

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

Davor Vulic,
Petitioner,

v

MTT Docket No. 15-004644

Michigan Department of Treasury,
Respondent.

Administrative Law Judge Presiding
Peter M. Kopke

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION UNDER
MCR 2.116(C)(8)

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION UNDER
MCR 2.116(C)(10)

ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF RESPONDENT
PURSUANT TO MCR 2.116(I)(2)

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

Petitioner filed this appeal disputing Final Assessment Nos. TQ56706, TQ86040, TR16098, TR55050, and TR 55051 on July 6, 2015. The assessments, which reflect unpaid cigarette taxes under the Tobacco Products Tax Act ("TPTA"), were issued on June 3, 2015, following the entry of a Decision and Order of Determination by the Department.¹

On March 14, 2016, Respondent filed a motion requesting that the Tribunal enter summary disposition in its favor and dismiss the above-captioned case. In the Motion, which was filed pursuant to MCR 2.116(C)(8) and MCR 2.116(10), Respondent contends that Petitioner has failed to state a claim upon which relief can be granted, and that there are no genuine issues of material fact. As such, Respondent is entitled to judgment as a matter of law.

Petitioner filed a response in opposition to Respondent's Motion on April 5, 2016.

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner purchased 1,799 cartons of untaxed cigarettes from an unlicensed out-of-state tobacco business during the period December 1, 2005 through November 27, 2009. Petitioner paid for the cigarettes from a bank account in his name and had them

¹ The Final Assessments reflect the removal of the use tax liability reflected in the corresponding Intents to Assess pursuant to the Referee's Informal Conference Recommendation, which was accepted in the Decision and Order of Determination.

shipped to him in the State of Michigan. Pursuant to MCL 205.431(1), a person shall not sell or solicit a sale of a tobacco product to be shipped, mailed, or otherwise sent or brought into the state unless the tobacco product is to be sold to or through a licensed wholesaler. In addition, a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a wholesaler, secondary wholesaler, or unclassified acquirer in this state unless licensed to do so.² Petitioner, who is not licensed under the TPTA, acted in the capacity of an unclassified acquirer when he imported the cigarettes at issue.³ Having sold the cigarettes to another for purposes of resale without being licensed to do so, Petitioner is personally liable for the tobacco taxes and interest due.⁴ The Department has invoked the authority granted to it as to unclassified acquirers, so the cigarette tax liability immediately accrues upon importation of the cigarettes and must be paid to the Department on or before the 20th day of the month following the month in which the tobacco product was imported or acquired.⁵

PETITIONER'S CONTENTIONS

Petitioner contends that the TPTA, pursuant to its plain language, only authorizes a tobacco tax to be imposed on the consumer of a tobacco product, which is the individual who purchases the product for personal use in the state of Michigan.⁶ The TPTA's "Bad Debt" provision, which allows a licensee to deduct unreimbursed tax, further evidences this intent.⁷ It is clear from the facts of this case that there were never any consumers of the cigarettes at issue in Michigan—Mr. Bogdanovic sold them to consumers in Bosnia. Because the act does not authorize a tax to be imposed on the product if there is no consumer of that product in the State of Michigan, there is no tax for Petitioner to be personally liable for. Each and every provision cited by the Department in an attempt to impose a tax on Petitioner directly conflicts with the stated intent to impose tax upon the consumer, and as a result, must be construed in Petitioner's favor.⁸ Further, Petitioner did not open the packages, which were in his possession for less than 24 hours, before shipping them to Bosnia. Petitioner was not in control or possession of a tobacco product, but was merely a gratuitous Bailee.⁹

APPLICABLE LAW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.¹⁰ A motion under MCR 2.116(C)(8), "tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant."¹¹ Such motions "may be granted only where the claims alleged are 'so clearly

² MCL 205.423(1).

³ MCL 205.422(z).

⁴ MCL 205.428(1).

⁵ MCL 205.427(6); MCL 205.427(1)-(2).

⁶ MCL 205.427a; MCL 205.92g; Oxford English Dictionary, Consumer (2d ed, 1991).

⁷ MCL 205.427b.

⁸ *S Abraham & Sons, Inc v Dep't of Treasury*, 260 Mich App 1, 18-19, 677 NW2d 31 (2003).

⁹ *People v Mumford*, 60 Mich App 279, 282; 230 NW2d 395 (1975).

¹⁰ See TTR 215.

¹¹ *Maiden v Rozwood*, 461 Mich 109, 119-20; 597 NW2d 817 (1999).

unenforceable as a matter of law that no factual development could possibly justify recovery.”¹² Further, “when deciding a motion brought under [MCR 2.116(C)(8)], a court considers only the pleadings.”¹³ MCR 2.116(C)(10) provides for summary disposition when “there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.”¹⁴ The Michigan Supreme Court, in *Quinto v Cross and Peters Co.*,¹⁵ provided the following explanation of MCR 2.116(C)(10):

MCR 2.116 is modeled in part on Rule 56(e) of the Federal Rules of Civil Procedure . . . [T]he initial burden of production is on the moving party, and the moving party may satisfy the burden in one of two ways.

