Shaw Contracting Co.,
Petitioner,

MICHIGAN TAX TRIBUNAL

v

MOAHR Docket No. 19-003985

Michigan Department of Treasury,
Respondent.

Presiding Judge
Patricia L. Halm

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

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

FINAL OPINION AND JUDGMENT

I. INTRODUCTION

At issue in this case are three tax assessments levied under the Use Tax Act[1] (UTA) by the Michigan Department of Treasury (Respondent) against Shaw Contracting Co. (Petitioner), for the purchase and lease of cold planers, cold planer replacement and maintenance parts, and fuel used in the operation of the cold planers (collectively, "the equipment"). These assessments include: VA3RT6T, VA3RT6U, and VA3RT6V, and cover the 2015 through 2017 tax years, respectively. It is Petitioner's position that the purchase of this equipment is exempt from use tax under the UTA's industrial processing exemption.[2] In the alternative, Petitioner asserts that it is entitled to judgment as a matter of law under the doctrine of equitable estoppel because an audit

[1] See Michigan Compiled Laws (MCL) 205.91 *et seq*.
[2] MCL 205.94o.

performed by Respondent in 2010 determined that cold planers previously purchased by Petitioner were exempt from use tax under MCL 205.94o(3)(i) as they were used to recycle asphalt[3] that was ultimately sold at retail.

On August 21, 2020, Petitioner and Respondent filed motions for summary disposition under Michigan Rules of Court (MCR) 2.116(C)(10). Both parties argued that there was no genuine issue as to any material fact and, as such, that each should be granted summary disposition as a matter of law. Both parties filed responses to the opposing parties' motions. Having reviewed the motions, the responses and the evidence filed in this case, the Tribunal finds that there is no genuine issue of material fact and that Petitioner's motion for summary disposition should be denied and Respondent's motion for summary disposition should be granted.

II. APPLICABLE LAW

Section 4o of the UTA provides an exemption for specific types of property sold to industrial processors and used in industrial processing activities. As the activity suggests, this exemption is commonly known as the "industrial processing" exemption. Property eligible for this exemption includes "[m]achinery, equipment, tools, dies, patterns, foundations for machinery or equipment, or other processing equipment used in an industrial processing activity and in their repair and maintenance."[4] Property not eligible for this exemption includes "[t]angible personal property permanently affixed and becoming a structural part of real estate in this state . . . ."[5]

Eligible property is exempt from use tax when sold to the following entities:

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[3] Petitioner also uses the cold planers to remove and process concrete, but to a lesser extent.
[4] MCL 205.94o(4)(b).
[5] MCL 205.94o(5)(a).

(a) An industrial processor for use or consumption in industrial processing.

(b) A person, whether or not the person is an industrial processor, if the tangible personal property is intended for ultimate use in and is used in industrial processing by an industrial processor.[6]

(c) A person, whether or not the person is an industrial processor, if the tangible personal property is used by that person to perform an industrial processing activity for or on behalf of an industrial processor.[7]

"Industrial processor" is defined as "a person who performs the activity of converting or conditioning tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail . . . ."[8] "Industrial processing" is defined as:

> [T]he activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage.[9]

There are eleven activities defined as industrial processing activities.[10] In this case, Petitioner claims its activities fall under MCL 205.94o(3)(i), "[r]ecycling of used materials for ultimate sale at retail or reuse." There are also five activities that are excluded from the definition of industrial processing.[11] In this case, Respondent asserts

[6] This statutory provision is not at issue in this case. Therefore, there will be no further reference to this provision.
[7] MCL 205.94o(1).
[8] MCL 205.94o(7)(b).
[9] MCL 205.94o(7)(a).
[10] MCL 205.94o(3).
[11] MCL 205.94o(6).

that Petitioner's activities fall under "[d]esign, engineering, construction, or maintenance of real property and nonprocessing equipment."[12]

III. PETITIONER'S CONTENTIONS

Petitioner is a "small family owned business,"[13] "incorporated on July 12, 2000,"[14] as a Michigan Domestic Profit Corporation. Petitioner's primary business activity is "road, site, and utility construction including, to a large extent; cold milling services."[15] "Petitioner is subcontracted by asphalt paving contractors and/or other general contractors" to perform these services.[16]

