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MICHIGAN SUPREME COURT CONFIRMS THAT LAWNCARE COMPANY IS INELIGIBLE FOR SALES AND USE TAX AGRICULTURAL PRODUCTION EXEMPTION

In an Order issued by the Michigan Supreme Court (Court) on May 12, 2023, the Court denied the taxpayer's application for leave to appeal the published decision of the Court of Appeals in *TruGreen Ltd Partnership v Dep't of Treasury*, 338 Mich App 248 (2021). In that decision, the Court of Appeals held that the use tax exemption under MCL 205.94(1)(f), and by implication the sales tax exemption under MCL 205.54a(1)(e), is only available to a business that is engaged in "agricultural" production activities. The taxpayer, a company that provided lawn care and landscaping services for its commercial clients, was not an agricultural business according to the Court of Appeals. For more information regarding the Court of Appeals' decision, please refer to the June 2020 issue of the Treasury Update.

Accompanying the Court's Order, Justice Welch (joined by Justice Bolden) explained in a separate concurrence that the Court of Appeals reaffirmed "what taxpayers and courts in this state have understood for decades – that the 'agricultural use exemption' … applies to agricultural uses." Justice Welch continued by expressing why she disagreed with how the dissent characterized the Court of Appeals' decision and the role of the courts as interpreters of the law.

In a dissent to the Court's Order, Justice Viviano (joined by Justices Clement and Zahra) argued that the taxpayer was entitled to the exemption as the plain language of the statute does not require agricultural production.

PUBLIC ACTS 20 AND 21 CHANGE THE TAXABILITY OF DELIVERY AND INSTALLATION CHARGES

On April 26, 2023, the General Sales Tax Act and the Use Tax Act were amended to change the sales- and use-tax treatment of "delivery charges" and "installation charges." Before those amendments, a delivery or installation charge was subject to tax as part of an item's price if the charge was "incurred or to be incurred before the completion of the transfer of ownership of

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INDUSTRIAL PROCESSING EXEMPTIONS EXPANDED TO ADDRESS PROPERTY USED TO PROCESS AGGREGATE FOR MICHIGAN REAL ESTATE PROJECTS

Public Acts 27 and 30 of 2023 (Acts), which became effective May 8, 2023, amended the industrial processing exemptions under MCL 205.54t and MCL 205.94o (collectively, the IP Statutes) to address sales and use taxes relating to property used to process aggregate for construction and related real property projects located in Michigan. The Acts also provide relief to certain taxpayers for unpaid sales or use tax assessment balances and audits for past periods arising from the sale or use of such property.

The Acts expand the industrial processing exemptions for sales and use taxes in several ways. *First*, the Acts expand the list of enumerated industrial processing activities in subsection (3) of the IP Statutes to include "production, manufacturing, or recycling of aggregate" by the property, and for the purpose, described in the newly added subsection (4)(i) to the IP Statutes, but only if that aggregate is subject to use tax. *Second*, the Acts amend the types of property that are eligible for the industrial processing exemption under subsection (4) of the IP Statutes by adding a new subdivision (i) that involves "property that performs an industrial processing activity upon an aggregate product or material that will be used as an ingredient or component part for the construction, maintenance, repair, or reconstruction" of real property in Michigan but only if that aggregate product or material is subject to use tax. This property is not disqualified from eligibility for the exemption simply for being used in any of activities described in subsection (6) of the IP Statutes (e.g., construction or maintenance of real property). *Finally*, the Acts amend the definitions under subsection (7) of the IP Statutes for the terms "industrial processing" and "industrial processor" consistent with the changes described above and add a definition for the term "aggregate" in subsection (7) of the IP Statutes.

Concerning the tax relief provided by the Acts, Treasury is required to cancel all outstanding (unpaid) balances related to sales or use tax liabilities involving industrial processing activities and property, described in subsections 3(l) or (4)(i) of the IP Statutes, on Notices of Intent to Assess and Final Assessments issued by Treasury before the effective date of the Acts. Unpaid balances on Notices of Intent to Assess and Final Assessments are considered "outstanding" even if they are in an Informal Conference or on appeal before a court. The Acts direct Treasury to cancel these outstanding balances related to such industrial processing activities and property no later than 90 days after the effective date of the Acts. While Treasury will be proactive in locating and cancelling assessments, taxpayers with outstanding balances eligible for this relief are strongly encouraged to contact Treasury at Treas-TCB-Technical@michigan.gov.

