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

Garfield Mart Inc,
Petitioner,

v

MTT Docket No. 14-005162-R

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H Lasher

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment on March 28, 2016. The Proposed Opinion and Judgment states that "[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal **in writing, by mail or by electronic filing, if available,** if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions)."

On April 1, 2016, Petitioner filed exceptions to the Proposed Opinion and Judgment. In the exceptions, Petitioner states that the Administrative Law Judge ("ALJ") erred in disregarding the undisputed evidence that the sampling technique employed in the audit was flawed, and in stretching the language of MCL 205.52(2)(b) to include all prepaid telephone calling arrangements irrespective of the manner of delivery of such services. The ALJ also erred in characterizing the receipts Petitioner's customers receive when they purchase cardless and PINless calling arrangements as the new version of the phone card, and in describing the scope of the statute to cover "prepaid calling services." The receipts do not contain access codes, nor do they contain any stored or other intrinsic value—they are merely receipts, and the statute only applies to certain methods of delivery of telephone calling arrangements, namely "prepaid telephone calling cards" and "prepaid authorization numbers," both of which require customers to input an access code to dial the purchased services.

On April 15, 2016, Respondent filed a response to Petitioner's exceptions. In the response, Respondent states that Petitioner is attempting to reargue arguments already addressed in the parties' various motions and briefs, as well as at the hearing. The Proposed Opinion and Judgment properly addressed and decided all of the relevant issues, including Petitioner's objections to the audit findings and methodology and the Department's treatment of phone cards. Petitioner's exceptions provide no basis as to why the Tribunal should reconsider the ALJ's decision or provide a different rationale or outcome of the case, and the assessment at issue should remain valid and enforceable as a matter of law.

The Tribunal, having given due consideration to the exceptions, response, and the case file, finds that Petitioner is, as indicated by Respondent, largely restating arguments that were previously presented, and the Administrative Law Judge ("ALJ") properly considered the testimony and evidence provided. Pursuant to MCL 205.68(1), "A person liable for any tax imposed under this

act shall keep in a paper, electronic, or digital format an 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."[1] Though Petitioner contends that it maintained adequate records, the records, by its own admission, did not include the source material, i.e., the daily cash register tapes. And though Petitioner contends that its internal controls were sufficient to support the reliability of the documentation provided, this contention is without merit, as the general ledger contained a number of unexplained discrepancies. Specifically, the ledger showed "no lump sum purchases in July and August for invoices paid with cash, no check purchases in November, limited check purchases in December, Marceco phone card purchases recorded as a liability but not an expense, errors in entries under the gas purchases account, and a large amount of cash on hand entries."[2] Because Petitioner failed to maintain complete daily sales records, Respondent had authority to conduct an indirect audit to test the accuracy of its books and records.[3] Petitioner had no right to choose the audit method employed by Respondent and the assessment is prima facie correct; Petitioner bears the burden of proving by a preponderance of the evidence that it is incorrect in whole or in part, and it failed to submit adequate affirmative evidence establishing that Respondent's audit was inaccurate.[4] The few invoices submitted were insufficient to determine what, if any, modifications should have been made to the sample, and on the issue of markups, Petitioner did not offer its accountant as a witness to explain how the records were prepared or the basis of the discrepancy, if any, between the markups provided by Petitioner to the accountant and those provided by the accountant to Respondent.[5]

Further, the ALJ did not err in characterizing the receipts Petitioner's customers receive when they purchase cardless and PINless calling arrangements as the new version of the phone card, or in describing the scope of the statute to cover "prepaid calling services" as Petitioner contends. MCL 205.52(2) imposes a tax upon the sale of prepaid telephone calling cards, reauthorization of prepaid telephone calling cards, prepaid authorization numbers for telephone use, and reauthorization of prepaid authorization numbers for telephone use. The Legislature's inclusion of "authorization numbers" evidences its intent to tax more than just the sale of tangible property, i.e., the cards. It clearly intended to tax the calling services associated with those cards, and with the referenced authorization numbers. Moreover, the receipts, as they stand with respect to the EPIN transactions, contain a PIN number that the customer inputs into his or her phone to obtain the add-on minutes purchased at Petitioner's store. Consequently, the only difference between these receipts and a standard prepaid calling card is that the latter is

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[1] *Id.*
[2] R-2: Sales Tax Audit Report of Findings, p 7.
[3] "If the taxpayer fails to file a return or to maintain or preserve sufficient 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 an indirect audit procedure or any other information that is available or that may become available to the department." MCL 205.68(4).
[4] See *By Lo Oil Co v Dep't of Treasury* 276 Mich App 19; 703 NW2d 822 (2005) and MCL 205.68(4). Petitioner also failed to provide Respondent with a sampling for the entire year, despite being given the opportunity to do so.
[5] Petitioner's accountant was responsible for preparation of the records and information utilized in the audit.

preprinted and held in a physical inventory. As noted in the admitted Marceco brochure, "Prepaid transactions started out in the 1990's with preprinted scratch-off cards with PIN numbers. Marceco jumped to the forefront of electronic PIN delivery in 2003 . . . ."[6] Even assuming, however, that said receipts cannot be construed as prepaid telephone calling cards within the meaning of MCL 205.52(2), the PINs themselves clearly constitute prepaid authorization numbers for telephone use.[7] Similarly, even assuming that the PINless transactions cannot be construed as prepaid telephone calling cards or prepaid authorization numbers due to their PINless nature, such transactions are properly considered reauthorizations of a prepaid authorization number. As noted in the Proposed Opinion and Judgment, customers are required to have a prepaid telephone to complete each top-up transaction, as the number assigned to or otherwise authorizing use of that telephone must be inputted into the MARCECO terminal to effectuate the sale of additional minutes to the telephone.

Given the above, Petitioner has failed to show good cause to justify the modifying of the Proposed Opinion and Judgment or the granting of a rehearing.[8] As such, the Tribunal adopts the Proposed Opinion and Judgment as the Tribunal's final decision in this case.[9] The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgment in this Final Opinion and Judgment. As a result:

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

Assessment Number: TR79204

Taxes	Interest	Penalties
$178,463.00	$40,281.25	$17,847.00

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

Assessment Number: TR79204

Taxes	Interest[10]	Penalties
$178,463.00	$40,281.25	$17,847.00

IT IS SO ORDERED.

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

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[6] P-2, p. 4.
[7] The PINs are numbers that authorize the use of the telephone services that the customer has paid for.
[8] See MCL 205.762.
[9] See MCL 205.726.
[10] Interest continues to accrue per 1941 PA 122. Interest shown above is current as of the date of the assessment.

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.[11] 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.[12] 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.[13] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[14]

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."[15] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[16] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[17]

By

Entered: MAY 05 2016
ejg

[11] See TTR 261 and 257.
[12] See TTR 217 and 267.
[13] See TTR 261 and 225.
[14] See TTR 261 and 257.
[15] See MCL 205.753 and MCR 7.204.
[16] See TTR 213.
[17] See TTR 217 and 267.

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

Garfield Mart Inc,
Petitioner,

v

MTT Docket No. 14-005162-R

Michigan Department of Treasury,
Respondent.

Administrative Law Judge Presiding
Peter M. Kopke

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Garfield Mart Inc., appeals a final assessment under the General Sales Tax Act ("GSTA") levied by Respondent, the Michigan Department of Treasury, based on an audit for the tax period ending June 30, 2011. Maurice S. Reisman, Attorney, represented Petitioner; James A. Ziehmer, Assistant Attorney General, represented Respondent; and a hearing on this matter was held on January 26, 2016. Petitioner's witness was Javed Ahmad, Petitioner's Store Manager. Respondent's witness was Sarah Johnson, Michigan Department of Treasury Auditor.

