STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Trettco, Inc.,
Petitioner,
v
Michigan Department of Treasury,
Respondent.

MTT Docket No. 338936

Tribunal Judge Presiding
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner appeals Respondent's Assessment No. O138157 for a use tax liability for the period September 1, 2002 through December 31, 2005. Petitioner filed a Petition with the Tribunal on June 26, 2007. A hearing was held in the above-captioned matter on August 26, 2008. Petitioner was represented at the hearing by Thomas S. Nowinski, Attorney. Respondent was represented by Amy M. Patterson and Shenique A. Moss, Assistant Attorneys General.

BACKGROUND

Petitioner is a food service management company headquartered in Farmington Hills, Michigan. Petitioner provides management personnel and services to kitchens and cafeterias owned by corporations, schools, and hospitals, as well as assisted living, retirement, and nursing homes. Respondent assessed Petitioner for use tax. Petitioner asserts that it is exempt from the use tax pursuant to MCL 205.94.

Respondent conducted an audit of Petitioner for the period September 1, 2002 through December 31, 2005 and determined a use tax deficiency of $416,290. Petitioner requested an informal conference but subsequently withdrew that request on June 6, 2007. Respondent issued Final

Assessment No. O138157 on June 20, 2007. Respondent later reduced the final assessed use tax deficiency from $416,290 to $340,213.35.

The tax, interest, and penalties due as assessed by the Michigan Department of Treasury in Assessment No. O138157 are:

Tax	$340,213.45
Interest*	$*
Penalty	$0

*Interest accruing and to be computed in accordance with §§ 23 and 24 of 1941 PA 122.

PETITIONER'S CONTENTIONS

Petitioner offered the following exhibits, which were admitted:

1. Exhibit P-1: Letter to Mr. Benjamin Holderied from George A. Cousins dated October 7, 1980.
2. Exhibit P-2: Agreement between Crittenton Hospital and Hospital Dietary Service, Inc. dated April 9, 1976.
3. Exhibit P-3: Letter from B.C. Holderied to George A. Cousins dated October 10, 1980.
4. Exhibit P-4: Letter from B.C. Holderied to George A. Cousins dated October 10, 1980.
5. Exhibit P-5: Agreement between McAuley Center and HDS Services dated July 9, 2003.
6. Exhibit P-6: Audit Report of Findings dated March 3, 2008.
7. Exhibit P-7: Invoice from Cadillac Coffee Co.
8. Exhibit P-8: Invoice from Cochran Bros. Distributors Inc.
9. Exhibit P-10: Deposition transcript of William P. d'Hondt dated August 5, 2008.

Exhibits P-1, P-2, P-3, P-4, P-5, P-6, and P-10 were admitted without objection. Respondent's objections to Exhibits P-7 and P-8 were overruled and the exhibits were admitted for the limited purpose of showing general business practices. Respondent's objection to Exhibit P-9, an invoice from Sysco, was sustained as the exhibit was not legible.

Petitioner is a Michigan Corporation "engaged in the business, among others, of managing food services for institutional and corporate clients."[1] Petitioner provides its services to tax-exempt clients pursuant to written agreements between Petitioner and clients. During the period audited, Petitioner "had food services management agreements with 69 clients whose purchases of tangible personal property on their own behalf would be exempt from use tax under MCL 205.94."[2]

Petitioner offered the testimony of George A. Cousins, an employee of Petitioner from November 1973 through June 2005. Mr. Cousins was "vice president and treasurer" [3] of Trettco at time of his retirement. Mr. Cousins testified that his undergraduate education was as an "accounting major . . . [with] a graduate degree in management, masters in management."[4] Mr. Cousins is a CPA, a certified management accountant, and is certified in financial management.[5]

Mr. Cousins testified that a majority of Petitioner's "clients are tax-exempt . . . [such as] hospitals, nursing homes, assisted-living facilities, retirement facilities . . . [and] schools."[6] Petitioner requires that a client file a copy of their state issued tax-exempt form with the contract. Mr. Cousins further testified that Petitioner has clients that are not tax-exempt, a "category of business and industry, like an employee cafeteria in an office building or a small factory

[1] Joint stipulation of facts p 2
[2] Joint stipulation of facts p 2
[3] Transcript p 9, ll 18-20
[4] Transcript p 10, ll 6-12
[5] Transcript p 10, ll 9-12
[6] Transcript p 11, ll 3-9

cafeteria."[7] Mr. Cousins testified that the business and industry clients, "all that client is concerned about is that their . . . employees are happy . . . it . . . [is] an employee benefit and for convenience."[8] That client's objective is that "it doesn't subsidize-wise cost their employer too much money."[9]