In addition to the cancellation of balances described above, the Acts prohibit Treasury from issuing any new assessments for such industrial processing activities and property for tax periods occurring before the effective date of the Acts.

HEAVY EQUIPMENT RENTAL COMPANIES NOW HAVE OPTION OF PAYING TRANSACTION TAX IN LIEU OF PERSONAL PROPERTY TAX

Under two laws enacted in March, heavy equipment rental companies now have the option of paying a 2% specific tax on their rental receipts in lieu of the personal property tax on the value of their rental equipment.

Beginning December 31, 2022, PA 46 of 2022 allows a "Qualified Renter" (generally, a heavy equipment rental business located in Michigan that receives more than 50% of its gross receipts from qualifying rentals) to claim an exemption from personal property tax for its "Qualified Heavy Equipment Rental Personal Property" (generally, mobile construction, earth moving, and industrial equipment).

To claim the personal property tax exemption, a Qualified Renter must file an annual statement (Treasury Form 5819) with its local assessor prior to February 20 of the exemption year (e.g., for an exemption to apply in 2023, the statement must be filed by February 20, 2023) listing all qualified property located at and rented from its business location in that assessing district (separate forms must be filed for each business location). MCL 211.9p sets forth the specific filing requirements, including a process to address late filings. Property that is exempt under section 9p does not qualify for exemption under sections 9m, 9n, or 9o (the manufacturing and small business personal property tax exemptions).

Starting in 2023, PA 35 of 2022 subjects the rental of exempt property to a new 2% state specific tax. The tax is in addition to all other applicable taxes and is imposed directly on the customer. Rental businesses will be required to collect the tax and remit it to the state in quarterly filings for each business location. (Treasury will make forms available no later than March 31, 2023, and the first filing is due April 30, 2023.) Proceeds from the tax will be used to reimburse local taxing units for revenue lost due to the personal property tax exemption.

For more information on the property tax exemption and specific tax please click on the following links:

Michigan Legislature - Section 211.9p

Michigan Legislature - Act 35 of 2022

Bulletin 18 of 2022 - Qualifed Heavy Equipment Rental Personal Property.pdf (govdelivery.com)

Business Taxpayer Forms (michigan.gov)

COURT OF APPEALS AFFIRMS TAX TRIBUNAL'S DECISION IN HERTZ

Hertz Corporation and Affiliates v Dep't of Treasury, unpublished per curiam opinion of the Court of Appeals, issued December 22, 2022 (Docket No. 359190) addressed the question of whether Petitioner could use a timely appeal of an assessment for an open tax year to challenge prior unchallenged (and therefore final) Treasury adjustments for earlier tax years involving a unitary business group (UBG) member (DTG), which adjustments ultimately resulted in the assessment at issue. Treasury argued that using an appeal in this manner constituted an impermissible collateral attack, and the Tax Tribunal agreed, granting Treasury's motion for summary disposition and denying Petitioner's. (See the lead article in the November 2021 Michigan Department of Treasury Update for a summary of the Tax Tribunal's decision.)

Petitioner appealed and the Court of Appeals affirmed, finding that DTG's supplying of additional information in response to Treasury's notices did not constitute an appeal and stating:

"Without any evidence that the underlying decisions regarding DTG's 2009-2012 credits were ever appealed pursuant to MCL 205.22, these decisions became final, conclusive, unreviewable in any court, and immune from any further appeal, direct attack, or collateral attack."

The court addressed several other claims raised by Petitioner, finding that:

- Treasury's notices disallowing the claimed credits constituted "an assessment, decision, or order" under MCL 205.22(1).
- Even if the notices were somehow deficient (as argued by Petitioner but not addressed by the court), Petitioner failed to support its argument that the disallowances could be challenged in the present action or were void by operation of law.
- MCL 205.30 (petition for refund) and MCL 205.27a (statute of limitations for refund) do not provide an avenue for collateral attacks that are otherwise barred by MCL 205.22.
- Because Petitioner was barred from collaterally attacking Treasury's credit disallowances, the Tribunal did not err by denying Petitioner's motion for additional, limited discovery and costs.