The assessment at issue, as established by Respondent, is as follows:

Assessment No.	Tax	Penalties	Interest[1]
TR79204	$178,463.00	$17,847.00	$40,281.25

Based on the evidence (i.e., testimony and admitted exhibits), the case file, and applicable law discussed in detail below, the Tribunal determines that the assessment, as established by Respondent, should be AFFIRMED.

PETITIONER'S CONTENTIONS[2]

Petitioner contends that the "major" issues in this case relate to the taxability of its prepaid "cardless and PINless" calling arrangements and the accuracy of Respondent's sampling methodology.[3]

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[1] Interest continues to accrue per 1941 PA 122. Interest shown above is current as of the date of the assessment.
[2] See also Petitioner's March 18, 2015 Motion for Partial Summary Disposition ("Petitioner's Motion"); Petitioner's March 18, 2015 Brief in Support of Petitioner's Motion ("Petitioner's Motion Brief"); Petitioner's May 12, 2015 Reply Brief to Respondent's Response ("Petitioner's Reply Brief"); and Petitioner's August 26, 2015 Brief in Support of Petitioner's Response to Respondent's Motion ("Petitioner's Response Brief").
[3] See Transcript ("TR") at p 6.

With respect to its prepaid calling arrangements, Petitioner contends that the arrangements do not involve the sale or reauthorization of a prepaid telephone calling card or a prepaid authorization number, and thus are not subject to Michigan sales tax.[4] In explaining the arrangements, Petitioner indicated that there were two (2) types of transactions. More specifically, Petitioner indicated that "[f]or 98 percent of its calling arrangements, all the customer gets . . . is a receipt and an electronic delivery from some service provider" of "minutes" to be "added" to the customer's "active" prepaid cell phone (i.e., "top up" arrangements).[5] Of the remaining "2 percent" or "less" of the arrangements, "they," being Petitioner, "actually furnish a customer a pin number" (i.e., E-PIN arrangements), which the customer utilizes in contacting the service provider to obtain the electronic delivery of minutes to be added to a prepaid cell phone.[6] To accomplish these "transactions," Petitioner asserts that (i) Petitioner has access to a dedicated terminal located behind its cash register, (ii) its cashiers input a customer's data (i.e., telephone number, etc.) into the terminal, and (iii) the terminal prints either a receipt with a transaction number or an "E-PIN" number.[7] More importantly, Petitioner

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[4] See TR at p 161 and pp 163-4.
[5] See TR at pp 161-2. See also TR at pp 40-1.
[6] See TR at pp 162-3. See also TR at pp 38-40.
[7] In its response to Respondent's Interrogatory No. 4, Petitioner stated that:

> . . . the real time top-up delivery of prepaid cellular telephone minutes during the periods at issue was done through a real time top-up delivery from a dedicated HTML (MARCECO) terminal located at Garfield's gas and convenience store. Garfield did not sell to any customers prepaid plastic telephone calling cards which provide information of an authorization code to access prepaid telephone calling services. Garfield does not maintain any inventory of telephone cards nor authorization numbers but merely has access to a MARCECO dedicated terminal where it can input the customer's telephone numbers, print a payment receipt for the customer and allow its customers immediate additional cell phone use.
>
> As part of its operations, it provides cardless and PINless retail sales of "top-up" (i.e., additional minutes) for wireless accounts of customers who request such services. Pursuant to a contract with MARCECO LTD ("MARCECO"), Garfield acts as a non-exclusive sales agent for the use of MARCECO's PayGo prepaid system with the ability to access for cellular phone usage prepaid wireless services on an "on-time" basis mainly from Boostmobile LLC ("Boostmobile") that are then delivered over a credit card type terminal or other electronic interface (internet connectivity) located at Garfield's location. Boostmoblie is a mobile virtual network operator in the United States that concentrates on prepaid mobile phone services.
>
> Garfield does not have a contract or agreement with any of the wireless service providers such as Boostmobile, Virgin Mobile and AT&T to sell their wireless calling services during the periods at issue. Rather, Garfield had a contract with MARCECO, which acted as a middleman between Garfield and the wireless service providers. MARCECO furnished to Garfield the countertop terminal at Garfield's store and also handled all of the accounting and distribution of the sales

contends that neither "transaction" is covered by the applicable statutory language[8] because (i) the technology for these transactions did not exist at the time the GSTA was amended to include

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> proceeds received by Garfield. MARCECO withdrew from the bank account between 92% and 98% of the amount paid by his customers for the cellular services depending on the wireless provider and Garfield retained the remaining proceeds as a sales commission.
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> Typically, when a customer visited Garfield's gas station to purchase prepaid wireless services the clerk will ask for the name of the wireless service provider, the customer uses his/her wireless phone number of the account to which the customer wishes to add money and the amount the customer wishes to add. The clerk typically asked the customer that he or she pay first before proceeding with the top-up transaction. Once they receive the customer's payment, the clerk will select the right product (i.e., wireless carriers such as Boostmobile, AT&T, etc.) by using the menu on the MARCECO terminal. The terminal will prompt the clerk to enter the customer's cellular number of the account to be replenished. The web terminal will then prompt the store clerk to enter the amount of the top-up or enter the desired amount. The customer will be offered a choice of denominations (i.e., $10, $20, etc. within the allowed range $10 to $99) for the pay-as-you go transaction or for a monthly unlimited calling arrangement. The price varies as to the additional minutes purchased and the time period of use. With the cellular phone number and amount, the terminal will now be able to complete the real-time top-up transaction. This is done by having the technology provider use their connection with the wireless provider to verify that the phone number is valid and then complete the top-up transaction. The clerk then prints out the receipt that contains the date and time of the transaction, phone number replenished, amount added and new account balance.
>
> Garfield also made some sales during the periods at issue of so-called on-time "electronic PIN authorization numbers" (E-PINs) through its MARCECO terminal. This technology encompasses the providing of a PIN to the MARCECO terminal, comprising a request for a PIN over the MARCECO network, the request originating at the terminal, the request associated with a requested monetary unit and a required provider selected from among a set of available providers; receiving from a database a PIN associated with requested monetary unit and requested providers transmitting the retrieved PIN to the MARCECO terminal over the network wherein the PIN is transmitted to the terminal on demand in response to the clerk's request. Garfield does not maintain an inventory of E-PIN numbers.
>
> The E-PIN sales transaction begins if the customer tells the clerk that he utilizes one of the following service providers which do not provide PINless wireless calling arrangements; namely Trac Fone, Page Plus, All Tel, Sti Explore 2, Net 10 or Air Voice. If one of these service providers are selected then the store clerk will select on the MARCECO terminal the designated service providers and then input the amount of the top-up transactions. The terminal will now be able to print out a receipt which includes the E-PIN number that the customer can input in his/her phone to obtain the add-on minutes . . . . There are other service providers [accessible] on the MARCECO terminal that provide both PINless and E-PIN calling arrangements such as T-Mobile, AT&T and Verizon. In these instances, a customer could purchase an E-PIN calling arrangement (as opposed to a PINless arrangement) in the infrequent case when the customer is using someone's cellular phone . . . .

See Attachment No. 3 to Respondent's August 14, 2015 Motion for Summary Disposition at pp 4-6. See also Exhibit D to Petitioner's March 18, 2015 Motion for Partial Summary Disposition ("Affidavit of Riaz Admad").

