

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

Besser Company USA,
Petitioner,

v

MTT Docket No. 16-005598

Michigan Department of Treasury,
Respondent.

Tribunal Member Presiding
Steven H Lasher

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner is appealing Respondent's rescission of its Eligible Manufacturing Personal Property ("EMPP") exemption for Parcel No. 018-999-000-070-00 for the 2016 tax year. A hearing was held on March 6, 2018. Gregory A. Nowak, Attorney, appeared on behalf of Petitioner. Michael S. Hill, Assistant Attorney General, appeared on behalf of Respondent. Petitioner presented testimony from Michelle Hillert and David Buick and Respondent presented testimony from Matthew Williston, Kyle Tenbroke, and Jackie NG.

PETITIONER'S CONTENTIONS

Petitioner contends that Respondent improperly rescinded Petitioner's EMPP because it failed to comply with statutory notice obligations under the State Essential Services Assessment Act ("ESAA") and the Revenue Act and Petitioner did not receive the required notice.

PETITIONER'S ADMITTED EXHIBITS

P-10: October 21, 2016 ESA Notice of Intent to Rescind

RESPONDENT'S CONTENTIONS

Respondent contends that its rescission of Petitioner's EMPP was proper because the notice sent to Petitioner on August 24, 2016 complied with the ESAA, and the Revenue Act and its notice requirements are not applicable to administration of the Essential Services Assessment ("ESA").

RESPONDENT'S ADMITTED EXHIBITS

R-3: ESA Statement/Payment Reminder dated July 22, 2016
R-4: SAP system screen capture re: ESA Statement/Payment Reminder
R-5: Filenet System Image of ESA Statement/Payment Reminder
R-6: Screenshots of email transmission confirmation to mhillert@besser.com

R-7: Besser Company's ESA Annual Statement and Return
R-8: ESA Notice of Account Status dated August 24, 2016
R-9: SAP system screen capture re: Notice of Account Status
R-10: Filenet system image of Notice of Account Status
R-11: Notes from courtesy phone call on September 27, 2016
R-12: Notice of Intent to Rescind
R-13: SAP system screen capture re: Notice of Intent to Rescind
R-14: Filenet system image of Notice of Intent to Rescind
R-17: Entire Tribunal Property Tax Petition
R-23: SAP screen capture of ESA Annual Return Filing date

FINDINGS OF FACT

1. Petitioner is a manufacturer based in Alpena, Michigan.
2. Petitioner filed its 2016 ESA return on July 18, 2016.
3. Petitioner's 2016 ESA return identified 801 Johnson Street, Alpena, MI 49707-1870 as the mailing address for ESA Correspondence.
4. Petitioner's 2016 ESA return certified a liability in the amount of \$951.00 for the subject property.
5. Respondent issued a Statement/Payment Reminder to Petitioner on July 22, 2016.
6. The July 22, 2016 notice was mailed to Petitioner at 801 Johnson Street, Alpena, MI 49707-1870. The notice was also emailed to mhillert@besser.com.
7. Petitioner received the July 22, 2016 notice.
8. Petitioner did not pay its ESA liability by August 15, 2016.
9. Respondent issued a Notice of Account Status to Petitioner on August 24, 2016.
10. The August 24, 2016 notice was mailed to Petitioner at 801 Johnson Street, Alpena, MI 49707-1870.
11. Respondent issued a Notice of Intent to Rescind to Petitioner on October 21, 2016.
12. The October 21, 2016 notice was mailed to Petitioner at 801 Johnson Street, Alpena, MI 49707-1870.
13. Petitioner received the October 21, 2016 notice.
14. Petitioner paid its ESA liability on November 17, 2016.