The decision was not appealed and is now final.

ABOUT TREASURY UPDATE

Treasury Update is a periodic publication of the Tax Policy Division of the Michigan Department of Treasury.

It is distributed for general information purposes only and discusses topics of broad applicability. It is not intended to constitute legal, tax or other advice. For information or advice regarding your specific tax situation, contact your tax professional.

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RECENTLY ISSUED GUIDANCE FROM TREASURY

Revenue Administrative Bulletins

No substantive RABs issued since last issue

Notices

- Notice Regarding Expansion of the Industrial Processing Exemptions to Address Property Used to Process Aggregate for Michigan Real Estate Projects, Issued May 11, 2023
- Notice: Flow-Through Entity Tax Rate Reduced to 4.05% for Tax Years Beginning in 2023, Issued May 3, 2023
- Notice Regarding Changes in the Taxability of Delivery and Installation Charges for Sales and Use Taxes, Issued April 26, 2023
- Notice Regarding the Implementation of the Michigan Flow-Through Entity Tax – updated April 21, 2023, originally issued January 14, 2022
- Notice: Income Tax Rate of Individuals and Fiduciaries Reduced to 4.05% for the 2023 Tax Year, Issued March 30, 2023
- Notice to Taxpayers Regarding IRS Form 1098-F, Issued: March 9, 2023

Statement of Acquiescence/Non-Acquiescence Regarding Certain Court Decisions

In each issue of the quarterly Treasury Update, Treasury will publish a list of final (unappealed), non-binding, adverse decisions issued by the Court of Appeals, the Court of Claims and the Michigan Tax Tribunal, and state its acquiescence or nonacquiescence with respect to each. "Acquiescence" means that Treasury accepts the holding of the court in that case and will follow it in similar cases with the same controlling facts. However, "acquiescence" does not necessarily indicate Treasury's approval of the reasoning used by the court in that decision. "Non-acquiescence" means that Treasury disagrees with the holding of the court and will not follow the decision in similar matters involving other taxpayers.

ACQUIESCENCE: No cases to report this quarter.

NON-ACQUIESCENCE: No cases to report this quarter.

COURT OF CLAIMS: TAXPAYER MAY NOT INCREASE BASIS OF ASSETS PURCHASED UNDER SBT AND SOLD UNDER MBT/CIT BY AMOUNT OF FEDERAL DEPRECIATION DEDUCTION DISALLOWED UNDER SBT

Michigan Bell Telephone Co v Dep't of Treasury, COC No. 21-000148-MT (Feb. 3, 2023) and *Republic Services of Michigan Holding Co, Inc v Dep't of Treasury*, COC No. 21-000178-MT (March 2, 2023), involved the same substantive tax issue. The main question in each case was whether Taxpayer could increase its basis in assets purchased under the Single Business Tax (SBT) and sold under the Michigan Business Tax (MBT)/Corporate Income Tax (CIT) by the amount of depreciation it was required to add back to its tax base under the SBT. Treasury argued that neither the MBT nor the CIT allowed such a basis adjustment, and the Court of Claims agreed, granting Treasury's motion for summary disposition in each case. (Note: While the cases addressed the same substantive tax issue, *Republic Services* only involved asset sales under the CIT.)

The SBT was a value-added tax and quite different from both the MBT and CIT. Among its unique provisions, it required a taxpayer to add back to its tax base the amount of asset depreciation the taxpayer had claimed as a deduction on its federal return. When those assets were sold, the taxpayer's federal gain (which accounted for the assets' federal depreciation) was included in the taxpayer's federal taxable income and flowed through to its state return.

The MBT and CIT both allow a taxpayer that sold a depreciable asset during the tax year to adjust the amount of federal taxable income flowing through to its state return by the amount of federal bonus depreciation that had been disallowed with respect to that asset under the MBT/CIT but not by the amount of any federal depreciation that the taxpayer had been required to add back to its tax base under the SBT. Thus, an MBT/CIT taxpayer could be taxed on federal gain that had been calculated, at least in part, based on federal depreciation deductions for which the taxpayer received no benefit under the SBT.