[8] See MCL 205.52(2)(b).

the applicable statutory language[9] and if "the Michigan legislature wished to tax the prepaid cellular minutes at issue in this case, it could have changed its statute as Alabama, Illinois and other states have done,"[10] (ii) the amendment's legislative analysis indicated that the Legislature intended the provision to cover the sales of cards and/or authorization numbers to make prepaid long distance telephone calls only,[11] and (iii) the transactions, particularly with respect to E-PINS, were not sales by Petitioner, but rather by MARCECO, as Petitioner is "just an agent" and no evidence has been provided to indicate that the monies from MARCECO are anything but commission.[12] Petitioner further contends that Respondent's Hearing Referee "got it right," when the Referee found that statute did not apply to the prepaid calling arrangements at issue and that "[t]he Legislature's omission of cardless and PINless top-up transactions as taxable is presumed to be intentional," as such "transactions were unavailable" and, "therefore, never contemplated."[13]

As for Respondent's sampling methodology, Petitioner contends that the assessment was based on "imperfect estimates" because Respondent gave "improper weight to various purchase records" and utilized "improper mark-up percentages."[14] Petitioner also contends that (i)

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[9] See 1997 PA 193.
[10] See TR at p 163.
[11] In its brief in support of Petitioner's March 18, 2015 Motion for Partial Summary Disposition, Petitioner stated at p 13, "[t]he legislative analysis of the enrolled Senate Bills 716 and 721, which became Public Act 1993 and 194 of 1997, prepared by nonpartisan Senate staff for use by the Senate only refers to a card's use to make long distance telephone calls."
[12] See TR at p 163. See also Respondent's Exhibit R-2.7.
[13] See TR at pp 163-4.
[14] In its response to Respondent's Interrogatory No. 6, Petitioner stated that:

> . . . the Department used arbitrary purchase cost estimates for a three month period in 2010 to calculate the sales tax adjustments. These adjustments failed to recognize that Garfield Mart has a very low gross profit margin with respect to its taxable sales. Determining the sales adjustments by looking to Garfield Mart's purchase price is an inverted and arbitrary method. The Department's use of a flat mark-up rate for all products is arbitrary and has no direct correlation to the products sold by Garfield Mart. There has also been significant theft losses at the Garfield Mart location by customers and former employees of the gas station. On one [occasion] during the audit period the store was vandalized.
>
> Full and complete credit was not granted to Garfield Mart by the Department for the cash rebates from cigarette manufacturers/distributors. Beginning and ending inventory levels by merchandise or product were not taken into account by the Department in order to reflect the yearly increases to determine the gross sales calculation. The Department's disregard of the increase in Garfield Mart's inventory overstated the gross sales for the period at issue.

Respondent's "sampling" was unnecessary given Petitioner's "good internal controls" (i.e., training, observation, and security cameras) and "accurate" reporting of Z-tape daily totals,[15] (ii) if sampling was required, the parties should have "jointly" worked to figure out the appropriate methodology, particularly when the sampling is based on purchases and not sales, and participated in the sampling or audit on an "ongoing basis" (i.e., "joint cooperation"),[16] and (iii) Respondent should have been required "to go back to the drawing board" given the variance of over 15%.[17]

PETITIONER'S ADMITTED EXHIBITS[18]

P-1 Copy of undated photographs of MARCECO Terminal utilized in subject store.
P-2 Copy of undated MARCECO Brochure indicating "prepaid card spending" in 2004 and 2007 and projected spending in 2010. The brochure also indicates, in pertinent part:

> Prepaid transactions started out in the 1990's with preprinted scratch-off cards with PIN numbers. MARCECO **jumped to the forefront of electronic PIN delivery starting in 2003**, and presently leads the field in supplying you with the next jump in prepaid transactions, real time top-up. We offer **two options** for electronic PIN delivery and top-up transactions . . . [Emphasis added.]

P-3 Copy of document entitled "MARCECO Prepaid Services Rider" signed by Javed Cheema[19] and dated June 6, 2007, indicating that Petitioner's "relationship" with MARCECO is "as a non-exclusive sales agent for the use of MARCECO Ltd's PayGo prepaid system"; that Petitioner "agrees to use best efforts to market prepaid products available through PayGo"; and that Petitioner "is **responsible** for the payment of all sales, use, or other taxes associated with the sales of the Services." [Emphasis added.]
P-4 Copy of MARCECO "ACH" Statement dated March 8, 2010, indicating various dates, product descriptions, amounts, discounts, and nets.
P-5 Copy of MARCECO "ACH" Statement dated December 9, 2009, indicating various dates, product descriptions, amounts, discounts, and nets.
P-6 Copy of MARCECO "ACH" Statement dated October 31, 2008, indicating various dates, product descriptions, amounts, discounts, and nets.

See Attachment No. 3 to Respondent's Motion at pp 6-7. See also TR at pp 6-7 and pp 165-170 and Respondent's Exhibit R-2.7.

[15] See TR at pp 69-70, pp 74-5, p 164, and pp 170-1.

[16] See TR at p 165 and pp 168-9. In that regard, Petitioner's attorney infers that the lack of "cooperation" may have been the result of a "personality difference" or "dispute" between Respondent's auditor and Petitioner's accountant. Petitioner did not, however, submit any evidence to support any such inference. Rather, the evidence submitted supports a finding that Petitioner's accountant failed to submit all of the information requested by Respondent's auditor for purposes of conducting the audit. See Respondent's Exhibit Nos. 5-8.

[17] See TR at p 167.

[18] The parties stipulated to the admission of Petitioner's exhibits. See TR at pp 4-5.

[19] Mr. Cheema and Mr. Ahmad are the same person as "Cheema" is a "family name." See TR at p 9.

P-7 Copy of November 23, 2015 E-Pay Invoice, indicating various "Commission" amounts.
P-8 Copy of Boost Top-up "Customer Receipt" dated September 27, 2012, indicating "Transaction ID"; "Date" of September 27, 2012; and "Price" of $10.00.
P-9 Copy of AT&T "Customer Receipt" dated June 26, 2015, indicating "PIN Number"; "Transaction ID"; "Sale Date" of June 26, 2015; "Sale Amount" of $10.00; "Service Charge" of $0.00; and "Total Sale" of $10.00.
P-10 Copy of document entitled "Garfield Mart PIN Sale $11820.99" indicating Petitioner's "schedule of E-PIN sales."
P-11 Copy of Petitioner's General Ledger for "01/01/10 – 12/31/10."
P-12 Copy of Petitioner's Balance Sheet "[a]s of December 31, 2006."
P-13 Copy of Petitioner's Income Statement for "12 Months Ended December 31, 2008" and Balance Sheet "[a]s of December 31, 2008."
P-14 Copy of Petitioner's Income Statement for "12 Months Ended December 31, 2009."
P-15 Copy of Petitioner's Income Statement for "12 Months Ended December 31, 2010."
P-16 Copy of Petitioner's Income Statement for "12 Months Ended December 31, 2011."
P-17 Copy of Petitioner's 2009 U.S. Income Tax Return for an S Corporation signed by Petitioner's CPA, Ashraf Boules, on February 16, 2008.
P-18 Copy of Petitioner's 2008 U.S. Income Tax Return for an S Corporation signed by Mr. Boules on February 15, 2009.
P-19 Copy of Petitioner's 2009 U.S. Income Tax Return for an S Corporation signed by Mr. Boules on April 10, 2010.
P-20 Copy of Petitioner's 2010 U.S. Income Tax Return for an S Corporation signed by Mr. Boules on April 7, 2011.
P-21 Copy of Petitioner's 2011 U.S. Income Tax Return for an S Corporation signed by Mr. Boules on September 17, 2012.
P-22 Copy of National City Bank Statement for "Statement Period: Jan 30, 2010 – Feb. 26, 2010."
P-23 Copy of National City Bank Statement for "Statement Period: Feb. 27, 2010 – Mar. 31, 2010."
P-24 Copy of PNC Bank Statement "[f]or the period 04/01/2010 to 04/30/2010."
P-25 Copy of PNC Bank Statement "[f]or the period 05/01/2010 to 05/28/2010."
P-26 Copy of PNC Bank Statement "[f]or the period 05/29/2010 to 06/30/2010."
P-27[20] Not provided.
P-28 Copy of PNC Bank Statement "[f]or the period 07/31/2010 to 08/31/2010."
P-29 Copy of PNC Bank Statement "[f]or the period 09/01/2010 to 09/30/2010."
P-30 Copy of PNC Bank Statement "[f]or the period 10/01/2010 to 10/29/2010."
P-31 Copy of PNC Bank Statement "[f]or period 10/30/2010 to 11/30/2010."
P-32 Copy of PNC Bank Statement "[f]or the period 12/01/2010 to 12/31/2010."
P-33 Copy of Police Report Number 08-02492 dated February 4, 2008, entitled "Detail of Loss" indicating theft of cash and checks, cost of damages to Petitioner's store, business loss resulting from theft, and "Unaccounted Cig Inventory."