In the "health care industry, . . . the client there is very concerned about what happens . . . [t]hey're actually involved . . . they have as much control over that department as they have any other department."[10] Mr. Cousins testified that for these clients Petitioner is "charged with the responsibility, as they would be, to purchase the food product, order the food product, so forth, have it delivered to that client location, and train and manage their employees to see that the food product is produced and delivered to the patients." [11]

Mr. Cousins testified that at the beginning of a relationship with a client, Petitioner "estimates what the monthly cost of that food service is going to be; food supplies, labor and so forth,"[12] and clients pay that in advance. On a monthly basis, Petitioner provides each client "a monthly statement that shows the food . . . labor and supplies . . . [w]e don't warehouse anything. We don't mark up anything. It's whatever the invoice cost is. That's what's charged to the client, and then we add the fee, and then we reduce it by the advance."[13] With some clients, at their request, Petitioner may use a per diem arrangement, adjusted at the end of the fiscal period, and "instead

[7] Transcript p 11, l 23- p 12, l 1
[8] Transcript p 12, ll 7-13
[9] Transcript p 12, ll 18-19
[10] Transcript p 12, ll 22- p 13, l 4
[11] Transcript p 13, ll 8-13
[12] Transcript p 14, ll 9-11
[13] Transcript p 14, l 22- p 15, 1 4

of settling up monthly, we settle up annually."[14] A rate is established and billing is determined by "the per diem rate times the census monthly . . . ."[15]

Mr. Cousins testified that "none of the [food] is on our books as inventory. In the case of food, it's on our account as unbilled receivable because . . . we charge the client on the operating statement for the food consumed because that relates to the volume of food served . . . ."[16] The "beginning inventory and the most recent ending inventory is reconciled and adjusted on the final billing for the client."[17]

Mr. Cousins testified regarding Respondent's 1973 sales and use tax audit of Petitioner. Mr. Cousins asserts that "the outcome was unfavorable . . . [because] we had a contract that said all the wrong things. It did not really reflect the relationship with the client,"[18] as the contract "referred to us specifically as an independent contractor."[19] Petitioner "restructured the contract to have it conform to what we understood the operation to, in reality, be."[20]

Mr. Cousins identified Exhibit P-1 as a letter from Petitioner to Respondent's Deputy Revenue Commissioner "asking him to give us a position on the contract that we had revised."[21] The letter states that Mr. William Burr, an auditor for the Department, "has acknowledged the existence of

[14] Transcript p 16, l 12
[15] Transcript p 16, l - p 1, l 1
[16] Transcript p 18, l 23- p 19, 1 5
[17] Transcript p 19, ll 20-22
[18] Transcript p 20, ll 17-20
[19] Transcript p 20, ll 24-25
[20] Transcript p 22, ll 17-19
[21] Transcript p 23, ll 14-17

an agency relationship between Hospital Dietary Service, Inc. and its clients as described by the language in our standard contracts currently in effect."[22] The letter further requested "written acknowledgment of the Department's position with respect to these agreements."[23]

Mr. Cousins identified Exhibit P-2 as a contract between Petitioner and Crittenton Hospital. The contract includes the provision that "all inventory of the hospital's foodstuffs and merchandise is the property of the hospital at the instant of purchase of such by HDS (Petitioner's former d/b/a) as agent for the hospital."[24] Mr. Cousins testified that the provisions were "representative of the changes that were made to the [standard] contract."[25] Mr. Cousins contended that there was not any independent contract language in the standard form of contract used by Petitioner.

Mr. Cousins read from Exhibit P-3, a letter from Respondent's Deputy Revenue Commissioner which stated "In review of the agreement between Crittenton Hospital, . . . and Hospital Dietary Service indicates an agency relationship exists for the operation of the dietary and food services at the hospital . . . the Department will consider your firm to be acting as agency for Crittenton Hospital."[26] Mr. Cousins identified Exhibit P-4 as a letter from Respondent's Deputy Revenue Commissioner, which "reads the same except for the name of Triplett Services[27] and Boulevard United Temple.[28]

[22] Transcript p 24, ll 1-7
[23] Transcript p 24, ll 17-19
[24] Transcript p 26, ll 17-20
[25] Transcript p 26, ll 4-6
[26] Transcript p 28, ll 3-12
[27] A separate entity created in 1973 by Mr. Triplett for non health care clients
[28] Transcript p 28, ll 20-22

With the exception "the one assessment that had to be paid as a result of the 1979 decision… there was no assessment for these kinds of transactions during Mr. Burr's audit or any subsequent one, actually, until the recent audit."[29] Mr. Cousins testified that Petitioner was audited subsequent to the 1979 decision "two times that I can think of."[30] Petitioner was not assessed any use tax for purchases for tax-exempts in any of those prior periods.[31]