In an effort to avoid this outcome, Plaintiffs in the two cases claimed basis adjustments on their MBT/CIT returns for the tax years at issue for assets sold under those tax regimes that were purchased under the SBT. Specifically, each Plaintiff increased its basis in such assets for *state tax purposes* by the amount of federal depreciation it had been required to add back to its tax base under the SBT. These adjustments resulted in the plaintiffs reporting federal taxable income on their state returns that was lower than the amount reported on their federal returns.

Plaintiffs were subsequently audited, and these adjustments were disallowed. After informal conferences upholding Treasury's position, each Plaintiff sued in the Court of Claims, arguing that its adjustments were supported by Michigan statute and caselaw. The Court of Claims disagreed, finding that the only allowed adjustments to federal taxable income are those expressly outlined in the two tax statutes (such as the adjustment for federal bonus depreciation) and that neither the MBT nor the CIT allowed Plaintiffs' claimed tax treatment. It further found that the cases cited by plaintiffs, *Sturrus v Dep't of Treasury*, 292 Mich App 639 (2011), an individual income tax case, and *Maxitrol Co v Dep't of Treasury*, 217 Mich App 366 (1996), did not support plaintiffs' position.

The court addressed an additional issue in *Republic Services*-whether a final assessment related to an Intent to Assess that Treasury had temporarily cancelled internally in order for Treasury to process plaintiff's amended returns was valid. Noting that Treasury "did not provide plaintiff with any written notice of cancelation or otherwise indicate that it would no longer pursue the tax," that the Intent to Assess and final assessment were issued in compliance with the relevant provisions of the Revenue Act, and that plaintiff had provided no legal support for its theory that the final assessment was invalid, the court upheld the final assessment and two other assessments that had also been temporarily canceled.

Following the court's decision, the Plaintiff in *Michigan Bell* filed a motion for reconsideration, which was denied and appealed to Court of Appeals on April 6, 2023. Republic Services of Michigan Holding Co's motion for reconsideration was denied on April 27, 2023, the time to appeal remains open.

TRIBUNAL UPHOLDS CORPORATE OFFICER LIABILITY ASSESSMENTS

In *Ahmad v Dep't of Treasury*, MTT No. 22-002549, (Feb. 27, 2023) the Michigan Tax Tribunal granted Treasury's motion, thereby upholding several withholding and sales tax Corporate Officer Liability assessments for periods in 2015-2017 against the Taxpayer.

In granting the motion to dismiss, the Tribunal ruled that there was no genuine issue as to any material fact and that Treasury was entitled to judgment on Taxpayer's claim as a matter of law. Specifically addressing responsibility, the Tribunal focused on the terms of MCL 205.27a(5) and (15) and on Ahmad's admissions that he was the sole officer and owner of the business during the periods of default. The Tribunal concluded that these admissions, coupled with undisputed documentary evidence that he had exercised his authority to handle the business's tax matters before the period of default (tax payment checks Ahmad had signed spanning 2005 through 2014), amounted, consistent with RAB 2015-23, to prima facie evidence of responsibility during the period of default. Moreover, checks the Taxpayer signed after the period of default, coupled with Ahmad's admissions (sole ownership and officer) as well as other undisputed documentary evidence, amounted to additional prima facie evidence of responsibility. Also, during the period of default, Taxpayer executed an installment agreement on behalf of the business. For all these reasons, the Tribunal concluded that Ahmad's assertion of no tax-specific responsibility during the period of default was lacking in merit. The Tribunal also observed that the Taxpayer was acting as the sole corporate officer when he made the alleged decision to delegate responsibility to another and, citing *Klecha v Treasury*, 21 MTT 378 (2012), the Tribunal observed that this decision could not shield him from responsibility to supervise the individual and ensure that the taxes were timely paid.

The Taxpayer withdrew his appeal to the Court of Appeals and it was dismissed on April 25, 2023.

TRIBUNAL FINDS CORPORATE OFFICER WILLFULLY FAILED TO FILE TAX RETURNS

In *Mertz v Dep't of Treasury*, MTT No. 21-002888, (Jan. 31, 2023), the Michigan Tax Tribunal upheld 2016 Corporate Officer Liability assessments against the Taxpayer.

