argues that the parol evidence rule is not applicable here. Petitioner cites to a number of cases that hold that Respondent is not bound by the parol evidence rule, concluding that substance over form is critical (see, for example, *Denha v Jacob*, 179

Mich App 545; 446 NW2d 503 (1989), and *APCOA, Inc v Department of Treasury*, 212 Mich App 114, 118; 536 NW2d 785 (1985)). Here, Petitioner contends the courts apply an economic reality test "which examines a number of criteria to determine whether the employer had control over the employee, including whether the employer paid the employee's wages, hired, fired, or had the capacity to discipline the employee, or whether the employer/employee had a common purpose." (Transcript, p. 46) The substance over form argument is also adopted in *Bandit Industries, supra*, a PEO case where Treasury allowed Respondent to look beyond the non-ambiguous contract to determine PEO status.

Finally, Petitioner argues that Respondent has no basis to impose a 10% negligence penalty on Petitioner in this case. Not only is there no basis for Respondent, or its auditor, to make the determination that Petitioner was negligent by failing to exercise due care in its filing of its SBT return, Respondent has also failed to show how that purported negligence caused the deficiency. Here, Petitioner reasonably believed that because it did not "manage" human resources for its trucking clients, it was not a PEO under the statute. Further, the testimony of Mr. Thirman establishes that Petitioner truthfully filed the returns to reflect actual facts.

FINDINGS OF FACT

Although the parties did not submit a Joint Stipulation of Facts, the Tribunal has reviewed the respective briefs filed by the parties, and finds the following facts:

1. Petitioner is a Michigan corporation whose main business office is located in Shelby Township, Michigan.
2. Petitioner provided certain services to trucking clients, including Implant Recycling, LLC, and Steel Transport, Inc.

3. Petitioner is a member of a controlled group of companies including Better Integrated Systems, Inc., which is appealing Respondent's determination that it is a PEO under MTT Docket No. 364358 and Beacon Enterprises Staffing, Inc., which is appealing Respondent's determination that it is a PEO under MTT Docket No. 371782.
4. Petitioner entered into form Client Services Agreements with Steel Transport, Inc. on August 1, 2007 (Respondent's Brief, Exhibit 4) and with Implant Recycling, LLC on August 15, 2008 (Petitioner's Brief, Exhibit C).
5. In its SBT returns for the tax years at issue, Petitioner added compensation to the SBT tax base attributable only to its employees servicing the payroll for its trucking clients.
6. Respondent's auditor added to the SBT tax base compensation paid by Petitioner as reflected on Petitioner's federal employment tax returns, which included compensation paid to employees leased to its trucking clients.
7. Respondent imposed a 10% negligence penalty on Petitioner for each of the tax years at issue.
8. Petitioner's trucking clients did not report any salaries or wages for tax years 2003-2007.
9. Petitioner withheld and deposited federal income taxes for the employees subject to the Client Services Agreements.

STANDARD OF REVIEW

Petitioner moves for summary disposition pursuant to MCR 2.116(C)(8). Motions for summary disposition under MCR 2.116(C)(8) are appropriate when the opposing party has failed

to state a claim on which relief can be granted. Summary disposition should be granted when the claim, based solely on the pleadings, is so clearly unenforceable that no factual development could possibly justify a right to recovery. *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993). In reviewing a motion for summary disposition under this subsection, the court must accept as true all factual allegations in support of a claim, as well as all inferences which can fairly be drawn from the facts. *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

Both Respondent and Petitioner move for summary disposition pursuant to MCR 2.116(C)(10). In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004), 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 Insurance*, 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 non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of

supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 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*, 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 (1992).