"Cold milling services" are accomplished using self-propelled equipment known as a cold planer. "The cold planer performs an asphalt recycling activity called asphalt milling which is the controlled removal of the existing pavement surface to a desired depth and processing the pavement surface into a small aggregate product."[17] Once the pavement has been milled, the reclaimed asphalt pavement (RAP) is deposited into a dump truck via a conveyor. Petitioner does not own or operate these dump trucks; they are "furnished and paid for by others."[18] According to Petitioner, the RAP is then "transported offsite to an asphalt manufacturing plant for processing as an ingredient in the new hot mixed asphalt which is ultimately sold at retail with sales tax paid."[19]

Petitioner explained that:

> Federal and state regulations require all asphalt plants to use Reclaimed Asphalt Pavement (RAP) in their mix design formulas. The Michigan

[12] MCL 205.94o(6)(d).
[13] Petitioner's Motion for Summary Disposition (Petitioner's Motion) at 3.
[14] Petitioner's Brief in Support of Petitioner's Motion for Summary Disposition (Petitioner's Brief) at 3.
[15] Petitioner's Motion at 3.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*. at 4.

> Department of Transportation (MDOT) requires a specified percentage. Asphalt batch plants that produce commercial type products (non-government) are required to use a much higher percentage of Reclaimed Asphalt Pavement.[20]

In 2019, Respondent conducted a use tax audit of Petitioner. On July 18 and 19, 2019, Respondent issued the following bills for taxes due for the purchase and lease of the equipment:

Year	Assessment	Use Tax	Penalty[21]	Interest	Total
2014	VA3RQ3X	$ 3,991.00	$ 0.00	$ 833.24	$ 4,824.24[22]
2015	VA3RT6T	$67,054.26	$758.00	$11,162.14	$78,974.40[23]
2016	VA3RT6U	$84,579.48	$550.00	$10,395.10	$95,524.58[24]
2017	VA3RT6V	$83,892.54	$785.00	$ 6,362.77	$91,040.31[25]

On July 12, 2019, prior to the date the bills were issued, Petitioner submitted a payment of "$25,341.00, which represented the agreed and uncontested portion of the amount determined to be due."[26] Respondent applied this payment to the oldest assessment, VA3RQ3X, which, having been paid in full, was cancelled. The remaining amount of the payment "was applied to the next oldest assessment (VA3RT6T) resulting in a reduction of tax and interest [and] elimination of the penalty."[27]

On September 27, 2019, Respondent issued the following final tax assessments:

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[20] Petitioner's Response to Respondent's Motion (Petitioner's Response) at 8.
[21] Per Petitioner's Exhibit 18, the auditor "did not apply a penalty to the cold milling equipment, related repair parts, and fuel as the taxpayer was relying on departmental guidance."
[22] Petitioner's Exhibit P-4.
[23] Petitioner's Exhibit P-5.
[24] Petitioner's Exhibit P-6.
[25] Petitioner's Exhibit P-7.
[26] Petitioner's Brief at 3.
[27] *Id*.

Year	Assessment	Use Tax	Penalty	Interest	Total
2015	VA3RT6T	$50,112.26	$ 0.00	$10,144.69	$60,256.95[28]
2016	VA3RT6U	$84,579.48	$ 0.00	$11,135.46	$95,714.94[29]
2017	VA3RT6V	$83,892.54	$ 0.00	$ 7,097.12	$90,989.66[30]

Petitioner contends that the equipment is exempt from use tax under MCL 205.94o, the industrial processing exemption. Petitioner argues that it does not need to be an industrial processor, as defined by MCL 205.94o(7)(a), to claim this exemption.

In support of this argument, Petitioner provided the following history of this statutory provision:

> With the passage of PA 117 of 1999, persons who were not an industrial processor could qualify for the exemption. Prior to the enactment of PA 117 of 1999, only an industrial processor could qualify for the industrial processing exemption. With the enactment of PA 117 of 1999, other service providers, whether they were industrial processors or not, could qualify for the exemption. PA 117 of 1999 added to the statute a list of activities at MCL 208.94o(3) which could qualify a person who is not an industrial processor for the exemption. The 1999 legislation included the Section 4o, Paragraph 3(i) exemption for "Recycling of used materials for ultimate sale at retail or reuse."[31]

With these changes, subsection (1)(c) "merely requires that the property is used to perform an industrial processing activity for or on behalf of an industrial processor."[32] [Emphasis in original.] Petitioner argues that the equipment meets these requirements. And as required by MCL 205.94o(7)(a), the RAP that results from this activity "becomes a component in a product which will ultimately be sold at retail with tax paid thereon."[33]

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[28] Petitioner's Exhibit P-1.
[29] Petitioner's Exhibit P-2.
[30] Petitioner's Exhibit P-3.
[31] Petitioner's Response at 4-5.
[32] *Id*. at 11.
[33] *Id*. at 12.