First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.¹⁶

In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied.¹⁷

¹² *Id.* (citations omitted).

¹³ *Id.* (citations omitted).

¹⁴ *Id.*

¹⁵ *Quinto v Cross and Peters Co.*, 451 Mich 358; 547 NW2d 314 (1996)(citations omitted).

¹⁶ *Id.* at 361-363. (Citations omitted.)

¹⁷ *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

Pursuant to MCR 2.116(I), “If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.”¹⁸

CONCLUSIONS OF LAW

Having given careful consideration to Respondent’s Motion for Summary Disposition under the criteria for MCR 2.116(C)(8), the Tribunal finds that granting the motion is not warranted. In that regard, it appears to the Tribunal that Respondent’s motion arises out of its contention that Petitioner incorrectly asserts that it is not liable for the disputed taxes. Whether there is any legal merit to the claim is irrelevant, however, for purposes of a motion for summary disposition under this section. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. As such, and inasmuch as it cannot be said that no factual development could possibly justify a right to recovery, Petitioner has not failed to state a claim on which relief can be granted. As for Respondent’s Motion under MCR 2.116(C)(10), the Tribunal agrees with Petitioner that the majority of its arguments are irrelevant, as they speak only to violations of the Act.¹⁹ MCL 205.428(1) is the only relevant statute, as it is the only one that provides for personal liability for the taxes due under the TPTA upon anyone other than the licensee:

A person, other than a licensee, who is in control or in possession of a tobacco product contrary to this act, who after August 31, 1998 is in control or in possession of an individual package of cigarettes without a stamp in violation of this act, or who offers to sell or does sell a tobacco product to another for purposes of resale without being licensed to do so under this act, shall be personally liable for the tax imposed by this act, plus a penalty of 500% of the amount of tax due under this act.

Further, while the Department contends that it “has invoked the authority granted to it under MCL 205.427(6) as to unclassified acquirers so the cigarette tax liability immediately accrues upon importation and/or acquisition of the cigarettes in Michigan and must be paid . . . on or before the 20th day of the month following the month in which the tobacco product was imported or acquired,” the cited statute provides no such authorization. This statute provides that “[t]he department may require the payment of the tax imposed by this act upon the importation or acquisition of a tobacco product.”²⁰ Respondent impermissibly reads nonexistent language into the statute, as nowhere therein are “unclassified acquirers” referenced. Indeed, this statute is

¹⁸ *Id.*

¹⁹ See Respondent’s arguments with respect to MCL 205.426(a)(2) (“Before delivery, sale, or transfer to any person in this state, a wholesaler or an unclassified acquirer shall place or cause to be placed on the bottom of each individual package of cigarettes to be sold within this state a stamp provided by the department.”), MCL 205.431(1) (“A person, either as principal or agent, shall not sell or solicit a sale of a tobacco product to be shipped, mailed, or otherwise sent or brought into the state, to a person not a licensed manufacturer, licensed wholesaler, licensed secondary wholesaler, licensed vending machine operator, licensed unclassified acquirer, licensed transporter, or licensed transportation company, unless the tobacco product is to be sold to or through a licensed wholesaler.”), and MCL 205.423(1) (“Beginning May 1, 1994, a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so.”).

²⁰ MCL 205.427(6).

found in the section of the TPTA that addresses the obligation of *licensees* to collect and remit the tax to the Department. Read as a whole, it provides for a tax upon “the sale of tobacco products sold in this state,”²¹ which licensees are required to pay to the Department “at the time of the filing of the return”²² due under subsection two “[o]n or before the twentieth day of each calendar month,”²³ though the Department may “require the payment of the tax . . . upon the importation or acquisition of a tobacco product.”²⁴ Further, “[a] person liable for the tax may reimburse itself by adding to the price of the tobacco products an amount equal to the tax levied under this act.”²⁵

As for Petitioner’s liability under MCL 205.428(1), Respondent contends only that Petitioner sold cigarettes to another for purposes of resale without being licensed to do so. The term “sale” is, as noted by Respondent, broadly defined by MCL 205.422(r) as “a transaction by which the ownership of tangible personal property is transferred for consideration and applies also to use, gifts exchanges, barter, and theft.”²⁶ Consideration is nevertheless required, and while Petitioner may have provided the cigarettes to another for purposes of resale, there is no evidence or even an allegation that he did so for consideration.²⁷ Petitioner has repeatedly stated both in his filings with the Tribunal and the Department that his actions were purely made as a favor and that he wasn’t making any profit from the transaction.²⁸ Consequently, granting Respondent’s Motion for Summary Disposition under MCR 2.116(C)(10) is not warranted.

Notwithstanding the above, Petitioner’s contention that he is not liable for taxes on the cigarettes because they were ultimately sold to consumers in Bosnia, and there were no consumers of the cigarettes in the State of Michigan is without merit. MCL 205.427a does specifically provide that “[i]t is the intent of this act to impose the tax levied under this act upon the consumer of the tobacco products by requiring the consumer to pay the tax at the specified rate”²⁹ as Petitioner contends. The Use Tax Act (“UTA”) defines “consumer” as a “person who has purchased tangible personal property or services for storage, use, or other consumption in this state”³⁰ Petitioner, focusing on the “consumption in this state” portion of the UTA definition, and reading

²¹ MCL 205.427(1).

