

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

MJR Group LLC,
Petitioner,

v

Michigan Department of Treasury,
Respondent.

MTT Docket No. 441767

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, MJR Group LLC, appeals from a Decision and Order of Determination (“Decision”) levied by Respondent, Michigan Department of Treasury, on May 16, 2012. The Decision denied Petitioner’s sales tax refund for tax years 2007 - 2010. Lynn A. Ghandi, Attorney, and Brian T. Quinn, Attorney represented Petitioner, and James A. Ziehmer, Assistant Attorney General, represented Respondent.

A hearing on this matter was held on May 27, 2015. Petitioner’s witnesses were Dennis Redmer and Donna Kondek. Respondent’s sole witness was Kimberly Knoll.

Based on the documentary evidence, testimony, and case file, the Tribunal finds that sales tax was not a consideration in establishing the price of prepackaged candy and bottled water. Since sales tax was not included in the sales price of these products, Petitioner, and not Petitioner’s customers, paid sales tax on nontaxable items. Therefore, Petitioner is entitled to a sales tax refund, as identified in its amended sales tax returns for the 2007 – 2010 tax years.

BACKGROUND

On September 27, 2012, the Tribunal issued a Final Opinion and Judgment granting Respondent’s Motion for Summary Disposition and denying Petitioner’s Motion for Summary Disposition. Petitioner filed a claim of appeal with the Michigan Court of Appeals on October 9, 2012. On February 25, 2014, the Court of Appeals issued an opinion reversing and remanding the appeal for further proceedings, holding that “MTT applied wrong standards when reviewing the parties’ cross-motions for summary disposition and therefore rendered an erroneous ruling.”¹

¹ *MJR Group, LLC v Dep’t of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2014 (Docket No. 312745).

On September 22, 2014, Petitioner filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case. On October 6, 2014, Respondent filed a response to the Motion. The Tribunal heard oral argument on November 18, 2014, in order for Petitioner to provide “an explanation regarding the calculations contained in the Motion and Ms. Kondek’s affidavit.”² The Tribunal denied Petitioner’s Motion for Summary Disposition on January 26, 2015, finding that “Petitioner’s affidavits contain conflicting statements, Petitioner has asserted two conflicting positions during this appeal, and Petitioner has not provided documentary evidence in support of its contentions. The Tribunal concludes that the credibility contest originally identified by the Court of Appeals has not been resolved.”³

PETITIONER’S CONTENTIONS

Petitioner contends that it is entitled to a refund of sales tax paid on nontaxable items. Specifically, Petitioner argues it paid sales tax on prepackaged candy and bottled water, for the tax years at issue, even though these specific products are exempt from the collection of sales tax. Petitioner believes the testimony of its witnesses establishes that sales tax was not included in the price of prepackaged candy and bottled water and because the accounting department erroneously believed sales tax was due on these products, it calculated the sales tax due as if sales tax was included in the sale price. Petitioner contends its customers did not pay tax on the sale of prepackaged candy and bottled water. Rather, Petitioner mistakenly paid sales tax on these items; thus, Petitioner is entitled to a refund.

PETITIONER’S ADMITTED EXHIBITS

- P-1 Affidavit of Donna Kondek
- P-2 Affidavit of Michael Mihalich
- P-3 MJR Group, LLC Petition
- P-4 General Entries Report – 2007
- P-5 General Entries Report – 2008
- P-6 General Entries Report – 2009
- P-7 General Entries Report – 2010

² Tribunal’s October 15, 2014 Order.

³ January 26, 2015 Order Denying Petitioner’s Motion for Summary Disposition.

- P-8 Tax Worksheet – 2007
- P-9 Tax Worksheet – 2008
- P-10 Tax Worksheet – 2009
- P-11 Tax Worksheet – 2010
- P-12 Amended Annual Tax Returns
- P-13 Department’s Discovery Responses

PETITIONER’S WITNESSES

Dennis Redmer

Mr. Redmer testified that (i) he is the Vice President of Operations for MJR Theaters, (ii) he runs the day-to-day operations of the company which includes setting concession sale prices, (iii) he was involved in changes to the pricing for concession items in 1991, (iv) prices were set in quarter increments to enable lower wait times in concession lines, (v) when pricing changes were made in 1991, sales tax was not considered when setting prices because sales tax is a cost of doing business, (vi) when setting prices he looks to market conditions only and any additional costs comes out of the company’s profits.⁴