CONCLUSIONS OF LAW

ESA is a "state specific tax on the eligible personal property owned by, leased to, or in the possession of an eligible claimant on December 31 of the year immediately preceding the assessment year" ¹ "Eligible personal property" is defined, in pertinent part, as "personal property exempt under section 9m or 9n of the general property tax act, 1893 PA 206, MCL 211.9m and 211.9n." ² Section 7 of the ESAA requires the Department to "make available in electronic form to each eligible claimant a statement for calculation of the assessment" ³ by May 1 in each assessment year, and each eligible claimant must "electronically revise as necessary and certify the completed statement and make full payment of the assessment levied" no later

¹ MCL 211.1055(2).

² MCL 211.1053(e)(i).

³ MCL 211.1057(2).

than August 15 each year.⁴ It also requires the Department to issue a notice if a taxpayer has not filed its return and certified payment by August 15, and the notice must “include a statement explaining the consequences of nonpayment . . . and instructing the eligible claimant of its potential responsibility under subsection (5)(e).”⁵ If payment is not submitted in full by October 15, “The department shall rescind no later than the first Monday in December for the assessment year any exemption described in section 9m or 9n of the general property tax act, 1893 PA 206, MCL 211.9m and 211.9n, granted for any parcel for which payment in full and any penalty due have not been received”⁶ Petitioner acknowledges that it did not submit its payment by October 15, 2016, but contends that this deadline was never triggered because Respondent did not comply with statutory notice obligations under the ESA and Revenue Acts.

Respondent issued a Notice of Account Status to Petitioner on August 24, 2016, and the notice included a statement explaining the consequences of nonpayment, i.e., that the exemption would be rescinded if the ESA liability and late payment penalty were not paid by October 15, 2016 and instructing Petitioner of its potential responsibility under subsection MCL 211.1057(5)(e), i.e., Petitioner’s obligation to file a personal property statement after rescission of the exemption. Petitioner contends, however, that Respondent’s service via first class mail was deficient because it was required to serve the notice via personal service or certified mail, as provided by Section 28 of the Revenue Act.⁷ In support of this contention, Petitioner cites Section 20 of the Act, which states: “Unless otherwise provided by specific authority in a taxing statute administered by the department, all taxes shall be subject to the procedures of administration, audit, assessment, interest, penalty, and appeal provided in sections 21 to 30.”⁸ Though Petitioner correctly asserts that ESA is a tax administered by the Department of Treasury, the introductory phrase of this statute makes it clear that this section only applies if there is no other authority that addresses administration and other such procedures. Section 28 of the Revenue Act similarly states that the conditions set forth therein, including the notice requirement found in subsection (1)(a), “apply to all taxes administered *under this act* unless otherwise provided for in the specific tax statute”⁹ The ESAA has its own administration provisions, and unlike the General Sales Tax Act (“GSTA”) at issue in *Fradco, Inc v Dep’t of Treasury*,¹⁰ it does not direct the Department to administer the tax pursuant to the Revenue Act.¹¹ Section 7 of the ESAA

⁴ MCL 211.1057(3).

⁵ MCL 211.1057(4). MCL 211.1057(5)(e) states that “For any assessment year in which an eligible claimant does not submit payment in full and any penalty due under subsection (4) or (6) by October 15, or if the department discovers that the property is not eligible under section 9m or 9n of the general property tax act, 1893 PA 206, MCL 211.9m and 211.9n, all of the following shall apply: (e) The eligible claimant shall file with the assessor of the township or city within 30 days of the date of the rescission issued under subdivisions (a) to (d) a statement under section 19 of the general property tax act, 1893 PA 206, MCL 211.19, for all property for which the exemption has been rescinded under this section.” *Id.*

⁶ MCL 211.1057(5)(a).

⁷ MCL 205.28(1)(a) states that “Notice, if required, must be given either by personal service or by certified mail addressed to the last known address of the taxpayer. Service upon the department may be made in the same manner.” *Id.*

⁸ MCL 205.20.

⁹ MCL 205.28(1) (emphasis added).

¹⁰ *Fradco, Inc v Dep’t of Treasury*, 495 Mich 104; 845 NW2d 81 (2014).