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[20] Petitioner's Exhibit List dated January 26, 2016, indicates that Petitioner's Proposed Exhibit 27 was "Bank Statements for Period 7/1/20 – 7/31/10." The exhibit marked as Exhibit 27 is, however, "Bank Statements for Period 7/31/10 – 8/31/10," which is the same as the exhibit marked as Exhibit 28.

P-34 Copy of document entitled "Affidavit of Acceptance" signed by Emily Alderton and dated August 13, 2010, relative to an admitted theft of cash from and reimbursement to Petitioner's store by Ms. Alderton.
P-35 Copy of Invoice from SAS (S. Abraham & Sons, Inc.) to Petitioner dated February 23, 2010, indicating various purchases, a retail tax status summary for taxable and non-taxable costs, various suggested retail sales prices, and "Extended Cost Per."
P-36 Copy of Invoice from SAS (S. Abraham & Sons, Inc.) to Petitioner dated April 13, 2010, indicating various purchases, a retail tax status summary for taxable and non-taxable costs, various suggested retail sales prices, and "Extended Cost Per."
P-37 Copy of Invoice from United Wholesale to Petitioner dated February 3, 2010, indicating various purchases, suggested retail prices, and "Mark Up %."
P-38 Copy of Notice of Preliminary Audit Determination dated and signed by Ms. Johnson on September 25, 2012, and signed by Mr. Boules on October 4, 2012, indicating that Petitioner does not agree with the "preliminary determination."
P-39 Copy of Final Audit Determination Letter dated November 9, 2012.
P-40 Copy of Michigan Department of Treasury Bill for Taxes Due (Intent to Assess) dated November 15, 2012.
P-41 Copy of Michigan Department of Treasury Final Bill for Taxes Due (Final Assessment) dated June 10, 2014.
P-42 Copy of Michigan Department of Treasury Sales Tax Audit Work Schedules with the "Summary of Schedules" dated September 12, 2012.
P-43 Copy of Michigan Department of Treasury Sales Tax Audit Report of Findings for subject audit.
P-44 Copy of Michigan Department of Treasury Form 4928 revised August 2015 entitled "Cash Basis Sales Tax Audit Overview."
P-45 Copy of Michigan Department of Treasury Form 2315 revised July 2015 entitled "Taxpayer Rights During an Audit."
P-46 Copy of Michigan Department of Treasury Internal Policy Directive 2009-2 dated June 22, 2009.
P-47 Copy of Michigan Department of Treasury Tax Compliance Bureau Audit Division Audit Sampling Manual dated June 2015.

PETITIONER'S WITNESS

Petitioner presented the testimony of Javed Ahmad, Petitioner's store manager. Mr. Ahmad testified that: (i) he has worked at the store for the "last 10 years" and is the "site manager" working "six days a week, about 50 hours" and responsible for the "day-to-day operations" and "activities" including hiring, training, and supervision of employees, purchasing, cash deposits, and the preparation of daily sales reports to reconcile daily Z-tapes,[21] (ii) he works with the accountant and gave him "all of the necessary information he needed" and "had

[21] See TR at pp 9-11. See also TR at pp 63-70.

requested" including the daily sales report, but no Z-tapes,[22] (iii) the Store did not have or maintain a physical inventory of phone cards for sale during the audit period at issue, but sold phone "cards" through its dedicated terminal with MARCECO (i.e., "we have to use the phone lines to print those cards"),[23] (iii) the Store had a contract with MARCECO during the audit period at issue that provided Petitioner with "access" to the terminal and Mr. Ahmad signed that contract on behalf of Petitioner,[24] (iv) no one from MARCECO ever told him or discussed with him the collection or payment of sales taxes,[25] (v) they have contracts with several tobacco companies and receive payments to both display and "lower" the price of the cigarettes being displayed and without the cigarette "buy-down" payments they would have lost money on the sale of the cigarettes based on the price they paid for the cigarettes,[26] (vi) he purchases cigarettes at the beginning or end of every month and if the cigarettes are bought at the end of the month they would be sold during the next month,[27] (vii) he met the auditor, but did not discuss the audit or the store's operations with her,[28] (viii) the store was broken into on February 4, 2008, and an employee admitted to "pocketing" money over a 10 month period during 2010,[29] (ix) store prices not only changed every month based on the cost of the product being sold, but there were also inventory changes during the audit period,[30] (x) Petitioner did not follow the retail price suggested by the cigarette wholesaler invoices,[31] (xi) he told the accountant that there was a "9 to 10 percent" markup on cigarettes,[32] (xii) although Petitioner's accountant represented Petitioner during the audit, he was not present to testify,[33] (xiii) Petitioner made a profit on the sale of cigarettes based on the buy-down,[34] (xiv) Petitioner maintained inventory logs and he provided

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[22] See TR at p 10 and p 12. See also TR at pp 44-5, pp 70-2, and pp 87-91.
[23] See TR at pp 13-6, pp 29-30, and p 33.
[24] See TR at pp 17-20.
[25] See TR at p 27.
[26] See TR at pp 49-61. See also TR at p 96
[27] See TR at pp 62-3.
[28] See TR at pp 75-8.
[29] See TR at pp 78-80.
[30] See TR at p 80.
[31] See TR at p 82.
[32] See TR at pp 82-3.
[33] See TR at p 85 and p 90.
[34] See TR at p 87.

those logs to the accountant,[35] and (xv) Petitioner "physically" conducted the top-up and E-PIN transactions and every customer was required to have a pre-paid wireless cellphone to complete each transaction.[36]

RESPONDENT'S CONTENTIONS[37]

Respondent contends that the Tribunal lacks authority over Petitioner's appeal, as Petitioner was required to, but did not, pay the uncontested portion of the assessment at issue.[38] In that regard, Respondent contends that Petitioner has conceded that the prepaid calling arrangement transactions relating to E-PINs are taxable and that Petitioner did not pay the taxes

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[35] See TR at pp 91-2.
[36] See TR at pp 92-6.
[37] See also Respondent's April 6, 2015 Response to Petitioner's Motion for Partial Summary Disposition ("Respondent's Response"); Respondent's April 6, 2015 Brief in Support of Respondent's Response ("Respondent's Response Brief"); Respondent's August 14, 2015 Motion for Summary Disposition ("Respondent's Motion"); and Respondent's August 14, 2015 Brief in Support of Respondent's Motion ("Respondent's Motion Brief").
[38] Although Petitioner objected to Respondent's closing argument relative to this issue arguing that the issue had been considered and resolved by the Tribunal, the Order entered by the Tribunal on September 18, 2015, was issued by an administrative law judge or, more appropriately, a hearing officer and not a Tribunal member. As such, the Order was a proposed order and not a final decision. See TR at pp 171-9. See also MCL 205.726. More specifically, the issue has not, in fact, been resolved. Further, the Order appears to be erroneous, as it focuses on the allegations made by the petition only and not the prosecution of the case to determine whether those allegations were made in good faith. In that regard, the Order provided, in pertinent part, that:

> Though it does appear that Petitioner now concedes that it did sell a certain amount of PIN authorization numbers, the fact that a taxpayer learns through the course of discovery that a portion of an assessment is valid, and concedes that portion of its claim, does not establish that they failed to pay "the uncontested portion" as a prerequisite to appeal with the meaning of MCL 205.22(1). Further, while acknowledging the existence of these sales, Petitioner differentiates them from those contemplated by statute, and thus appears to nevertheless dispute the taxability of the same.