Donna Kondek

Ms. Kondek testified that (i) she is the Controller for MJR Theaters and in that capacity she oversees the accounting department, (ii) she is responsible for preparing the sales tax returns for the company, (iii) she became aware that sales tax was not due on prepackaged candy and bottled water when the Girl Scouts brought a group to the theater and they requested a refund of sales tax paid on items purchased from the concession stand, (iv) she erroneously remitted sales tax on prepackaged candy and bottled water since she started working for the company in March of 1991, (v) to calculate the sales tax due, she divided the gross concession sales by 1.06 to calculate the net concession sales, then calculated the tax that was owed, (vi) in doing so, she assumed that sales tax was part of the sale price of all concession items, (vii) since discovering the error, she has revised her calculation by first deducting the nontaxable sales from the gross concessions sales before doing the tax in gross calculation.⁵

⁴ Transcript, pp 11-19.

⁵ Transcript, pp 19-32.

RESPONDENT'S CONTENTIONS

Respondent contends that sales tax is included in the sale price of prepackaged candy and bottled water; thus, Petitioner is not entitled to a refund because it may not enrich itself from the collection of sales tax. Respondent argues this is evident by Petitioner's use of the tax in gross calculation when determining the amount of sales tax owed.

RESPONDENT'S ADMITTED EXHIBITS

- R-1 Petitioner's 2007 sales tax return
- R-2 Petitioner's 2008 sales tax return
- R-3 Petitioner's 2009 sales tax return
- R-4 Petitioner's 2010 sales tax return
- R-5 Sales, Use, and Withholding Tax Forms and Instructions
- R-6 Affidavit of Kimberly Knoll
- R-7 Petitioner's Responses to Respondent's Second Set of Interrogatories and Requests for Production of Documents
- R-8 Petitioner's 2007 amended sales tax return
- R-9 Petitioner's 2008 amended sales tax return
- R-10 Petitioner's 2009 amended sales tax return
- R-11 Petitioner's 2010 amended sales tax return
- R-12 Affidavit of Donna Kondek
- R-13 General Entry Report Excerpt
- R-14 Petitioner's Tax Worksheet Excerpt

RESPONDENT'S WITNESS

Kimberly Knoll

Ms. Knoll testified that (i) she works for the Michigan Department of Treasury, Tax Compliance Bureau, Audit Division, (ii) when a taxpayer takes the tax in gross deduction it tells an auditor they included sales tax in the gross sales amount, (iii) she reviewed a general sales ledger which purportedly came from Petitioner's point of sale system because Petitioner does not

maintain a daily Z tape, (iv) after reviewing the source documents, it is her opinion that sales tax was collected on all concession sales.⁶

FINDINGS OF FACT

1. Petitioner operates movie theaters in the state of Michigan, all of which contain concession stands.
2. During the tax years at issue, Petitioner sold prepackaged candy and bottled water to its customers.
3. Prepackaged candy and bottled water are not subject to sales tax under the General Sales Tax Act (“GSTA”).
4. Petitioner paid to Respondent sales tax on the sale of prepackaged candy and bottled water.
5. On June 20, 2011, Petitioner filed amended annual sales tax returns claiming refunds totaling \$409,760.05 for the 2007, 2008, 2009, and 2010 tax years.
6. Respondent denied the refund request on August 12, 2011. Subsequently, Petitioner requested and received an informal conference where Respondent, again, denied the refund request in its May 16, 2012 Decision and Order of Determination.
7. Mr. Redmer, Petitioner’s Vice President of Operations, is responsible for concession pricing.
8. When setting prices, market conditions are the sole factor considered.
9. Sales tax is not considered when establishing prices as it is a “cost of doing business” and comes out of the company’s profits.

CONCLUSIONS OF LAW

The GSTA, MCL 205.51 *et seq.*, provides that businesses are subject to a six percent tax on retail sales.⁷ However, the GSTA exempts retailers from collecting or paying sales tax on the sale of prepackaged candy⁸ and bottled water,⁹ both at issue in this case. The parties do not contest whether these items are exempt from sales tax and do not contest that Petitioner sold such tax-exempt items at its movie theater concession stands in the state of Michigan, during the tax years at issue.

⁶ Transcript, pp 33-46.

⁷ MCL 205.52(1).

⁸ MCL 205.54g(5)(c). See also Revenue Administrative Bulletin 2009-8 on Sales Tax – Food for Human Consumption

⁹ MCL 205.54d(d).