Mr. Cousins testified that Petitioner did "collect and remit [the] tax on cafeteria consumables."[32]

Mr. Cousins was asked to review Exhibit P-6, the audit report for subject assessment, and compare that document to Exhibit P-5, Petitioner's contract with the McAuley Center. Mr. Cousins noted that the contract includes the phrase "as agent for the Center"[33] which was not included in the audit report when quoting the contract.[34] Mr. Cousins further testified that the audit report statement that "HDS's management receives the vendor's shipment and invoices with HDS stipulated as the ship to and sold to on the invoice for the product/services delivered,"[35] is not an accurate description of the process. Petitioner always instructs its suppliers "to bill it in the name of the client organization in care of HDS services."[36] Mr. Cousins was asked to read from page three of the audit which states that "if a client wants to review or audit their units, records, and source documents, they must travel to HDS corporate headquarters . . .

[29] Transcript p 29, ll 20-22
[30] Transcript p 31, l 12
[31] Transcript p 31, ll 23-24
[32] Transcript p 33, ll 10-11
[33] Transcript p 37, ll 24-25
[34] Transcript p 37, ll 22-23
[35] Transcript p 38, ll 6-9
[36] Transcript p 38, ll 12-14

."[37] Mr. Cousins testified that that is not accurate as "12-month rolling copy of . . . invoices . . . come with the product . . . [and] [t]hey're maintained there [at the client's place of business]. "[38]

On cross-examination, Mr. Cousins testified that Petitioner is a for-profit business.[39]

Petitioner offered the testimony of Jerry L. Fournier. Mr. Fournier was "hired to be the assistant manager and assigned at Crittenton Hospital."[40] Mr. Fournier "eventually became executive vice president of Trettco, Incorporated."[41] Mr. Fournier testified that the services provided by Petitioner benefited its clients by saving the client money and "improving their [food services] quality"[42] Mr. Fournier testified that part of his job was to describe Petitioner's program assuring clients "that they weren't going to lose control and they were going to save money and they were going to improve their quality.…"[43] The manager would recommend vendors and "the [client] administrator would say, okay, fine, or, no, I would like to use this vendor . . . ."[44] When a manager was placed with a client, that manager "had to fit in with their policies and procedures, their work rules, you know and basically they set those policies and we helped manage the facilities along those lines."[45] Mr. Fournier testified that "we tried to be invisible . . . oftentimes the badge I would wear at Crittenton, would say Crittenton Hospital with my name on it. It

[37] Transcript p 39, ll 7-10
[38] Transcript p 39, ll 18-19
[39] Transcript p 43, ll 14-15
[40] Transcript p 51, ll 22-23
[41] Transcript p 52, ll 5
[42] Transcript p 53, l 3
[43] Transcript p 53, ll 18-21
[44] Transcript p 54, ll 3-5
[45] Transcript p 54, ll 12-15

wouldn't say Trettco or HDS."[46] To determine who would fill management positions, the assigned manager "would present resumes or we would say the existing management employees would be a candidate for those jobs. I explain why we felt they would be qualified, and then the [client's] administrator would have the final say."[47]

Mr. Fournier testified that

> ...we had that stated in [the contract] so it was very clear that –that the merchandise was paid for up front by the client. We were acting as an agent and we never took title to it and, you know, we didn't have a warehouse that we bought food and stored it and then had it shipped in. It was coming from the vendor directly to them."[48]

When asked if the contracts contain language "about items purchased under the contract becoming the client's property at the moment of purchase," Mr. Fournier replied, "[y]es it does."[49]

On cross-examination, Mr. Fournier testified that as for Petitioner's for-profit clients, "[the purchases] were probably billed to us and sold to us."[50]

In its post hearing brief, Petitioner asserts that the written contracts between "Trettco and its clients states specifically that Trettco carries out its duties 'as agent' for the client."[51] Petitioner further asserts that Respondent's audit "attributes Trettco's purchases of tangible personal

[46] Transcript p 54, ll 18-24
[47] Transcript p 55, ll 2-6
[48] Transcript p 56, ll 11-18
[49] Transcript p 57, ll 11-14
[50] Transcript p 63, ll 4-5
[51] Petitioner's post hearing brief, p 1

property on behalf of its clients to Trettco itself, ..."[52]