¹¹ MCL 205.59(1) states that “The tax imposed by this act shall be administered by the department pursuant to 1941 PA 122, MCL 205.1 to 205.31, the streamlined sales and use tax administration act, and this act. If the provisions of

specifically states that “The department shall collect and administer the assessment as provided *in this section*.”¹² The ESAA is also not referenced or identified in Section 13 of the Revenue Act, which lists all of the laws Treasury is vested with administering and enforcing under that Act, and as noted by Respondent, Michigan “recognizes the maxim *expressio unius est exclusio alterius*; that the express mention in a statute of one thing implies the exclusion of other similar things.”¹³ Consequently, Respondent’s notice obligations under the ESAA are governed solely by MCL 211.1057(4). The Tribunal finds that Respondent complied with this section when it issued the August notice to Petitioner via first class mail.

As for Petitioner’s non-receipt of the August 24, 2016 notice, this fact is irrelevant because actual receipt is not required by the ESAA or due process. MCL 211.1057(4) only requires that the notice be issued, and due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”¹⁴ Respondent’s ESA Administrator, David Buick, testified that the notices are generated by a computer program called SAP. The program generates the notice, prints a copy, which is automatically placed in a window envelope affixed with the proper postage and collected by the United States Postal Service from Treasury’s central mailroom. Kyle Tenbroke, manager of the ESA unit, further explained: “The SAP, upon initiation of a program at my request, checks to see which accounts have not both paid and/or submitted the return. If either of those cases has occurred, they haven’t paid or haven’t certified the return, this is generated by the software, ESA software.” On the issue of mailing, Mr. Tenbroke testified that “once that program is run, it’s generated within the system, a pdf, I believe, is generated that is spooled with all the other notices and sent to the print center, which then prints and prepares them for mailing.” It is noted in the account that the notice was generated, and a pdf copy is made available to the Department through FileNet, an electronic data warehouse-type program. The corresponding evidence establishes that the August 24, 2016 notice was issued to Petitioner at 801 Johnson Street, Alpena, MI 49707-1870, which is the same address Petitioner identified as the mailing address for ESA Correspondence on its 2016 ESA return, and Mr. Tenbroke testified that notices returned by the post office are tracked on a spreadsheet and reissued if necessary after taxpayers are contacted and advised on correcting their addresses in the system. Mr. Tenbroke also testified that there was nothing in that spreadsheet indicating that any of the notices sent to Petitioner were returned. As such, and inasmuch as Petitioner’s financial analyst, Michelle Hillert, acknowledged that it was possible that another employee picked up the notice from the mail bin (though she opined that it was not likely), the Tribunal is satisfied that the August 24, 2016 notice was issued to Petitioner within the meaning of MCL 211.1057(4), and that it was reasonably calculated, under all the circumstances, to apprise Petitioner of the requirement to pay its ESA assessment prior to the deadline and afford it an opportunity to do so. Though Petitioner contends that there is no evidence establishing that the notice was actually printed and mailed, the Michigan Court of

1941 PA 122, MCL 205.1 to 205.31, the streamlined sales and use tax administration act, and this act conflict, the provisions of this act apply.” *Id.*

¹² MCL 211.1057 (emphasis added).

¹³ *Bradley v Saranac Cmty Sch Bd of Educ*, 455 Mich 285, 298; 565 NW2d 650, 656 (1997), *holding modified by Michigan Fed’n of Teachers & Sch Related Pers, AFT, AFL-CIO v Univ of Michigan*, 481 Mich 657, 753 NW2d 28 (2008). See also *Stowers v Wolodzko*, 386 Mich 119; 191 NW2d 355 (1971).

¹⁴ *Mullane v Cent Hanover Bank & Tr Co*, 339 US 306, 314; 70 S Ct 652, 657, 94 L Ed 865 (1950).

Appeals has held that “evidence of business custom or usage is sufficient to establish the fact of mailing without further testimony by an employee of compliance with the custom.”¹⁵ As such, the fact that there is nothing on record concerning the procedures of the print center is irrelevant. This is particularly true in light of Mr. Tenbroke’s testimony that the notices are also made available to taxpayers on their Michigan Treasury Online (“MTO”) accounts and can be accessed by the taxpayer as soon as they are generated by the system.