Although the hearing officer was correct is his assertion that a taxpayer that learns though the course of discovery that a portion of an assessment is valid does not justify the dismissal of the petition for failure to pay the uncontested amount, no discovery had been conducted or was required, as Petitioner had all information necessary to determine the validity of its claim at the time the petition was filed. Nevertheless, the Order also provided, in pertinent part, that:

> . . . Petitioner raised claims in its Petition that if proven would eliminate the claimed deficiency. Petitioner may still meet its burden, and dismissal of the case for failure to do so at this time would be premature. Moreover, Respondent initially argued that granting Petitioner's Motion was not warranted because there were genuine issues of material fact, and the Tribunal agrees.

As such, Petitioner was required to submit evidence to support its claim and Respondent is alleging that Petitioner failed to submit sufficient, reliable evidence to support the claimed "differentiation." See MCL 205.22(1) and *Toaz v Dep't of Treasury*, 280 Mich App 457, 462; 760 NW2d 325 (2008).

attributable to those transactions.[39] Respondent also contends that Respondent conducted a sales tax audit of Garfield Mart for the tax periods beginning July 1, 2007 through June 30, 2011,[40] and that (i) the audit was based on the best available evidence, as Petitioner failed to "maintain proper records such as source documentation" (i.e., Z-tapes) or submit all of the requested documentation,[41] (ii) the audit resulted in a tax deficiency, and (iii) the audit is not only presumed correct, but Petitioner also failed to rebut that presumption through the presentation of evidence.[42]

With respect to the prepaid calling arrangements, Respondent contends that (i) the prepaid calling arrangements at issue are taxable, as the applicable statutory language "encompasses and covers" both transactions,[43] (ii) the "top-up" sales are a reauthorization of an existing account or credit balance for a preexisting telephone number (i.e., authorization number),[44] (iii) the paper receipt received by the customer for either a top-up or E-PIN transaction is the "new" version of the phone card, (iv) the fact that such transactions were not in existence at the time the statute was enacted is not controlling, as the applicable statue concerns itself with what is being sold, not the method used to acquire and deliver the goods, and (v) Petitioner is responsible for any sales tax associated with the sale of these products pursuant to both the General Sales Tax Act, which imposes sales tax directly on the seller, and its contract with MARCECO, which explicitly states, "MERCHANT is responsible for the payment of all sales, use, or other taxes associated with sales of the Services."[45]

As for the audit, Respondent contends that (i) an audit requires an independent review of a taxpayer's records,[46] (ii) Respondent is not required to expand the audit to review additional documentation not previously provided,[47] (iii) the auditor looked to the vendor checks for cigarette sales because Petitioner did not provide invoices for use during the audit,[48] (iv)

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[39] See TR at p 171 and p 179.
[40] See Respondent's Exhibit R-2. See also TR at p 7.
[41] See TR at p 7, pp 103-6, pp 150-160, and pp 180-2. See also Respondent's Exhibit R-2.1, R-2.2, and R-2.6.
[42] See TR at p 7 and p 182.
[43] See TR at pp 179-180.
[44] See TR at p 179.
[45] See Attachment No. 3 to Respondent's Motion at pp 4-6 and pp 7-8. See also Attachment No. 6 to Respondent's Motion under Section 2.3 *End User Customer Relationship* and Respondent's Exhibit R-2.7.
[46] See TR at p 180.
[47] See TR at pp 180-2.
[48] See TR at p 181. See also Respondent's Exhibit R-2.2 and R-2.3.

Petitioner's only witness testified that the cigarette sales netted a mark-up of at least 10 percent,[49] and (v) Petitioner's general objections and hypothetical arguments about what could have been or what should have been isn't based on evidence and doesn't refute the validity of the assessment.[50]

RESPONDENT'S ADMITTED EXHIBITS[51]

R-1 Copy of Treasury Final Assessment issued to Petitioner and dated June 10, 2014.
R-2 Copy of Treasury Audit Report and Findings for subject audit.
R-3 Copy of Treasury Audit Schedules for subject audit dated June 24, 2014.
R-4 Copy of Treasury Supplemental Audit Schedules for subject audit dated June 24, 2014.
R-5 Copy of Treasury Tax Compliance Information and Document Request dated January 30, 2012, indicating receipt of some of the information and documents requested on February 2, 2012, with explanation as to the information and documents provided.
R-6 Copy of Treasury Tax Compliance Information and Document Request dated May 2, 2012, indicating that the requested information and documents [were] "never received."
R-7 Copy of Treasury Tax Compliance Information and Document Request dated August 10, 2012, indicating receipt on August 29, 2012, and August 30, 2012, of the requested documents.
R-8 Copy of Treasury document reflecting records (i.e., documents) received and return of those records dated September 8, 2011, and May 1, 2012.
R-9 Copy of receipt issued by Petitioner and dated June 26, 2015, for purchase of AT&T PIN number.
R-10 Copy of receipt issued by Petitioner and dated October 21, 2012, indicating "Transaction ID" for Boost Top "product."
R-11 Copy of document entitled "MARCECO LTD Prepaid Services Rider" signed by Mr. Cheema and dated June 6, 2007.
R-12 Copy of Petitioner's 2007 State "Annual Return for Sales, Use and Withholding Taxes" dated March 9, 2008.
R-13 Copy of Petitioner's undated 2008 State "Annual Return for Sales, Use and Withholding Taxes" with notification indicating receipt on January 16, 2009.
R-14 Copy of Petitioner's undated Amended 2008 State "Annual Return for Sales, Use and Withholding Taxes" indicating receipt by Treasury on January 30, 2009.
R-15 Copy of Petitioner's undated 2009 State "Annual Return for Sales, Use and Withholding Taxes" with notification indicating receipt on April 30, 2010.
R-16[52] Not provided.

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[49] See TR at p 181.
[50] See TR at p 182. See also Respondent's Exhibit R-2.8.
[51] The parties stipulated to the admission of Respondent's exhibits. See TR at pp 4-5. Further, Respondent's audit documents indicate that they were prepared alternatively by Ms. Johnson and Sarah McGraw. Ms. Johnson and Ms. McGraw are the same person as Ms. McGraw's last name was changed to Johnson as a result of a marriage during the course of this matter. See TR at p 103.
[52] Although Respondent's Exhibit List indicates the submission of 17 exhibits, only 16 exhibits were submitted. More specifically, Respondent did not submit Respondent's Proposed Exhibit 16 - Petitioner's "2010 Tax Return." Rather, Respondent marked the "Theft Reports" as Exhibit 15 and 15.1 and submitted them under Tab 16. Further, Respondent also marked its Proposed Exhibit 15 (Petitioner's "2009 Tax Return") as Exhibit 16 and submitted that

R-17 Copies of Police Report Number 08-02492 dated February 4, 2008, entitled "Detail of Loss" and "Affidavit of Acceptance" signed by Emily Alderton and dated August 13, 2010.