CONCLUSIONS OF LAW

For the tax years at issue, the Michigan Single Business tax was imposed on the "adjusted tax base" of every person with business activity in the state. (see MCL 208.31(1)) For this purpose, adjusted tax base included federal taxable income with various additions and subtractions, including the addition of compensation. (see MCL 208.9(5)) "Compensation" was defined by the SBT as "all wages, salaries, fees, bonuses, commissions, or other payments made in the taxable year on behalf of or for the benefit of employees." (MCL 208.4(3)) For this purpose, the term "employee" is defined by statute to mean "an employee as defined in section 3401(c) of the internal revenue code. A person from whom an employer is required to withhold for federal income tax purposes shall prima facie be deemed an employee." (MCL 208.5(1)) Finally, MCL 208.4(4) provides that for tax years after December 31, 2003, compensation of a PEO is defined to include:

> Payments by the professional employer organization to the officers and employees of an entity whose employment operations are **managed** by the professional employer organization. Compensation of the entity whose employment operations are **managed** by a professional employer organization does not include compensation paid by the professional employer organization to the officers and employees of the entity whose employment operations are managed by the professional employer organization.
>
> [p]rofessional employer organization means an organization that provides the management and administration of the human resources and employer risk of another entity by contractually assuming substantial employer rights, responsibilities, and risk through a professional employer agreement that establishes an employer relationship with the leased officers or employees assigned to the other entity by doing all of the following:
>
> (a) Maintaining the right of direction and control of employees' work, although this responsibility may be shared with the other entity.
> (b) Paying wages and employment taxes of the employees out of its own accounts.
> (c) Reporting, collecting, and depositing state and federal employment taxes for the employees.
> (d) Retaining the right to hire and fire employees. (Emphasis added.)

Here, both Petitioner and Respondent agree that it is Petitioner's responsibility under its Client Services Agreements with its trucking clients to withhold federal income taxes from employees leased to Rush Trucking, and therefore, pursuant to MCL 208.5, Petitioner is "prima facie" deemed to be the employer of those employees. (*Mid America, supra*). Therefore, a rebuttable presumption is established that because Petitioner is required to withhold for federal income tax purposes, it is therefore an employer for SBT purposes. In this regard, Petitioner contends that the "employer-employee" relationship purportedly created by the Client Services Agreements with its trucking clients is easily rebutted by both the terms of the Agreements themselves, as well as by extrinsic evidence such as the Affidavits submitted by Petitioner from Mr. Manzo and others.

Petitioner recognizes the two-part test in *Mid America,* but Petitioner contends that it did not have the exclusive right to direct and control the manner and method of providing services under the Client Services Agreements. Arguing substance over form, Petitioner primarily relies on extrinsic evidence to establish that Petitioner's small staff, none with human resources experience or logistical training, were incapable of directing, controlling and managing the work involved with determining which truckers would go where, reviewing driving records and performance, determining pay raises, and were not the ultimate decision makers regarding who was hired or fired.

Because the Tribunal's acceptance of extrinsic evidence regarding the intent of the parties in executing the Client Services Agreements is critical to support Petitioner's argument that is (1) not a PEO as defined by statute, and (2) even if determined to be a PEO, it does not **manage** the employment operations of its trucking clients, the parties spend a considerable amount of time in their briefs and oral argument regarding the issue of parol evidence.

The Michigan Court of Appeals summarized the parol evidence rule and its exceptions in *Hamade v Sunoco, Inc,* 271 Mich App 145; 721 NW2d 233 (2006). The Court reiterated that the parol evidence rule prohibits oral testimony and prior written agreements to explain or vary the terms of a fully integrated written contract. Thus, when a contract is unambiguous, it must be enforced according to its terms. *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc,* 260 Mich App 183, 185; 678 NW2d 647 (2003). Again, in *UAW-GM Human Resource Ctr v KSL Recreation Corp,* 228 Mich App 486, 492; 579 NW2d 411 (1998), the Court concluded that where a contract is clear and unambiguous, parol evidence will not be admissible. A contract is ambiguous "when its provisions are capable of conflicting interpretations." *AFSCME*

International Union v Bank One, 267 Mich App 281, 283-284; 705 NW2d 355 (2005), or "if its provisions may be reasonably understood in different ways." *Universal Underwriters Ins Co v Kneeland,* 464 Mich 491, 496; 628 NW2d 491 (2001). Only when a contract is determined to be ambiguous can the fact-finder determine the meaning of the provisions "in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning." *Klapp v United Ins Group Agency, Inc.*, 468 Mich 469; 663 NW2d 447 (2003). Further, citing *NAG Enterprises, supra,* the Court in *Hamade, supra,* held that "it is a prerequisite to application of the parol evidence rule that there be a finding that the parties intended the written instrument to be a complete expression of their agreement with regard to the matters covered." In this regard, the Court in *NAG Enterprises* provided the following exceptions to the parol evidence rule, concluding that extrinsic evidence can be presented to show: (a) that the writing was a sham and not intended to create legal relations, (b) that the contract was fraudulent, illegal or mistaken, (c) that the parties did not integrate their agreement or assent to it as the final embodiment of their understanding, or (d) that the agreement was only partially integrated because essential elements were not reduced to writing. Finally, the Court in *UAW-GM* held that where the contract contains an express integration clause, parol evidence is not admissible.