In *Andrie Inc v Dep't of Treasury*,¹⁰ the Michigan Supreme Court was asked to determine whether a presumption exists that sales tax is always included in an item's purchase price. The Court stated that "[u]nder MCL 205.73(1), a retail seller is 'not prohibited' from including sales tax in an item's price, but this leaves the retail seller the option to shoulder the sales tax burden itself. In that event, the retail seller may remit the tax from its gross proceeds or from another source entirely."¹¹ Here, if Petitioner "shouldered" the sales tax burden itself, it is entitled to a refund of sales tax unnecessarily paid. Accordingly, the Tribunal cannot presume sales tax was included in the sale price of the items. Instead, the Tribunal must determine whether sales tax was incorporated in the sale price of prepackaged candy and bottled water sold at Petitioner's concession stands or whether Petitioner paid the sales tax itself.

In the January 26, 2015 Order, the Tribunal determined it could not render summary judgment in favor of either party because "Petitioner's affidavits contain conflicting statements, Petitioner has asserted two conflicting positions during this appeal, and Petitioner has not provided documentary evidence in support of its contentions."¹² The Tribunal's Order further outlined the inconsistencies within Petitioner's affidavits and Petitioner's legal positions regarding whether or not sales tax was included in the sale price. Specifically, the Tribunal's Order states that:

Petitioner's current position is that it *included* sales tax in the menu board prices for "items that are subject to tax," and that "when [Petitioner] set the pricing for bottled water and candy they knew it wasn't taxable." . . . Petitioner's revised argument is actually supported by Donna Kondek's original affidavit when she stated that "[t]here was never any tax collected *in excess* of the previous amount because there were no sales to which tax was added (sales at advertised price plus tax)." However, her other affidavits contradict this statement; her second affidavit indicates that "the company does not collect sales tax from the customer on *any sales*," and her most recent affidavit states "[a]ll taxes on [bottled water and prepackaged candy], *as well as all other concession items*, were paid by MJR."¹³ (Citations omitted.)

Ms. Kondek testified, corroborating her affidavits, that to calculate sales tax she would "take the gross concession item sales, [and] divide that by 1.06 to get to the net concession sales with

¹⁰ *Andrie Inc v Dep't of Treasury*, 496 Mich 161; 853 NW2d 310 (2014).

¹¹ *Id.* at 174.

¹² January 26, 2015 Order at 13.

¹³ *Id.* at 11.

which to calculate the tax that was owed.”¹⁴ Ms. Kondek admitted she erroneously performed the tax in gross calculation on the gross concession sales for nontaxable items. Even though portions of Ms. Kondek’s affidavits regarding whether sales tax was collected were contradictory, she testified that she used the tax in gross calculation because that is *how it has been done since she joined the company*¹⁵ and not specifically because tax was collected from the customer.

In the Tribunal’s January 26, 2015 Order, the Tribunal also held that “Petitioner’s vast documentation . . . explains how the sales tax was calculated, but does not prove Petitioner’s customers did not pay sales tax on bottled water and prepackaged candy purchases.”¹⁶ This discrepancy was clarified through Mr. Redmer’s testimony. At hearing, Mr. Redmer testified that shortly after his arrival with the company he reviewed and set concession process. In doing so, he further testified that sales tax was *not considered* in setting those prices. In fact, Mr. Redmer testified that “sales tax is a cost of doing business. I never even considered sales tax.”¹⁷ Rather, he considered market conditions when setting prices and any additional costs would “[c]ome[] out of the bottom line.”¹⁸

It was also ascertained at hearing that neither Mr. Redmer nor Ms. Kondek were involved in the other’s roles within the company. Thus, whether Ms. Kondek believed sales tax was included in the concession prices is irrelevant as she admitted at hearing that she took no part in setting pricing. Additionally, in light of Mr. Redmer’s testimony, Ms. Kondek’s use of the tax in gross calculation is not conclusive evidence that tax was included in the concession prices. Accordingly, the Tribunal finds that even if Ms. Kondek believed sales tax was included in the sale price of prepackaged candy and bottled water, and calculated the tax returns accordingly, the prices were set without regard to sales tax.

Respondent attempted to refute Petitioner’s claims through the testimony of Ms. Knoll. Ms. Knoll testified that, in her opinion and based on her review of Petitioner’s source documents, tax was included in the sales prices and collected by Petitioner. However, she admitted that “[b]ased on the records that [she] reviewed, [she] could not tell,” whether “the dollar for bottled

¹⁴ Transcript at 24.

¹⁵ See Transcript p 26.

¹⁶ January 26, 2015 Order at 12.