RESPONDENT'S WITNESS

Respondent presented the testimony of Sarah Johnson, Michigan Department of Treasury Auditor. Ms. Johnson testified that: (i) the tax deficiency was based on adjustments to sales (i.e., merchandise and prepaid calling arrangements) and the food deduction,[53] (ii) the markups utilized in the audit were provided by Petitioner's accountant,[54] (iii) for merchandise sales, she reviewed purchase invoices and vendor checks, as the required and requested source documentation (i.e., Z-tapes) and inventory logs were not provided and, based on that review, the sales were understated by 35%,[55] (iv) cigarette purchases were higher than cigarette sales, as the sales were not higher than the purchases based on the mark-up percentage provided by the accountant,[56] (v) for the top-up and EPIN transactions, she reviewed bank statements from 2007 through 2009 and purchase information from MARCECO and then applied the markup provided by MARCECO,[57] (vi) for the food deduction, she applied a "markup allowance" (i.e., 32.2359%) to the food percentage of purchases to determine the food percentage of sales that was then multiplied by the net merchandise sales to determine that the calculated food deduction was less than what was reported by Petitioner,[58] (vii) she reviewed Petitioner's "theft" documentation and did not adjust the audit for either incident as the first incident did not occur during the sample period and related to property damage, loss of cash, and an estimate of the "unaccounted cigarette inventory" and the second incident was a theft of cash and not merchandise,[59] (viii) the sample period covered the three month period of February, March and April of 2010, based on the use of a random number generator and Petitioner's request for a three month sample period, rather than the typical two month sample period,[60] (ix) her cigarette determinations were "net" of

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exhibit under Tab 15. Although marked as Exhibit 16, the exhibit will be treated as Exhibit 15. As for the Theft Reports, there is no Tab 17. Nevertheless, that exhibit, although marked at Exhibit 15 and 15.1, and submitted under Tab 16 will still be treated as Exhibit 17.

[53] See TR at p 101.
[54] See TR at p 102. See also TR at p 137.
[55] See TR at pp 105-6. See also TR at pp 107-8 and p 123.
[56] See TR at pp 106-7.
[57] See TR at p 108.
[58] See TR at pp 109-110. See also TR at pp 117-122.
[59] See TR at pp 111-2.
[60] See TR at p 112.

the manufacturer rebates (i.e., "buy-down payments"),[61] (x) if the markup were 10% and not 13%, that would change the computations she made in determining the deficiency,[62] (xi) based on the information provided by the vendor checks, she was able to determine that cigarettes were purchased during the month reflected by the check, but not whether the cigarettes were purchased on the 1st or 30th of that month and they sample consecutive months to reduce any "timing differences,"[63] (xii) the 2% undocumented shrinkage/theft allowance currently applied to audits was not applied to the audit at issue, as that procedure was not in effect at the time of the audit,[64] (xiii) she used the term "phone cards" in her audit because it "is the generic term we use to include phone minutes – airtime minutes, calling authorizations,"[65] (xiv) she relied on the invoices provided for the sample period and not the general ledger provided, as she found the general ledger to be unreliable,[66] (xv) Petitioner's failure to collect sales tax on its top-up and E-PIN sales was a factor, but not the sole factor, in her penalty recommendation,[67] (xiv) even if a taxpayer had "good" internal controls, she would still follow the same audit procedure,[68] (xvii) she did not meet with Petitioner's accountant during the audit, but she did contact him when she needed information,[69] (xviii) she did, however, meet with Petitioner's accountant to review the completed audit and offered to review a purchase spread for all of 2010 if provided and no such purchase spread was provided,[70] (xix) Petitioner did not provide police reports evidencing theft, inventory logs, general ledgers other than the general ledger for 2010, Z-tapes, or the exhibits offered by Petitioner for admission and she would have reviewed that documentation,[71], and (xx) it was not part of their procedures to do another sampling if there was a 15% variance in the merchandise adjustment.[72]

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[61] See TR at pp 114-7.
[62] See TR at pp 116-7.
[63] See TR at pp 122-8.
[64] See TR at pp 128-131.
[65] See TR at pp 133-4.
[66] See TR at pp 134-5.
[67] See TR at pp 135-7.
[68] See TR at pp 137-8.
[69] See TR at pp 141-2.
[70] See TR at pp 143-4.
[71] See TR at pp 150-160
[72] See TR at p 159.

FINDINGS OF FACT

The following facts were proven by a preponderance of the evidence:

1. The petition indicated that Petitioner was contesting the entire amount of the taxes levied by Respondent and Petitioner did not pay any of the taxes levied.
2. Petitioner did not "concede" that the prepaid calling arrangement transactions relating to E-PINs were taxable, as Petitioner consistently contended that neither transaction (i.e., top-up or EPIN) was covered by the applicable statutory language.
3. Petitioner did not submit evidence relative to the audit to support its original claim that no sales tax, penalty or interest was warranted. Rather, the evidence submitted merely raised questions regarding the need and accuracy of the audit based on Petitioner's "internal controls"; theft from the Store; Respondent's use of purchase-based estimates; Respondent's purported use of "improper markups"; Petitioner's perception of a "personality difference" between Respondent's auditor and Petitioner's designated representative, Ashraf Boules; and the size of the "variance" determined by the audit.
4. The top-up and EPIN transactions resulted in the addition of minutes of the customers' prepaid cellular telephones. The minutes were added automatically by the cellular telephone service provider (i.e., Boostmobile, etc.) in the case of a top-up transaction or added by the service provider (i.e., AT&T, etc.) after the customer contacted the service provider by telephone and inputted the pin number provided by an EPIN transaction.
5. The purported "receipt" issued by the MARCECO terminal was a paper prepaid telephone card evidencing the type of transaction (i.e., top-up or EPIN), which was utilized to enforce the top-up transactions, if necessary, or finalize the EPIN transactions.
6. Petitioner was responsible for the payment of sales taxes on the top-up and EPIN transactions.
7. Petitioner did not submit the source documentation (i.e. Z-tapes) or all of the documentation requested by Respondent and the documentation provided, specifically the 2010 general ledger, contained certain unexplained discrepancies that rendered portions of that documentation unreliable.
8. The markups utilized in the audit were provided by Petitioner. Further, Petitioner did not rely on the retail prices suggested by its suppliers and made a profit from its sales of cigarettes.
9. Respondents reliance on purchase information (i.e., invoices, vendor checks, etc.) was appropriate in the conducting of the audit, as said documentation was the best information available.
10. Petitioner failed to submit sufficient and reliable documentation (i.e., test samples, etc.) to rebut the presumption of correctness attributable to the audit.

ISSUES AND CONCLUSIONS OF LAW

Under the GSTA, a person engaged in the business of making sales at retail, "by which ownership of tangible personal property is transferred for consideration," is subject to "a tax equal to 6% of the gross proceeds of the business . . . less deductions allowed."[73] Further, a person liable for sales tax has a duty to keep accurate and complete "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."[74] [Emphasis added.]

In resolving Petitioner's appeal, the Tribunal must determine: (1) the Tribunal's authority over the appeal given Respondent's allegation that Petitioner was not appealing the entire amount of the taxes at issue and failed to pay the "uncontested debt" before filing its petition, (2) the taxable status of Petitioner's prepaid "top-up and EPIN" calling arrangements, and (3) the need for and accuracy of the audit conducted by Respondent.

As for the first issue, Respondent contends that Petitioner conceded that its EPIN transactions are taxable and argues that the case should be dismissed because the Tribunal lacks subject matter jurisdiction given Petitioner's failure to pay the taxes attributable to the uncontested portion of the assessment at issue prior to the filing of its petition. In that regard, MCL 205.22(1) states, in pertinent part:

> A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the **contested portion** of the assessment, decision, or order to the tax tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision, or order. The **uncontested portion** of an assessment, order, or decision **shall be paid as a prerequisite to appeal**. [Emphasis added.]

Notwithstanding the fact that Petitioner has not conceded that its EPIN transactions are taxable, a dismissal of the case for lack of subject-matter jurisdiction would be inappropriate given "nature of the case and the type of relief sought."[75] Rather, the appropriate question is whether Petitioner properly "invoked" the Tribunal's subject matter jurisdiction, as indicated by both Petitioner's original claim and the prosecution of that claim, as Petitioner was, in fact,

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[73] See MCL 205.52(1).
[74] See MCL 206.68(1).
[75] *Black's Law Dictionary* (10th ed 2014).

required to "discharge the uncontested tax debt," if any, prior to the filing of its petition.[76] As a point of reference, taxpayers have in the past filed petitions claiming that no tax is "warranted" so to avoid paying any taxes even though there was an uncontested tax debt.