Petitioner argues that "it is true that there does not appear to be any binding precedent in Michigan law on the topic of whether purchases of tangible personal property by an agent for a tax-exempt entity are shielded from sales and use tax as a result of the agency relationship. However, there is no case law whatever holding that the agency theory could not apply."[53] (Emphasis in original.) Petitioner asserts that even the case Petitioner was previously party to, *Hospital Dietary Service, Inc v Department of Treasury*, State Board of Tax Appeals Docket No. 1391 (1979), "did not hold that an agent of a tax-exempt entity was able to avail itself of the entity's exemption. It merely held that the appellant was an independent contractor, not an agent."[54] However, the Tribunal "did recognize and apply the agency concept"[55] in *Systems Parking, Inc v Department of Treasury*, MTT Docket No. 91346 (1988). In that case, the petitioner was assessed both single business tax and use tax. The Tribunal held, as to the use tax assessment, that "the intent of the parties was that of an agency relationship."[56] The Tribunal went on to state that

> all purchases here were related to the operation of the exempt public parking facilities, paid by Petitioner on [Respondent's] behalf and reimbursed by the [Respondent], were likewise made as their agent, and thereby exempt from imposition of the use tax under MCL 205.94(h) as purchases made by an exempt political subdivision in performance of its governmental function in operating a public enterprise.[57]

[52] Petitioner's post hearing brief, p 3
[53] Petitioner's Post hearing brief p 6
[54] Petitioner's post hearing brief, p 6
[55] Petitioner's post hearing brief, p 6
[56] Petitioner's post hearing brief, p 6
[57] Petitioner's post hearing brief, p 7

Petitioner contends that the decision in Systems Parking, as to the application of the agency concept to the use tax "has never been questioned."[58]

Petitioner asserts that the Michigan Supreme Court "comprehensively" defined agent in *Stephenson v Golden*, 279 Mich 734-735, 276 NW 849 (1937)[59] as "a person having express or implied authority to represent or act on behalf of another person…one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it."[60]

Petitioner contends, however, that the real issue is "who is the 'consumer' of the tangible personal property."[61] Petitioner asserts that its tax-exempt clients are the consumers of the tangible personal property,[62] and that Respondent's position that Petitioner uses, stores, and consumes the tangible personal property is made with zero factual analysis and is not true.[63]

RESPONDENT'S CONTENTIONS

Respondent offered the following exhibits which were admitted without objection:

1. Exhibit R-1: Michigan Department of Treasury, Trettco, Inc., Audit Report Findings, Use Tax Audit for period 09/01/2002 through 12/31/2005
2. Exhibit R-2: Contract between HDS Services (a division of Trettco, Inc.) and Michigan Masonic Home
3. Exhibit R-3: Contract between HDS Services and McAuley Center
4. Exhibit R-4: Contract between HDS Services and Port Huron Hospital
5. Exhibit R-5: Contract between Trettco, Inc., and the State of Michigan

[58] Petitioner's post hearing brief, p 7
[59] Petitioner's post hearing brief, p 9
[60] Petitioner's post hearing brief, p 9
[61] Petitioner's post hearing brief, p 11
[62] Petitioner's post hearing brief, p 12
[63] Petitioner's post hearing reply brief, p 3

Respondent offered no witnesses or testimony at hearing.

Respondent argues, in its post hearing brief, that "the burden of proof in establishing that the assessment is in error is upon the Petitioner-taxpayer. Treasury therefore need prove nothing in order to prevail."[64] Respondent further argues that section 4 of the use tax act specifically allocates the burden of proof by providing, "[t]hat assessment shall be considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment shall be upon the taxpayer."[65] Respondent further asserts that it "is well settled that tax exemptions are to be strictly construed against the taxpayer, and the burden of proving an entitlement is on the party claiming the right to the exemption."[66]

Respondent contends that this case involves a question of statutory construction and states that "statutes should be interpreted consistently with their plain and unambiguous meaning," [67] and cites case law that provides "[i]n construing statutory meaning, a court's primary goal is to determine and give effect to the intent of the legislature,"[68] and that "[s]tatutes should be interpreted consistently with their plain and unambiguous meanings."[69] Judicial construction of

[64] Respondent's post hearing brief, p 2
[65] MCL 205.104 as in effect for the tax years at issue. MCL 205.104 was repealed, effective January 9, 2009 by 2008 PA 439. MCL 205.104a contains the same substantive language relative to burden of proof as was previously found in MCL 205.104
[66] Respondent's post hearing brief, p 2, citing *Sollitt Construction Co v MI Dept of Treas,* MTT Docket No. 103662 (1990), *Guardian Ind Corp v Dept of Treas,* 243 Mich App 244, 249; 621 NW2d 450 (2000)
[67] Respondent's post hearing brief, p 3, citing *Stozicki v Allied Paper Co,* 464 Mich 257, 263; 672 NW2d 293 (2001)
[68] Respondent's post hearing brief, p 3, citing *Canterbury Health Care v Dept of Treas,* 220 Mich App 23, 30; 558 NW2d 444 (1996)
[69] Respondent's post hearing brief, p 3, citing *Stozicki v Allied Paper Co,* 464 Mich 257, 263; 672 NW2d 293 (2001)

a statute is not permitted where the plain and ordinary meaning of the language is clear.[70] Respondent further contends that "administrative interpretation is entitled to considerable weight unless that interpretation conflicts with the plain meaning of the statute."[71]