Even assuming that the August notice was not properly issued, Ms. Hillert acknowledged receipt of the notice dated July 22, 2016. This notice indicates that an ESA statement had been generated, and that Petitioner was required to certify the statement and pay its full ESA liability by August 15th in order to receive the EMPP exemption for 2016 and avoid late penalties. The notice lists the step that Petitioner was required to complete its claim of the EMPP exemption through MTO, and states that “detailed instructions on how to navigate MTO, as well as additional information regarding the EMPP exemption, ESA tax, and approved electronic filing and payment methods are available on the ESA website” It also states that

the State Essential Services Assessment Act (P.A. 92 of 2014) requires taxpayers claiming an EMPP exemption to file and certify and ESA statement and submit payment of their ESA liability in full by August 15th to avoid late penalties. If a certified statement and full payment (including late payment penalties) are not received by October 15th, Treasury is required to rescind your EMPP exemption. If your EMPP exemption is rescinded, you will become liable for property taxes to the local tax collecting unit and any extended P.A. 328 or extended IFT exemption will be rescinded.

Consequently, while Ms. Hillert testified that she had no actual notice of the obligation to make a payment until receipt of the October 21, 2016 notice, the Tribunal finds that she had such notice upon receipt and review of the July 22, 2016 notice. The fact that this notice does not identify the amount required to be paid is irrelevant, because that is not information that is required to be provided by the statute. The Tribunal also disagrees that this notice did not indicate how to pay the liability, because as indicated above, it specifically stated that information on approved electronic filing and payment methods were available on the ESA website. As such, and inasmuch as the Court of Appeals has held that “if timely actual notice has been achieved, defects in how it was served are rendered harmless,”¹⁶ the Tribunal finds that the fundamental requirements of due process were satisfied.

Pursuant to MCL 211.1057(5)(a), Respondent is required to rescind any exemption granted under MCL 211.9m and MCL 211.9n for any parcel for which payment in full has not been received by October 15 of the assessment year. The statute states that the “department shall rescind,” and the Supreme Court has repeatedly held that “ ‘shall’ indicates a mandatory

¹⁵ *Good v Detroit Auto Inter-Ins Exch*, 67 Mich App 270, 275; 241 NW2d 71, 74 (1976).

¹⁶ *In re ITC Application*, 304 Mich App 561, 568; 847 NW2d 684, 691 (2014).

directive”¹⁷ The Tribunal has no equitable power to waive or otherwise disregard a statutory filing deadline, and it therefore has no authority to grant Petitioner the relief requested.¹⁸

JUDGMENT

IT IS ORDERED that the taxes, interest, and penalties shall be as set forth in the Summary of Judgment section of this Final Opinion and Judgment.

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

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes, interest, and penalties shall collect the taxes, interest, and penalties or 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 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.¹⁹ 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.²⁰ A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.²¹ Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.²²

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

¹⁷ *People v Lockridge*, 498 Mich 358, 387; 870 NW2d 502, 518 (2015).

¹⁸ The Tribunal’s powers are limited to those authorized by statute and do not include powers of equity. See *Federal-Mogul Corp v Dep’t of Treasury*, 161 Mich App 346; 411 NW 2d 169 (1987) and *Elec Data Sys Corp v Flint Twp*, 253 Mich App 538; 656 NW2d 215 (2002).

¹⁹ See TTR 261 and 257.

²⁰ See TTR 217 and 267.

²¹ See TTR 261 and 225.

²² See TTR 261 and 257.

21 days after the entry of the final decision, it is an “appeal by leave.”²³ A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.²⁴ The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.²⁵

By Steven H. Lasher

Date Entered by Tribunal: June 12, 2018
ejg

²³ See MCL 205.753 and MCR 7.204.

²⁴ See TTR 213.

²⁵ See TTR 217 and 267.