In the instant case, Petitioner did allege in its petition that "no sales tax, penalty or interest . . . is warranted." Said allegation was, however, principally directed at Petitioner's sales of prepaid top-up and EPIN calling arrangements and it is, in fact, arguable that Petitioner was not contesting the entire amount of the assessment at issue given Petitioner's pre-trial identification of potential witnesses, the identified witnesses' proposed testimony, and Petitioner's failure to present testimony or documentation to rebut, rather than merely question, Respondent's audit.[77] Nevertheless, Petitioner did present evidence to refute the need for the audit (i.e., "good internal controls," etc.) and said attempt, although ineffective, was, under the circumstances of this case, sufficient to support Petitioner's original claim and prosecution of that claim.

With respect to the second issue, Petitioner contends that its top-up and EPIN transactions are not taxable as the technology for its top-up and EPIN transactions did not exist at the time the GSTA was amended to provide for the taxation of prepaid telephone calling cards or prepaid authorization numbers and, as a result, the Legislature could not have intended to "cover" those transactions. In support of that contention, Petitioner also contends that other States with similar statutes had to amend those statutes to provide for the taxation of such transactions. The actions of other States are, however, irrelevant. Rather, the Tribunal must, in determining whether the transactions are covered, "ascertain the intent of the Legislature" by "focusing" on the plain language of the statutory provision in question and reading that language "in relation to the statute as a whole" (i.e., placement and purpose) so that the "contested

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[76] See *Toaz v Dep't of Treasury*, 280 Mich App 457, 462; 760 NW2d 325 (2008). See also the unpublished opinion *per curiam* issued by the Michigan Court of Appeal in *Bonar v Treasury* on May 30, 2013 (Docket No. 310707).
[77] See Petitioner's August 27, 2015 Prehearing Statement, Section VIII – Witnesses and TTR 237(3). In that regard, Petitioner listed its accountant, Ashraf Boules, as a potential witness and the offering of Mr. Boules as a witness would have been appropriate given his role in the audit (i.e., Petitioner's representative with power of attorney), specifically with respect to his provision of the markups utilized by Respondent, his failure to provide all of the documentation requested by Respondent, and, more importantly, to explain the discrepancies found in the documentation provided, as said documentation was prepared by him.

provision" and the statute "work in mutual agreement."[78] Further, if the language is "unambiguous," the statute "must be enforced as written." In that regard, the statutory provision in question provides, in pertinent part:[79]

> The tax under subsection (1) also applies to the following . . .
>
> (b) The sale of a **prepaid telephone calling card** or a **prepaid authorization number** for telephone use, rather than for resale, including the **reauthorization** of a prepaid telephone calling card or a prepaid authorization number. [Emphasis added.]

As such, the Tribunal must determine whether the top-up or EPIN transactions resulted in the sale of prepaid telephone calling cards, prepaid authorization numbers, or the reauthorization of prepaid authorization numbers.[80] The terms "prepaid telephone calling card" and "prepaid authorization number" are not defined by the GSTA and, as a result, the Tribunal "may look to a dictionary for interpretative assistance."[81]

After reviewing lay and legal dictionaries, the most reasonable interpretation for the term "prepaid telephone calling card" would be a piece of paper, cardboard, or plastic given to a customer in exchange for money that contains information that can be used for telephone calls or telephone service (i.e., minutes).[82] While the most reasonable interpretation for the term "prepaid authorization number" would be a series of numerals given to a customer in exchange for money that can be used for telephone calls or telephone service (i.e., minutes).[83] As for the context

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[78] See *Spartan Stores, Inc v City of Grand Rapids*, 307 Mich App 565, 569; 861 NW2d 347 (2014) *appeal denied*, 498 Mich 932; 871 NW2d 203 (2015). See also *US Fidelity & Guarantee Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009).

[79] See MCL 205.52(2).

[80] Neither transaction would result in the reauthorization of a prepaid telephone calling card, as further indicated herein.

[81] See *Spartan, supra* at 574-5. Although the Tribunal may, given the unique legal nature of the terms and the fact that the terms are located in a complicated taxing statute, "use a legal dictionary as opposed to a lay dictionary," neither set of dictionaries specifically address the terms. Rather, both sets only address certain component parts of the terms. Nevertheless, the definitions provided by both support the definitions indicated herein.

[82] See the definitions of "card" (a flat stiff usually small and rectangular piece of paper, cardboard, or plastic bearing information) "pay" (to give money to in return for goods or service), "phone call" (a prepaid card or credit card that can be used to pay for telephone calls), and "pre" (earlier, before, or prior to) in the *Merriam-Webster Dictionary*, 2015 Merriam-Webster, Inc. See also the definitions of "prepaid card" or "stored-value card" (the consumer uses the card rather than paper currency to purchase goods and services) in *Black's Law* (10th ed 2014).

[83] See the definition of "authorization" (something that authorizes, a sanction), "authorize" (to give permission for, sanction), "number" (a numeral or series of numerals used for reference or identification), and "re" (i.e., again, anew) in the *Merriam-Webster Dictionary*. See also the definition of "authorization" (official permission to do something, sanction or warrant) in *Black's Law*.

within which those terms should be read, "prepaid calling service" was taxed under the Use Tax Act until the GSTA and Use Tax Act were amended in 1997 to provide for its taxation under the GSTA and exemption under the Use Tax Act.[84] Although Petitioner is correct in its assertion that "tax statutes are to be construed in favor of the taxpayer and against the government" and that "the scope of tax laws may not be extended by implication or forced construction,"[85] Respondent's proposed construction is neither forced nor extends the scope of the contested language by implication. More specifically, both Petitioner and Respondent's Hearing Referee mistakenly focus on the methodology by which the transactions are accomplished (i.e., through a terminal and not a physical inventory of cards) and not the underlying transactions themselves (i.e., the purchasing of prepaid calling services or, more specifically, the purchasing of minutes to allow further use of the prepaid cellular telephone utilized to complete the transaction), as the underlying transaction are clearly taxable under the plain language of the statute. In that regard, MARCECO acknowledges that it "jumped to the forefront" in accomplishing these transactions by providing a "virtual inventory" and "virtual distribution" of prepaid telephone cards.[86] The fact that the paper prepaid telephone calling cards[87] provided by MARCECO's terminal are not utilized in the same fashion as the previous plastic prepaid telephone calling cards is irrelevant, as the use of both sets of cards ultimately resulted in authorized telephone usage.

Notwithstanding the recognition of these transactions as resulting in the issuance of paper prepaid telephone calling cards, it is also arguable that the transactions result in the reauthorization of a prepaid authorization number.[88] More specifically, the customers are required to have a prepaid cellular telephone to complete each transaction, as the number assigned to or otherwise authorizing the use of that telephone must be inputted to effectuate the

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[84] See 1997 Public Act 193 providing for the taxation of prepaid calling services and 1997 Public Act 194 exempting those services. See also MCL 205.93a(1)(a) and (c), 205.93b, and 205.94.

[85] See *GTE Sprint Communications Corp v Dep't of Treasury*, 179 Mich App 276, 279-80, 445 NW2d 476 (1989).

[86] See Petitioner's Exhibit P-2 and Exhibit B attached to Petitioner's Reply Brief under *Summary of the Invention*. See also Footnote 3 in *GTE Sprint Communications Corp*, *supra* at 283.

[87] Although the parties both refer to the paper document provided by MARCECO's terminal as a "receipt," the actual receipt is issued by Petitioner's cash registers when the customers pay for their purchase of minutes. Rather, the paper documents issued by MARCECO's terminal are paper prepaid telephone calling cards evidencing the type of transaction (i.e., top-up or EPIN), which can be utilized to enforce the top-up sales, if necessary, and are utilized to finalize the EPIN transactions through the use of the pin number or access code on the paper prepaid telephone calling card.