Respondent asserts that the use tax is a "specific tax for the privilege of using, storing, or consuming tangible personal property,"[72] and argues that the use tax is transactional and applicable at the time of acquisition of the property unless a valid exemption exists.[73] Respondent asserts that "[t]he legal incidence of the use tax falls on the consumer or purchaser,"[74] which in this case is Petitioner.

Respondent argues that although Petitioner claims that "by virtue of being an agent for tax exempt entities, it shares the tax exempt status of its clients….MCL 205.94 does not include language exempting agents from the use tax."[75] Further, Respondent argues that in providing food service management to tax exempt entities, "Petitioner uses, stores, and consumes tangible personal property subject to the use tax."[76] Respondent agrees that Petitioner has contracts with entities that are exempt from the use tax on the property or services sold to those entities.[77] However, Respondent contends, and references as support the testimony of Petitioner's witness,

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[70] Respondent's post hearing brief, p 3, citing *Canterbury*, *supra* at 30
[71] Respondent's post hearing brief, pp 3-4, citing *Honeywell, Inc v Dept of Treas*, 167 Mich App 446, 450; 423 NW2d 223 (1988)
[72] Respondent's post hearing brief, p 4
[73] Respondent's post hearing brief, p 4
[74] Respondent's post hearing brief, p 4, citing *Combustion Eng, Inc v Dept of Treas*, 216 Mich App 465; 549 NW2d 364 (1996)
[75] Respondent's post hearing brief, p 4
[76] Respondent's post hearing brief p 4
[77] Respondent's post hearing brief, p 5

George Cousins,[78] Petitioner "is not one of the entities named as exempt under MCL 205.94, but rather a private for profit entity that does business with these entities…[and] not entitled to the exemptions found in the statute."[79] Respondent states although Petitioner claims that it is an agent the "statutory section does not include language to allow agents...an exemption from use tax."[80] And that the Tribunal cannot extend the exemption "by inference or implication."[81]

Respondent contends that Petitioner's reliance on the letter rulings[82] from Respondent that acknowledge Petitioner's status as an agent of Crittenton Hospital and Boulevard Temple United Methodist Home in support of Petitioner's claim that it is exempt from use tax, is misplaced. The letter rulings "merely state that the Department would consider Trettco to be acting as an agent for the named entities….[but] do not state that based upon the agency relationship the Department would consider Trettco exempt from use tax."[83]

Further, Respondent asserts that "a letter ruling is not binding on the Department, taxpayers, or the courts."[84] Letter rulings are limited to the taxpayer's specific facts.[85] Further, the "Department is bound by a letter ruling only for the specific transaction and only for the tax

[78] Respondent's post hearing brief, p 5, citing Transcript p 43, ll 14-15
[79] Respondent's post hearing brief, p 6
[80] Respondent's post hearing brief, p 6
[81] Respondent's post hearing brief, p 6
[82] Petitioner's exhibits P-3 and P-4
[83] Respondent's post hearing brief, p 6
[84] Respondent's post hearing brief, Petitioner 6, citing *Ammex, Inc v Mich Dept of Treas*, 273 Mich App 623, 652; 732 NW2d 116 (2007)
[85] Respondent's post hearing brief, p 6, citing *Joe Lunghamer Chevrolet, Inc v MI Dept of Treas*, MTT Docket No. 313925 (2007)

period indicated."[86]

In its Post Hearing Reply Brief, Respondent cites *Hospital Dietary Services, Inc v Department of Treasury*, State Board of Tax Appeals No. 1392 (1979), in which Petitioner was a party. In that case, the State Board of Tax Appeals, outlined the distinction between an agent and an independent contractor and determined that Petitioner was an independent contractor of its clients and liable for use tax as the consumer of tangible personal property.[87] Respondent asserts that "[t]he case law cited within that case is still good law and applicable in this case to show that Petitioner is still acting as an independent contractor."[88]

Respondent agrees that subsequent to the State Board of Tax Appeals' decision, Petitioner "amended all of their contracts to include phrases like 'as agent' or 'as its agent' in an attempt to be treated as an agent."[89] However, Respondent asserts there were no substantive changes made by the taxpayer "to either the contracts or the corporate operations from before, or after, the Board's decision."[90] Respondent's argument is that the "label which the parties themselves place on their relationships is not determinative"[91] and that, if compared, the relationship between Petitioner and its clients in 1979 and the relationship with its clients in the instant case is the same. Thus, Petitioner "should be found to be an independent contractor in this case as

[86] Respondent's post hearing brief, pp 6-7, citing *DeYoung & Mellema v Dept of Treas,* MTT Docket No. 281467 (2003)
[87] Respondent's post hearing brief, p 2
[88] Respondent's post hearing brief, p 3
[89] Respondent's post hearing brief, p 3
[90] Respondent's post hearing reply brief, p 3
[91] Respondent's post hearing reply brief, p 4

well."[92]

FINDINGS OF FACT

The Tribunal incorporates the parties' stipulated findings of fact.