²² MCL 205.427(3).

²³ MCL 205.427(2).

²⁴ MCL 205.427(6).

²⁵ MCL 205.427(8).

²⁶ *Id.*

²⁷ Respondent cites the following facts in support of its contention that Petitioner offered to sell and sold cigarettes to another for purposes of resale: (1) Petitioner’s statement that his friend asked him to order the cigarettes and ship them to Ex-Yugoslavia, and (2) Kheops-Trade, LLC sold the 1,799 cartons of cigarettes imported from Petitioner in Michigan from a store located next to the American Humanitarian Organization.

²⁸ Petitioner’s letter to the Department specifically provides: “I want to state and make clear that I wasn’t making any profit from the cigarettes shipped to him; this was purely made as a favor to a very good friend of mine.” R-4. Mr. Bogdanovic’s letter provides: “I note that [Petitioner] did not have any personal gain but that he was, as a good friend of mine, doing me a favor.” R-5. The petition similarly states that Petitioner “merely provided a gratuitous favor to a friend in a foreign country”

²⁹ *Id.*

³⁰ MCL 205.92(g). Looking to the UTA for a definition of the term is proper “because the TPTA includes ‘use’ in the definition of ‘sale,’ MCL 205.422(m), [and as such,] the act imposes a tax on the *use* of tobacco products, akin to a use tax payable by the consumer, while simultaneously imposing a tax on the sale of tobacco products, see MCL 205.427(1), similar to a sales tax payable by the wholesaler.” *S Abraham & Sons*, 260 Mich App at 14.

the same in conjunction with a dictionary definition of the term, interprets “consumer” as one who purchases tobacco products for personal use in the State of Michigan.³¹ Consumption, however, is just one part of the UTA definition; a consumer is also someone who purchases property for storage or use in this state. “Use” is defined by the UTA as “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.”³² This language is exceedingly similar to that set forth in MCL 205.428(1), which provides for the imposition of tax liability on “[a] person . . . in control or in possession of an individual package of cigarettes without a stamp in violation of this act”³³

Petitioner cites *People v Mumford*,³⁴ for the proposition that he was not in control or possession of a tobacco product, and was merely a gratuitous Bailee. Petitioner fails to explain, however, how this case, which states that “[t]he term ‘possession’ connotes dominion or the right of control . . . with knowledge of its presence and character,” and affirms that it “is to be construed in its commonly understood sense and may encompass both actual and constructive possession,” supports such a conclusion.³⁵ Possession “may be provided by circumstantial evidence and reasonable inferences,” and the Court in that case found that a jury could reasonably infer from the defendant’s exclusive presence in the apartment and near the coffee table where a vial containing 7.83 grams of heroin was found, “under circumstances indicating that he was an inhabitant, not a mere visitor,” and his brandishing of a gun, “that he was exercising control over the heroin with knowledge of its character. Petitioner admits that he purchased the cigarettes at issue, and that they were shipped to his home in Michigan, and the fact that he did not open the packages before shipping them to his friend in Bosnia is irrelevant, as is the fact that they were in his possession for less than 24 hours.³⁶ Petitioner clearly had knowledge of the cigarettes’ presence and character, notwithstanding his failure to open that packages, as evidenced by his shipment of the same to his friend in Bosnia per their agreement, and he exercised control over the cigarettes in both receiving and shipping the same.

JUDGMENT

Given the above, the Tribunal finds that there is no genuine issue of material fact with respect to the validity of the assessments at issue in this appeal, and Respondent is entitled to judgment as a matter of law. Petitioner is a person, other than a licensee, who was in control and possession of unstamped packages of cigarettes in violation of the TBTA, and he is personally liable for the tax imposed by that act. Therefore,

IT IS ORDERED that Respondent’s Motion for Summary Disposition pursuant to MCR 2.116(C)(8) is DENIED.

³¹ Petitioner cites the Oxford English Dictionary definition of the term: “A person who purchases goods and services for personal use.” *Oxford English Dictionary*, (2d ed, 1991).

³² MCL 205.92(b).

³³ *Id.*

³⁴ *People v Mumford*, 60 Mich App 279; 230 NW2d 395 (1975).

³⁵ *Id.* at 282-283.

³⁶ See petition and Petitioner’s responses to Respondent’s First Set of Interrogatories and Requests for Production of Documents.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is DENIED.

IT IS FURTHER ORDERED that Respondent is GRANTED Summary Disposition pursuant to MCR 2.116(I)(1).

IT IS FURTHER ORDERED that Final Assessment Nos. TQ56706, TQ86040, TR16098, TR55050, and TR 55051 are AFFIRMED.

IT IS FURTHER ORDERED that 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. The opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions. A copy of a party's written exceptions or response 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 exceptions or response were served on the opposing party.

Entered: April 22, 2016
ejg

By: Peter M. Kopke