Although Petitioner has presented argument and affidavits that attempt to explain the intent of the parties and the actual practice of the parties pursuant to the Client Service Agreements entered into between Petitioner and its trucking clients, the Tribunal finds that the Client Service Agreements are clear, concise and unambiguous and therefore will not admit such evidence. Specifically, the Tribunal relies on the clear language of the Client Service Agreement

that establishes (1) Petitioner as the Employer of employees leased to its trucking clients, (2) Petitioner's commitment to fill the "human resources needs" of its trucking clients, and (3) provides that:

a. Petitioner agrees to designate supervisors to perform any and all administrative and personnel matters. (Section 1. A.)
b. Petitioner shall determine the procedures to be followed by Employer employees regarding the performance of their duties**.** Client agrees to permit Employer to implement Employer's policies and procedures relating to Employer employees. (Section 1. B.)
c. Client has committed a material breach of the contract if it fails to comply with any directive from Employer including any directive regarding health, safety or personnel decisions. (Section 2. B. 1.)
d. Client has committed a material breach of the contract if it commits any act that usurps Employer's rights as the employer of Employer employees. (Section 2. B. 2.).
e. All Employer personnel assigned to Client to fulfill job function positions are and shall remain the employees of Employer. (Section 4. B.)
f. Employer shall provide employees who are duly qualified and skilled in the area in which their services are to be utilized. Employer will consult with Client in filling its Job Function Positions, but Employer shall retain the sole and exclusive right to determine which of Employer's employees shall be designated to fill Client's Job Function Positions. Client has no right to

approve such determination, but nonetheless possesses the right to recommend replacement or substitution of any employee so furnished, if dissatisfied with such employee's qualifications and/or performance. (Section 4. C. 1.)

g. Employer shall have the sole responsibility of hiring, evaluating, supervising, disciplining and firing individuals assigned to fill Client's Job Function Positions. Under no circumstances shall Client have the right to terminate an Employer employee. It is understood and agreed that Employer shall retain full control over all personnel decisions. (Section 4. C. 2.)

The Tribunal further finds that Section 9(B) of the Client Services Agreement provides an Integration Clause[4] that constitutes "an express integration or merger clause within the agreement" that is conclusive and, therefore, extrinsic evidence is only admissible to show fraud in the clause itself. *Hamade, supra.*

Thus, the Tribunal has not considered the parol evidence submitted by Petitioner in determining the outcome of this case. Further, the Tribunal finds that the clear, concise and unambiguous language of the Client Services Agreements entered into between Petitioner and its trucking clients establishes that Petitioner is an employer that pays compensation for purposes of the Michigan Single Business Tax, is a PEO that manages the employment operations of its trucking clients and, therefore, must add to its SBT tax base all compensation paid by it to its employees leased to its trucking clients.

The Tribunal further finds that a waiver of the negligence penalty imposed by Respondent on Petitioner is warranted. Here, Petitioner reasonably believed that because it did not "manage"

[4] Section 9(B) provides that "[t]his Agreement and the Exhibits attached to it constitute the entire agreement between the parties with regard to the subject matter and no other agreement, statement, promise or practice between the parties relating to the subject matter shall be binding on the parties."

human resources for its trucking clients, it was not a PEO under the statute. The Tribunal finds that Petitioner exercised "due care" in making a determination of its tax liability, pursuant to the provisions of the RAB.

Therefore,

IT IS ORDERED that Respondent's Motion for Summary Disposition is PARTIALLY GRANTED.

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

IT IS FURTHER ORDERED that Respondent's Final Assessment No. Q764422 is MODIFIED to include $785,794.00 in tax, plus statutory interest, with a waiver of all penalties.

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: December 29, 2011 By: Steven H. Lasher