Specifically, the Tribunal finds that Petitioner is a Michigan Corporation whose business, for purposes of this appeal, is to provide food management services to tax-exempt clients pursuant to written agreements between Petitioner and its clients. The disputed use tax deficiency relates to purchases of food, supplies, and other tangible personal property. Petitioner has contracts with and provides services to for-profit entities and has paid tax on all purchases for those clients. The clients for whom the purchases on which the disputed use tax is assessed are exempt from use tax under MCL 205.94(w).

Petitioner enters into individual contractual agreements with each of its tax-exempt clients to provide food management services. Each contract explicitly states that Petitioner acts as an agent for the client in carrying out certain specified activities. Each contract is negotiated individually with each client. When the contractual arrangement is established, Petitioner and the client determine if Petitioner will provide a manager for the entity's facility, what food and supplies the client needs for its patient population, and an estimated cost for food and supplies. The client may choose from among vendors recommended by Petitioner or may select other vendors. Petitioner and the client project an annual cost and determine a monthly advanced payment amount. In addition, Petitioner charges a management and administrative fee.

[92] Respondent's post hearing reply brief, p 4

The contract entered into between Petitioner and each client clearly states that Petitioner is acting as an agent for the client, the client owns the tangible personal property at the moment of purchase, the property is delivered directly to the client, and Petitioner does not take possession of the property at any point in time.

The contract provides that all food and supplies the client has chosen are shipped directly to the client's facility, stored at the facility, used at the facility to prepare meals for the client's patients, and served at the facility by facility employees to facility patients. A client can change what it needs or its selection of food or vendors at any time. The client is billed in advance based on the projected expenditures and adjustments are made monthly if a client's advance payment exceeds or is less than the amount actually spent.

The agreed-upon process is that "ship to" and "sold to" designations list the client's name and the shipping address is the client's address. Invoices for a twelve-month revolving period are kept at each client location and records from prior periods are available at the Farmington Hills site or copies will be mailed to a client if the client so requests.

CONCLUSIONS OF LAW

The assessment at issue in this matter is for unpaid use tax. The Use Tax Act, 1937 PA 94, provides for the levy, assessment, and collection of a specific excise tax on the storage, use, or consumption in this state of tangible personal property and certain services. Section 2 of the act,

MCL 205.92, provides,

> As used in this act:
> …
> (b) "Use" means the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given. …
> (c) "Storage" means a keeping or retention of property in this state for any purpose after the property loses its interstate character.
> …
> (g) "Consumer" means the person who has purchased tangible personal property or services for storage, use, or other consumption in this state…

Section 3 of the act, MCL 205.93, provides,

> (1) There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property or services …

Petitioner does not deny that it made the transaction at issue. However, Petitioner asserts that, as all of the transactions were made by it as an agent for its tax-exempt clients, the transactions are exempt from the use tax pursuant to section 4 of the use tax act, MCL 205.94, which provides,

> (1) The following are exempt from the tax levied under this act, subject to subsection (2):
> …
> (w) Property or services sold to an organization not operated for profit and exempt from federal income tax under section 501(c)(3) or 501(c)(4) of the internal revenue code, 26 USC 501; …

Because it is claiming an exemption from tax, Petitioner carries the burden of proving entitlement to the exemption. *Betten Auto Ctr, Inc, v Department of Treasury*, 272 Mich App 14; 723 NW2d 914 (2006). It is well established that a statute granting a tax exemption or refund must be strictly construed against the taxpayer and in favor of the taxing authority. *Michigan*

Baptist Home & Development Co v Ann Arbor, 396 Mich 660; 242 NW2d 749 (1976). In *Evanston YMCA Camp v State Tax Commission*, 369 Mich 1; 118 NW2d 818 (1963), the Court adopted the following reasoning of 2 Cooley on Taxation (4th Ed):

> Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond a reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms . . . . Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, ...