[88] It is also arguable that the pin number or access code issued as the result of an EPIN transaction is a prepaid authorization number, as the customer is required to utilize that number to finalize the EPIN transaction by contacting the telephone service provider, as indicated on the "receipt" or paper prepaid telephone calling card.

sale of additional minutes to that telephone. As such, the telephone number is a prepaid authorization number that is utilized for the purpose of reauthorizing the further use of that prepaid authorization number.

As for Petitioner's reliance on the "Legislative Analysis" issued in conjunction with the amendment to the GSTA, said reliance was unnecessary and misplaced. More specifically, the statutory provision at issue is not, as indicated above, ambiguous and such analyses are entitled to little judicial consideration as they do not "officially summarize [legislative] intentions."[89] Nevertheless, the "Legislative Analysis" at issue does not, in fact, "only refer to a card's use to make long distance telephone calls." Rather, the "Legislative Analysis" actually supports the taxation of the transactions at issue. In that regard, the "Legislative Analysis" provides, in pertinent part:

> The use of prepaid calling cards or authorization numbers has become a **popular way** to make long distance calls. Calling cards are essentially **telephone debit cards, through which a certain amount of telephone service is purchased in advance**. While there are **several types** of prepaid calling cards, the standard cards generally are sold in retail outlets such as convenience stores. To make a call, the cardholder dials an 800 number and is connected to the telecommunications carrier's "software platform." A voice response unit prompts the cardholder to enter an **identification number** contained on the card, and **notifies the cardholder of the card's expiration date and the amount of calling time available**. The cardholder then dials his or her desired telephone number or waits for an operator to complete the call.
>
> Prepaid authorization numbers function similarly, **without** the involvement of a card. **A customer may purchase a certain amount of calling time by phoning a telecommunications provider or other seller** (who may have purchased a block of time for resale). The customer pays for the service with a credit card and receives **an access code** to dial when using the purchased service. [Emphasis added.][90]

Finally, Petitioner further contends that it is an agent of the seller (i.e., MARCECO) and the seller is, if necessary, responsible for the payment of the sales tax attributable to these

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[89] See *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 116-17; 659 NW2d 597 (2003) and *In re Certified Question, supra*, footnote 5 at 115.

[90] The "identification number" entered is the telephone number of the customer's prepaid cellular telephone and the "receipt" or the paper prepaid telephone calling card issued by the MARCECO terminal indicates the transaction or confirmation number, the amount of the sale and informs the customer that additional information regarding the purchase can be obtained by contacting the telephone service provider and providing the confirmation or transaction number.

transactions and not Petitioner. Said contention is not, however, supported by Petitioner's own evidence, as said evidence specifically indicates that Petitioner was responsible for the payment of the sales tax at issue.[91]

With respect to the final issue, the fact that Petitioner may have "good internal controls" is irrelevant for purposes of determining whether an audit was required. Rather, the issue is whether Petitioner's recordkeeping was in compliance with the requirements of law. In that regard, Petitioner did not submit to Respondent all of the records it requested and the records submitted were incomplete and unreliable, particularly in light of Petitioner's failure to retain required source documentation (i.e., Z-tapes or, more specifically, daily sales receipts).[92] As a result, Respondent lacked necessary information to verify if Petitioner had collected the amount of required sales tax and the lack of such information justifies Respondent's use of Petitioner's purchase invoices and the markups provided by Petitioner's representative (i.e., "the best information available") to determine the amount of Petitioner's liability.[93] Although Petitioner could have offered the requested records, other business records, or test samples for admission to demonstrate that the audit or sampling was inaccurate,[94] Petitioner did not offer such information or Petitioner's representative as a witness to explain why the requested records were not provided or, more importantly, how the records submitted were prepared and the basis of the discrepancy, if any, between the markups purportedly provided by Petitioner to its representative and the markups provided by the representative to Respondent, as Petitioner's representative was responsible for the preparation of those records and the providing of the information utilized in the audit. Rather, Petitioner offered as its sole witness its store manager and Mr. Ahmad's testimony and the few invoices submitted were insufficient for the Tribunal to determine what modifications, if any, should have been made to the assessment, particularly given the prima facie correctness of the audit.[95]

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[91] See Petitioner's Exhibit P-3.

[92] Although Petitioner argues that information from the Z-tapes was entered into a daily spreadsheet maintained by Petitioner, that issue was addressed in the unpublished opinion by the Michigan Court Appeals in *Plum Hollow Market Inc v Dep't of Treasury* issued on October 16, 2012 (Docket No. 305505). In that case, a similar spreadsheet containing daily sales information was found by the Tribunal not to be a reliable substitute for the required Z-tapes and the Tribunal's finding was upheld by the Court of Appeals.

[93] See *Vomvolakis v Dep't of Treasury*, 145 Mich App 238, 244-5, 377 NW2d 309 (1985)

[94] See *By Lo Oil Co v Dep't of Treasury*, 276 Mich App 19, 43; 703 NW2d 822 (2005).

[95] See *Vomvolakis, supra* at 245. See also the unpublished opinion issued by the Court of Appeals in *BF Enterprises, Inc v Dep't of Treasury* on October 28, 2014 (Docket No. 317278).

As for Respondent's purported lack of cooperation and unsupported inference of a "personality difference" between the auditor and Petitioner's representative, the auditor submitted multiple document requests to Petitioner's representative and agreed, at his request, to include a third month in the sampling even though such samples generally only cover two months. The auditor also informed Petitioner's representative in response to his objections to the completed audit that she would review the audit based on a sampling for the entire year if done by Petitioner and no such sampling was provided. Although Petitioner alleges that the auditor should have prepared that sampling herself, involved Petitioner in the on-going preparation of the audit report, or conducted another audit based on additional information given the amount of the discrepancy, Petitioner had no right to choose the audit method employed by Respondent and Respondent provided Petitioner with notice and an opportunity to information for the conducting of the audit.[96]

Finally, Petitioner's purported theft issues were, as indicated by Ms. Johnson's credible testimony, properly considered and addressed by Respondent in the conducting of the audit. As for the levied penalty, Petitioner's claim that it was not responsible for the payment of sales taxes on the top-up or EPIN transactions or that it was not aware that it was required to maintain complete daily sales records is neither supported by the record nor justifies a waiver of the levied penalty.

Based on the above, the Tribunal concludes that the assessment at issue is as indicated in the Introduction Section of this Proposed Opinion and Judgment (POJ).

PROPOSED JUDGMENT

This is a proposed decision and not a final decision. As such, no action should be taken based on this proposed decision until a final decision is issued by the Tribunal.

After the expiration of the time period for the opposing party to file a response to the exceptions, the Tribunal will review the case file, including the POJ and all exceptions and responses, if any, and:

1. Issue a Final Opinion and Judgment (FOJ) adopting the POJ as the final decision.
2. Issue an FOJ modifying the POJ and adopting the Modified POJ as the final decision.
3. Issue an Order vacating the POJ and ordering a rehearing or such other action as is necessary and appropriate.

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[96] See *By Lo Oil Co, supra* at 30 and 42-3.

EXCEPTIONS

This POJ was prepared by the Michigan Administrative Hearings System. The parties have 20 days from date of entry of this POJ to notify the Tribunal **in writing, by mail or by electronic filing, if available,** if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions).

Exceptions are **limited** to the evidence submitted prior to or at the hearing and any matter addressed in the POJ. There is no fee for filing exceptions and the opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions. Exceptions and responses filed by *e-mail or facsimile* will **not** be considered in the rendering of the Final Opinion and Judgment.

A copy of a party's written exceptions or response **must** be sent to the opposing party **by mail or email, if** email service is agreed upon by the parties, and proof must be submitted to the Tribunal demonstrating that the exceptions or response were served on the opposing party.

By Peter M. Kopke

Entered: March 28, 2016
pmk