

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

Plastic Surgery Associates, PC,
Petitioner,

v

MTT Docket No. 16-000011

Michigan Department of Treasury
Respondent.

Tribunal Judge Presiding
David B. Marmon

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

GRANTING SUMMARY DISPOSITION FOR PETITIONER

FINAL OPINION AND JUDGMENT

INTRODUCTION

On October 10, 2016, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case. More specifically, Respondent contends that drugs, injections, implants and office supplies did not constitute materials and supplies for purposes of determining the base for taxation under the Michigan Business Tax, and Respondent's assessments should be upheld.

On October 26, 2016, Petitioner filed a response to the Motion. Petitioner maintains that the phrase "materials and supplies" is not ambiguous, and should be subtracted from gross income. Alternatively, Petitioner argues that the phrase "materials and supplies" includes drugs, injections, implants and office supplies as defined under federal tax law, which is incorporated by reference into the Michigan Business Tax Act.

The Tribunal has reviewed the Motion, response, and the evidence submitted and finds that denying Respondent's Motion for Summary Disposition and instead granting Summary Disposition for the Petitioner is warranted.

RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends that Petitioner's purchase of drugs, implants, office supplies and medical supplies cannot be subtracted from Petitioner's gross income in calculating the base of the Michigan Business Tax.¹ Specifically, Respondent states:

In order to give meaning to the entire provision of MCL 208.113(6)(c) Treasury interprets the materials and supplies provision of the definition of "purchases from other firms" to mean that the deduction is for tangible personal property that is used or consumed in – and directly connected to – either the production or management of inventory or the operation or maintenance of depreciable assets.²

Respondent further contends that that because a deduction also has the effect of reducing a taxpayer's tax liability, it is treated the same as an exemption, and must be construed in its favor.³ On a similar note, Respondent argues that its interpretation is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.⁴

Respondent argues that the Michigan Business Tax Act does not define "materials and supplies," and therefore the phrase must be interpreted. It then argues because it has set forth an interpretation by way of FAQ Nos. M4, M37, and M67, its interpretation refining the definition of materials and supplies to mean tangible personal property *used or consumed in, and directly connected to either the production or management of inventory or the operation or maintenance of depreciable assets.*

Respondent further contends that reading the subsection in its grammatical context referring to inventory and depreciable property is a clear indication that the materials and supplies deduction must be evaluated in terms of the concepts of inventory and depreciable

¹ MCL 208.1101 et seq.

² Respondent's Motion for Summary Disposition, paragraph 2.

³ *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 473-474; 838 NW2d 736 (2013).

⁴ *In re Complaint of Rovas*, 482 Mich 90, 103; 754 NW2d 289 (2008).

property. Any other interpretation would render the introductory phrase of the provision surplusage or nugatory, and thus inconsistent with accepted rules of statutory construction.

Finally, Respondent argues that materials and supplies cannot be “a catch all” provision because such an interpretation would render the accompanying provisions of the statute extraneous. There would be no reason to identify inventory and depreciable property as separate categories if the Legislature had intended that all tangible personal property purchased from other firms would qualify for the deduction. Accordingly, Respondent requests that assessment numbers TW09167 and TW09168 be upheld.

PETITIONER’S CONTENTIONS

In support of its response, Petitioner contends that MCL 208.1113(6)(c) is clear on its face in defining materials and supplies as a purchase from other firms, and therefore, must be subtracted in determining the base for the Michigan Business Tax. Petitioner further contends that Respondent has no authority to interpret the statute and add additional restrictions that are neither present, nor implied in the statute. Petitioner also contends that materials and supplies are known terms under federal tax law, per MCL 208.1103. As such, drugs, injections, implants and office supplies are to be subtracted in calculating the base for the Michigan Business Tax, and Respondent erred in disallowing their subtraction from the tax base. Accordingly, assessments TW09167 and TW09168 must be canceled.

STANDARD OF REVIEW

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.⁵ In this case, Respondent moves for summary disposition under grounds correlating with MCR 2.116(C)(8) and (C)(10).

MCR 2.116(C)(8)

Motions under MCR 2.116(C)(8) are appropriate when “[t]he opposing party has failed to state a claim on which relief can be granted.” Dismissal should be granted when the claim, based solely on the pleadings, is so clearly unenforceable that no factual development could possibly justify a right to recovery.⁶ In reviewing a motion under this subsection, the court must accept as true all factual allegations in support of a claim, as well as all inferences which can fairly be drawn from the facts.⁷

MCR 2.116(C)(10)

Summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.⁸ In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under (C)(10) will be denied.⁹

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light

⁵ See TTR 215.

⁶ See *Transamerica Ins Group v Michigan Catastrophic Claims Ass’n*, 202 Mich App 514, 516; 509 NW2d 540 (1993).