In this case, it is uncontested that if Petitioner's clients entered into the transactions at issue, those transactions would be exempt from tax under MCL 205.94. Petitioner asserts that the transactions made as agent for its tax-exempt clients are similarly exempt. Respondent argues that the use tax act makes no provision for an agency relationship in determining liability under the act. The act also does not preclude a finding that an agency relationship exists or that based upon that finding the purchases involved would be exempt. That the statute is silent as to agency, does not require a finding that agency cannot exist.

Respondent asserts that deference should be given to the Department's interpretation of the statutory provisions pursuant to which Respondent's assessed Petitioner and its determination as to the applicability of agency principles. Respondent cites *Elias Brothers Restaurants, Inc v Michigan Department of Treasury*, 452 Mich 144; 549 NW2d 837 (1996). In that case, the petitioner claimed an industrial processing exemption. The Court's analysis and judgment were based upon a very specific and complex statutory provision related to industrial processing

exemptions. The facts and circumstances of that case are not applicable to this matter. As Respondent asserts, the Court did state, "…administrative interpretations are accorded deference." However, the Court went on to say, "the department's definition…, as applied in this case, would unfairly broaden the scope of the …exclusion and, ultimately, contravene legislative intent."[93]

The Michigan Court of Appeals in *Van Pelt v Paull*, 6 Mich App 618; 150 NW2d 185 (1967), sets out a standard for determining an agency relationship in Michigan,

> The question whether an agency has been created is ordinarily a question of fact which may be established the same as any other fact, either by direct or by circumstantial evidence; and whether an agency has in fact been created is to be determined by the relations of the parties as they exist under their agreements or acts, with the question being ultimately one of intention. The question is to be determined by the fact that one represents and is acting for another, and not by the consideration that it will be inconvenient or unjust if he is not held to be the agent of such other; and if relations exist which will constitute an agency, it will be an agency whether the parties understood the exact nature of the relationship or not. Moreover, the manner in which the parties designate the relationship is not controlling, and if an act done by one person in behalf of another is in its essential nature one of agency, the one is the agent of such other notwithstanding he is not so called.

The Court in *Van Pelt*[94]went on to say, "Generally speaking, the tests of principal and agent is the right to control. It is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant or agent."

The Tribunal discussed the issue of agency relationship in two use tax cases, *Sollitt Construction*

[93] Respondent's post hearing brief case index, exhibit 5, citing *Elias Brothers Restaurants, Inc v Michigan Department of Treasury*, 452 Mich 144; 549 NW2d 837 (1996)
[94] *Pelt v Paull*, 6 Mich App 618; 150 NW2d 185 (1967)

Company v Michigan Department of Treasury, MTT Docket No. 103662 (1990), cited by Respondent, and *Systems Parking, Inc v Michigan Department of Treasury*, MTT Docket No. 91346 (1988). In the *Sollitt* case, the petitioner entered into a contract with Independence Village, an entity arguably exempt for the use tax, whereby Sollitt was the general contractor to build a facility for Independence Village, and Gregory was the agency contractor under an agreement with Sollitt. All general contractor functions for the project, including "issuance of purchase orders, the selection of subcontractors and suppliers, and the arranging for the timing of materials and equipment at the job site were performed by …Gregory, as agent for…[Sollitt]."[95] The Tribunal found that there was no agency relationship between Sollitt and Independence Village. Independence Village did not use any of the materials or equipment at issue to carry out its business. Independence Village was not in the construction business and did not do any of the construction or installation related to the project. Independence Village did not purchase the materials and the materials for its own consumption or use. There was, however, an agency relationship between Sollitt and Gregory, neither of which qualified for exemption from the use tax. Gregory managed the building project; it acquired the property used for the project and performed subject to the control of Sollitt. The facts and circumstances are clearly distinguishable from the facts in this matter and do not provide support for Respondent's position that an agency relationship does not exist between Petitioner and its tax exempt clients.

Here, the tax-exempt clients determined what was purchased, how much was to be purchased,

[95] Respondent's post hearing brief case index, exhibit 10, citing *Sollitt Construction Company v Michigan Department of Treasury, MTT 103662, (1990)*

and could adjust those purchases on its own initiative. Petitioner in this case did not exercise any control over the tangible personal property. The supplies, equipment, and food were delivered directly to its client's facilities. The client used the supplies, equipment, and supplies to prepare meals the client served to its residents or patients. Where the tangible personal property was stored, how it was used, or if more or less was needed for any given period was determined by the client. Vendors billed the client directly at the client address. Records and invoices were kept at the client's facility for a year and then archived at Petitioner's facility. Each client's contract was individually crafted to suit the needs of the specific facility. Each client paid a monthly proration of the projected annual expenditures, based upon the client's choices in supplies, equipment, and food, plus an administration fee. If the client determined that it needed additional supplies or food, those supplies or food were purchased and billings were adjusted. Adjustments were made if less food or fewer supplies were needed for a specific period, again, based upon the client's usage. Petitioner responded to each client's individual needs. The administrative fee paid to Petitioner was for Petitioner's administrative functions such as processing orders, paying bills, and assisting with food management at the facility.