¹⁷ Transcript at 14.

¹⁸ *Id.* at 15.

water is really a dollar, but the dollar for popcorn is really 95 cents plus five cents of sales tax.”¹⁹ Admittedly, Ms. Knoll testified that when conducting an audit to determine whether sales tax is collected, she would need to review transactional details, receipts from purchases, and daily register summaries (e.g. Z tapes or the equivalent).²⁰ However, because Petitioner’s point of sale software is electronically driven, Petitioner does not maintain nor does the software produce this information. Thus, Ms. Knoll could not to review this documentation and was only able to review the general sales ledger and concession sale information in making her audit recommendation to Respondent’s Counsel. Ms. Knoll “looked at what the system was calculating, [and] it was sales tax on all concession sales.”²¹ However, the Tribunal previously determined that “Petitioner’s software made [an] arbitrary distinction [between concession sales and sales tax] and the bifurcation was not a result of Petitioner’s accounting practices”²² As such, the Tribunal cannot infer that Petitioner’s use of the tax in gross calculation based on values reported by Petitioner’s point of sale software is evidence of the collection of sales tax.

In remanding this case back to the Tribunal, the Court of Appeals stated that a credibility contest existed because, among other things, “[t]he Department presented no evidence to rebut [Petitioner’s] affidavits.”²³ Likewise, Respondent provided no documentary or testimonial evidence at hearing to rebut Petitioner’s affidavits or the assertions made by Petitioner’s witnesses. Specifically, Ms. Knoll’s testimony, while informational, does not rebut Mr. Redmer’s testimony which clearly established that sales tax was not included in concession pricing. Further, even though the Tribunal previously held that “Respondent’s argument that [Petitioner’s] computer-generated break out supports its position that the customers paid the sales tax is not supported,” Respondent still maintained this position at hearing and failed to provide any other argument or meaningful cross-examination of Petitioner’s witnesses in an attempt to diminish the credibility of the testimony in support of its contention that Petitioner’s customers paid the sales tax collected.²⁴

¹⁹ *Id.* at 46.

²⁰ *Id.* at 34-36.

²¹ *Id.* at 41.

²² January 26, 2015 Order at 9.

²³ *MJR Group, LLC v Dep’t of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2014 (Docket No. 312745).

²⁴ January 26, 2015 Order at 9.

The Tribunal concludes that Petitioner has proven, and Respondent has not rebutted, that sales tax was not included in the sale price of prepackaged candy and bottled water; thus, Petitioner unnecessarily bore the burden of paying sales tax on the sale of these exempt concession items. As a result, the Tribunal finds that Petitioner is entitled to a refund of sales tax paid, as set forth in Petitioner's amended sales tax returns, for the tax years at issue.

JUDGMENT

IT IS ORDERED that Petitioner's refund request is GRANTED and Petitioner is entitled to a sales tax refund, as set forth in its Amended Sales Tax Returns for the 2007 – 2010 tax years.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the acceptance of Petitioner's 2007 – 2010 amended sales tax returns and the refunds associated with the amended returns within 20 days of the entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with refunding the affected taxes shall issue a refund as required by this Final Opinion and Judgment within 28 days of the entry of this Final Opinion and Judgment.

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

APPEAL RIGHTS

If you disagree with the Tribunal's final decision in this case, you may either file a motion for reconsideration with the Tribunal or a claim of appeal directly to the Michigan Court of Appeals ("MCOA").

A motion for reconsideration with the Tribunal must be filed, by mail or personal service, with the \$50.00 filing fee, within 21 days from the date of entry of this final decision.²⁵ A copy of a party's motion for reconsideration must be sent by mail or electronic service, if agreed upon by the parties, to the opposing party and proof must be submitted to the Tribunal that the motion

²⁵ See TTR 257 and TTR 217.

for reconsideration was served on the opposing party.²⁶ However, unless otherwise provided by the Tribunal, no response to the motion may be filed, and there is no oral argument.²⁷

A claim of appeal to the MCOA must be filed, with the appropriate entry fee, unless waived, within 21 days from the date of entry of this final decision.²⁸ If a claim of appeal is filed with the MCOA, the party filing such claim must also file a copy of that claim, or application for leave to appeal, with the Tribunal, along with the \$100.00 fee for the certification of the record on appeal.²⁹

By: Steven H. Lasher

Entered: June 18, 2015
sms

²⁶ See TTR 225.

²⁷ See TTR 257.

²⁸ See MCR 7.204.

²⁹ See TTR 213 and TTR 217.