⁷ See *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

⁸ See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

⁹ See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

most favorable to the non-moving party.¹⁰ The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.¹¹ The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.¹² Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving 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.¹³ If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.¹⁴

Neither party contends that a factual question remains in this appeal. While Petitioner did not move for Summary Disposition, its response requests that the Tribunal in effect, find in its favor for Summary Disposition.

MCR 2.116(I)(2)

Summary disposition under MCR 2.116(I)(2) is appropriate “[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment . . . ,” and as such, the court may render judgment in favor of the opposing party.¹⁵

CONCLUSIONS OF LAW

The gravamen to deciding this Motion is whether or not Respondent’s interpretation of a definitional statute is consistent with the statute itself. The definitional statute at issue is MCL 208.1113(6)(c). This statute reads, in relevant part:

Section 208.1113 Definitions; P and R

¹⁰ See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).

¹¹ See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

¹² *Id.*

¹³ See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

¹⁴ See *McCormic v Auto Club Ins Ass’n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

¹⁵ See also *Washburn v Michailoff*, 240 Mich App 669; 613 NW2d 405 (2000).

(6) "Purchases from other firms" means all of the following:

(a) Inventory acquired during the tax year, including freight, shipping, delivery, or engineering charges included in the original contract price for that inventory.

(b) Assets, including the costs of fabrication and installation, acquired during the tax year of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes.

(c) *To the extent not included in inventory or depreciable property, materials and supplies, including repair parts and fuel.* [Emphasis added]

(d) For a staffing company, compensation of personnel supplied to customers of staffing companies. . . .

Respondent argues that the definition of purchases from other firms concerning materials and supplies is limited to materials and supplies supporting inventory or depreciable property, because those items are listed in the same subsection, and are referred to "to the extent not included" in subsection (c). The Tribunal finds this argument to be without merit. Rather, the Tribunal holds that the qualifier "to the extent not included" is an acknowledgement that materials and supplies might also be considered inventory or depreciable assets. The fact that "materials and supplies" is enumerated as its own subsection, (subsection (c)), rather than say, subsection (b)(i), is a strong indicator that these terms refer to a category of purchases from other firms, separate from inventory or depreciable assets, as is compensation of personnel for a staffing company, found in subsection (d). Further, the use of the phrase "including repair parts and fuel" in subsection (c) suggests that materials and supplies is broader than those two categories, which on their own, may or may not be included as part of a depreciable asset or inventory found in subparts (a) and (b) of this section. As other types of tangible personal property related to depreciable personal property or inventory are not obvious, Respondent's additional requirement under subsection render the phrase "including repair parts and fuel" nugatory. As stated by the Hearing Referee below:

With respect to the Legislature’s use of the first instance of the word “included” in subsection 113(6)(c) as in “[T]o the extent *not included* . . .” its intent is also clear. *Beyond* those items that *are* included under subsections (6)(a) and (b), there are additional “materials and supplies,” which are included in subsection (6)(c). Had the Legislature intended that the term “materials and supplies” be limited only as the Department contends – to items used or consumed in (i.e., repair parts and fuel) and directly connected to the operation of depreciable assets (included under subsection (6)(b)), the Legislature need not have included the phrase “materials and supplies” at all, but could have used plain language to say, “to the extent not included in inventory or depreciable property, [repair parts and fuel used or consumed in and directly connected to the operation of the depreciable property].” The Legislature chose not to include such language. The Department’s interpretation ignores the specific punctuation and language of the statute that makes it clear that “materials and supplies” are purchases from other firms “to the extent not included in inventory or depreciable property” and those “materials and supplies” may also include “repair parts and fuel.” [Emphasis in original].¹⁶

Respondent further argues that its additional limiting requirements for defining “materials and supplies” as items supporting inventory or depreciable property are necessary because to hold otherwise would make subsections (a) and (b) meaningless. Specifically, Respondent argues that subsection (c) is a “catch all” for tangible personal property that does not fit under subsections (a) and (b), and accordingly, the legislature would not have listed specific types of tangible personal property under subsections (a) and (b) if all tangible personal property were to qualify as purchases from other firms. The Tribunal rejects this argument as well.

Aside from the Referee’s reasoning stated above, this statute bases its definitions upon analogous federal statutes. Section 103 of the Act states:

A term used in this act and not defined differently shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes in effect for the tax year unless a different meaning is clearly required. A reference in this act to the internal revenue code includes other provisions of the laws of the United States relating to federal income taxes.¹⁷

¹⁶ Informal Conference Recommendation, Docket No. 20131834, p. 11. It is unclear as to what principled reasoning Respondent adopted below in rejecting the Informal Conference Recommendation.

¹⁷ MCL 208.1103

Materials and supplies to the extent that they are deductible, (as opposed to capitalized and depreciated under federal law) must be *ordinary and necessary* expenses under section 162 of the Internal Revenue Code. Accordingly, Respondent's characterization of 208.1113(c) as a "catch all" provision overstates its effect, since tangible personal items that are not ordinary and necessary, would not qualify even without Respondent's additional restrictions.