Mertz had argued: 1) that he was not an officer of the business during the period of default (throughout 2016 and beyond until January 20th, the date the return and payment were due for December 2016); 2) that to be a corporate officer he would have to have been listed in that capacity in the company's Articles of Incorporation or Operating Agreement and that he was not listed as an officer there until midway through 2017; 3) that he had no control over payment of taxes or filing of returns during this period; 4) that Treasury had not provided prima facie evidence and could not establish a prima facie case for responsibility under the statute; and 5) that the statute required Treasury to collect first against a successor company that purchased the business's assets in 2017.

Treasury had the burden to first produce prima facie evidence or establish a prima facie case that Taxpayer is the responsible person under MCL 205.27a(5). Here, Treasury could not produce prima facie evidence that Petitioner is the responsible person. Thus, Treasury had to establish a prima facie case. Treasury presented evidence, both documentary and testimonial, establishing 1) that Mertz had taken on the role of reporting and payment of taxes before, during and after 2016; 2) that he alone had handled tax reporting and had interfaced with the company's outside accountants in the preparation of the returns; 3) that while he hadn't executed returns during the period of default, he signed tax payment checks; 4) that he had signed returns before and after the period of default; 5) that he had held himself out to government agencies and a trade publication as an officer of the business; 6) that his signature on earlier tax returns contradicted his averment that he only became an officer of the business midway through 2017; 7) that while his father might also have tax responsibilities for the company, that fact would simply yield two potential responsible officers as collection candidates; 8) that he had full knowledge of the company's non-payment of taxes; 9) that his movement into and out of the company of substantial sums of his own money demonstrated control; and 10) that the business and its successor had not followed required tax clearance procedures and notified Treasury of the identity of the successor, so the statute did not require Treasury to collect first from the successor before asserting liability against the officer.

The Tribunal held that the undisputed facts established Mertz as an officer of the business with "tax-specific" responsibility, who willfully failed to file tax returns or pay the tax due. The Tribunal rejected the formalistic argument the Taxpayer had not been listed as an officer in the Articles or Operating Agreement, instead pointing out that his actions in preparing and signing returns and checks and allowing himself to be held out as a company officer to governmental agencies overrode any formalism. The Tribunal also held that the companies' failure to follow clearance procedures and identify the successor company did not prevent Treasury from assessing corporate officer liability against petitioner at the outset.

The Taxpayer appealed the Tribunal's opinion to the Court of Appeals on March 28, 2023.

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tangible personal property" from the retailer to the customer. Now, under the amended acts, charges for delivery or installation of an item are generally subject to tax as part of the item's price. But, except for utilities (discussed below), delivery and installation charges can be excluded from an item's tax base if the retailer states the charges separately both on the customer's receipt or invoice and in the retailer's books or records.

The amended acts treat gas and electric utilities' delivery and installation charges differently from others' delivery and installation charges. Even if a utility states the delivery or installation charges separately on an invoice and in its books and records, the delivery charges remain part of the tax base. In other words, unlike retailers in general, gas and electric utilities cannot avoid the inclusion of delivery charges in the tax base.

The amended acts also offer relief to taxpayers subject to liability for outstanding balances from unpaid tax on delivery and installation charges. Now, Treasury must cancel outstanding balances relating to those charges, on notices of intent to assess or on final assessments. However, the acts do not authorize Treasury to issue refunds of tax remitted before the amendments' April 26 effective date.

Treasury will act diligently to identify taxpayers entitled to relief for outstanding balances. But if you are subject to a notice to intent to assess or a final assessment, and you believe you are entitled to cancelation of your outstanding balance, please reach out to Treasury by emailing Treas-TCB-Technical@michigan.gov.

The new laws may be read here: 2023 PA 20 amended the General Sales Tax Act, MCL 205.51 and MCL 205.75; 2023 PA 21 amended the Use Tax Act, MCL 205.92 and MCL 205.111. If you have questions, please direct them to email Treasury Treas-TCB-Technical@michigan.gov.

Michigan Department of TREASURY

Archives of Treasury Update can be found on the website at Michigan.gov/Treasury under the Reports and Legal Resources tab.

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