The Tribunal agrees with Respondent that this matter does require interpretation of the statutory language of the Use Tax Act. And further agrees that the standard for statutory interpretation is well established. "The goal of statutory interpretation is to discern and give effect to the intent of the Legislature from the statute's plain language." *Houdek v Centerviller Twp,* 276 Mich App 568, 581; 741 NW2d 587 (2007). "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither

required nor permissible." *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164, 174 (1999). Unambiguous statutes are enforced as written. *Flour Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

Where statutory language is susceptible to differing interpretations and is of sufficiently indefinite meaning that reasonable people can and do disagree as to its actual meaning, interpretation of the statute is appropriate. *Kizer v Livingston County Bd of Comm'rs*, 38 Mich App 239, 246-247; 195 NW2d 884 (1972) (citing *McCann v Terhune*, 12 Mich App 364 (1968); *City of Lansing v Lansing Township*, 356 Mich 641 (1959)).

The tax at issue is levied for the privilege of *using, storing, or consuming tangible personal property*. (Emphasis added.) The Tribunal concludes that the statutory language here at issue is clear and unambiguous. The language is sufficiently definite so as not to require judicial construction to discern and give effect to the intent of the Legislature.

Petitioner does not use, store, or consume the tangible personal property at issue. Petitioner's clients use, consume, and store the tangible personal property. The contracts under which the parties operate clearly state that the tangible personal property becomes the property of the client at the moment of purchase. Petitioner exercises no power or control over the tangible personal property "incident to the ownership of that property." The client has possession of and control over the supplies, equipment, and food at issue.

In its post hearing brief, Respondent asserts that Petitioner's "reliance on two letter rulings issued on October 10, 1980 . . . is misplaced."[96] Petitioner, in its post hearing brief states, "[i]t is overwhelmingly tempting to argue simply that, having taken a position favorable to Trettco on the taxation of Trettco's operations and lived with it for a generation, Respondent should continue to be bound by that position."[97] However, Petitioner admits that "the courts of this State have shown a dismaying propensity to permit Respondent to carry on just this type of duplicitous conduct."[98] Petitioner contends that such an argument "would likely not survive appeal."[99] The Letter Rulings at issue related to Petitioner's predecessor, HDC, and to clients no longer clients of Petitioner. Letter rulings are not general binding on Respondent and, as these Letter Rulings apply to different parties, they are specifically not binding for purposes of this appeal. The Tribunal does not rely on the Letter Rulings in its determination.

In its post hearing reply brief, Respondent asserts "[b]ecause the Petitioner maintains operations as found in the 1979 opinion by the Board of Tax appeals, it should be found to be an independent contractor in this case as well."[100] First, a 30 year old opinion of the State Board of Tax Appeals is not binding on this Tribunal. Additionally, in 1979, and used by the State Board of Tax Appeals as a basis for its determination, Petitioner's contracts with its clients stated that HDS was an independent contractor. The contracts Petitioner used related to this matter, and in matters subsequent to the 1979 opinion of the State Board of Tax Review,

[96] Respondent's post hearing brief, p 6
[97] Petitioner's post hearing brief, p 5
[98] Petitioner's post hearing brief, p 5
[99] Petitioner's post hearing brief, p 5
[100] Respondent's post hearing reply brief, p 4

state that Petitioner is an agent of its clients. Further, the Tribunal might have ruled differently from the State Board of Tax Appeals based upon the facts in that case. The State Board of Tax Appeal's reasoning is not persuasive as to this Petitioner's status, in this matter, as an agent for its clients.

Based upon the file, the applicable statutory and case law, and the testimony and evidence presented, the Tribunal concludes that Petitioner has met its burden of proof to show by a preponderance of the evidence that Petitioner is not subject to use tax for the transactions upon which Assessment No. O138157 is based. Further, the Tribunal concludes that Petitioner has met its burden of proof to show by a preponderance of the evidence that Petitioner acted as an agent for its tax-exempt clients and the transactions upon which Assessment No. O138157 is based are exempt from use tax pursuant to section 4(1)(w) of the Use Tax Act, 1937 PA 94, MCL 205.94.

Respondent's Assessment No. O138157 is cancelled.

JUDGMENT

IT IS ORDERED that Respondent's Assessment No. O138157 is CANCELLED.

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

MICHIGAN TAX TRIBUNAL

Entered: February 27, 2009 By: Rachel Asbury

gmf/RJA