Moreover, statutes are not to be "interpreted" unless the language is ambiguous.¹⁸ In *Pohutski v City of Allen Park*, our Supreme Court summarized the law on this point and stated:

We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. *Turner v. Auto Club Ins. Ass'n*, 448 Mich. 22, 27, 528 N.W.2d 681 (1995). Where the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto*, *supra* at 402, 605 N.W.2d 300. Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. *See Lansing v. Lansing Twp.*, 356 Mich. 641, 649–650, 97 N.W.2d 804 (1959).

"A term is ambiguous when it is equally susceptible to more than a single meaning."¹⁹ The Tribunal agrees with the reasoning and conclusions of the Treasury hearing referee in her Informal Conference Recommendation below, that there was no ambiguity in which to trigger an interpretation. The Referee below stated:

The primary goal of statutory construction is to ascertain and give effect to the Legislature's intent as expressed by the language of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). When determining legislative intent it is necessary to first look at the language of the statute. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346; 578 NW2d 274 (1998). If the language is clear and unambiguous, judicial construction is not permitted. *Yaldo*, 457 Mich at 346. *The factfinder may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute*

¹⁸ *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002).

¹⁹ Footnote 2, *Toll Northville Ltd Pt v Northville Twp*, 480 Mich 6,15; 743 NW2d 902 (2008).

itself. Alvan Motor Freight Inc v Dep't of Treasury, 281 Mich App 35, 39; 761 NW2d 269 (2008).²⁰ [Emphasis added].

As the referee found below, there is nothing ambiguous in the definition of materials or supplies:

Indeed, the Department's interpretation of the meaning of the term "materials and supplies" is inconsistent with the statute's plain meaning and framer by narrowing the definition to only certain types of "materials" or "supplies (those which are used, consumed in an directly connected the operation or maintenance of inventory or depreciable assets). The Department's interpretation thus impermissibly expands the language of the statute in order to narrow the meaning of the term "materials and supplies." The statute does not contain any language so limiting the meaning of materials and supplies.²¹

Respondent next argues that its own interpretation requires deference. While the Tribunal agrees that Respondent's interpretation requires "respectful consideration,"²² as well as stated cogent reasons for disregarding Respondent's interpretation, *Andersons Albion Ethanol LLC v Dep't of Treasury*,²³ there is no requirement that their interpretation be accepted. The Tribunal rejects Respondent's addition of language to a clear and unambiguous statute, per the rules of statutory interpretation set forth above. Further, Respondent's interpretation was never adopted as a regulation. Rather, it was put forth in the form of answers to frequently asked questions, ("FAQs").²⁴ Even if it was so adopted, a regulation cannot go beyond the scope of the statute. None of the answers to the FAQs set forth by Respondent gives any hint of reasoning in its explanation. Rather, the answers are more in the form of the parental refrain, "because I said so." The Tribunal's consideration of Respondent's position would be somewhat more respectful if it were backed up by cogent reasons that are in harmony with, rather than opposed to our Supreme Court's rules of statutory construction.

²⁰ Informal Conference Recommendation, Docket No. 20131834, p. 9.

²¹ Informal Conference Recommendation, Docket No. 20131834, p. 10.

²² *In Re Complaint of Rovas*, 482 Mich 90, 103; 754 NW2d 289 (2008).

²³ *Andersons Albion Ethanol LLC v Dep't of Treasury* __ Mich App __; __ NW2d __ Court of Appeals Docket Number 327855 (decided September 13, 2016).

²⁴ Michigan Business Tax Frequently Asked Questions M4, M37 and M67.

The Tribunal has carefully considered Respondent's Motion under MCR 2.116 (C)(8) and (C)(10), and finds that denying the Motion is warranted. Further, the Tribunal holds that summary disposition in favor of Petitioner is warranted under MCR 2.116(I)(2).

JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition is DENIED, and Summary Disposition in favor of the Petitioner is GRANTED.

IT IS FURTHER ORDERED that Assessment Numbers TW09167 and TW09168 are hereby CANCELLED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Opinion within 28 days of entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves the last pending claim and closes the case.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

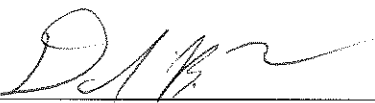
A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.²⁵ Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is \$50.00 in the Entire Tribunal and \$25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.²⁶ A copy of the motion must be served on the opposing party by mail or

²⁵ See TTR 261 and 257.

²⁶ See TTR 217 and 267.

personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.²⁷ Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.²⁸

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an “appeal by right.” If the claim is filed more than 21 days after the entry of the final decision, it is an “appeal by leave.”²⁹ A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.³⁰ The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.³¹

By: 

Entered: NOV 15 2016

²⁷ See TTR 261 and 225.

²⁸ See TTR 261 and 257.

²⁹ See MCL 205.753 and MCR 7.204.

³⁰ See TTR 213.

³¹ See TTR 217 and 267.