Petitioner also argues that "[i]t is a clear and uncontroverted fact that [it] is engaged in an exempt recycling activity [under MCL 205.94o(3)(i)] for and on behalf of its customers who will use and consume the recycled asphalt in the processing of that asphalt for sale at retail."[34] Petitioner cites *Black's Law Dictionary*, which defines "recycling" as "'[a] strategy to minimize waste in which any recoverable materials are recovered from a postconsumer waste stream, and put to the original or different use.' [Black's Law Dictionary, Online Legal Dictionary, 2nd Edition]."[35] According to Petitioner, "the waste is asphalt which is recovered and converted back to its original use. Petitioner converts the used asphalt into a fine aggregate that can be and is recycled into hot asphalt for reuse."[36]

Petitioner cites *Green Thumb Lawnscaping, Inc v Michigan Department of Treasury*[37], in support of its exemption claim. In *Green Thumb*, the petitioner purchased equipment similar to that at issue in this case.[38] However, unlike the present case, in *Green Thumb* the respondent agreed that the petitioner was an industrial processor and that the activities performed by the petitioner qualified as industrial processing. Instead, the petitioner's exemption request was denied because the property was not sold at retail and was not used in the manufacturing of a product sold at retail. The Tribunal disagreed, holding that the property was ultimately sold at retail, albeit not within the

[34] Petitioner's Brief at 12.
[35] Petitioner's Brief at 12-13.
[36] Petitioner's Brief at 13.
[37] *Green Thumb Lawnscaping, Inc v Michigan Department of Treasury*, (Docket No. 342253), issued July 31, 2009.
[38] The equipment in *Green Thumb* was used to break concrete into smaller concrete pieces, gravel, and aggregate.

time frame established by the respondent. Given this, the Tribunal held that the petitioner's equipment purchase was exempt from use tax under MCL 205.94o.

Finally, Petitioner argues that it is entitled to summary disposition under the doctrine of equitable estoppel because Respondent previously determined that similar equipment purchased by Petitioner was exempt from use tax under MCL 205.94o. In 2010, Respondent audited Petitioner and "instructed Petitioner to exempt from tax the purchase or lease of cold planers, replacement parts, maintenance parts and fuel. Without any formal instruction to the contrary; Respondent conducted an audit in 2019 without notice reversing the instructions provided in 2010."[39] Petitioner asserts that it "does not have the ability by contract to rebill or collect the tax from their customers on a retroactive basis."[40]

Petitioner cites *West American Insurance Company v Gutekunst*[41] in support of its equitable estoppel argument.[42] In that case, the court held that the doctrine of equitable estoppel applies when:

> (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts,
> (2) the other party justifiably relies and acts on that belief, and
> (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts.[43]

Applying the *West American* test to the case at hand, Petitioner argues that equitable estoppel is applicable because:

> (1) [W]hen Petitioner was audited for use tax in 2010, Respondent specifically instructed Petitioner to exempt from tax the purchase or

[39] Petitioner's Motion at 5.
[40] Petitioner's Brief at 11.
[41] *West American Insurance Company v Gutekunst*, *et al*, 230 Mich App 305; 583 NW2d 548 (1998).
[42] Petitioner's Brief at 11.
[43] *Id*. at 310.

lease of cold planers, replacement equipment, maintenance parts and fuel,
(2) Petitioner justifiably relied on the uncontroverted belief that the purchase or lease of cold planers, replacement equipment, maintenance parts and fuel were exempt from tax, and
(3) Petitioner is prejudiced if Respondent is allowed to change policy determinations without any formal instruction to the contrary.[44]

Petitioner further argues that "Respondent's failure to promulgate its policies relating to the cold planers and industrial processing lead Petitioner to believe that no use tax liability was believed to be due" on the equipment purchase.[45]

IV. RESPONDENT'S CONTENTIONS

Respondent asserts that the sole issue in this case is the correct interpretation of MCL 205.94o, the industrial processing exemption. Citing *AFSCME v City of Detroit*[46], Respondent argues that in interpreting statutes, "courts may not read into the statute what is not within the Legislature's intent as derived from the language of the statute."[47] To that end, Respondent cites *Evanston YMCA Camp v State Tax Commission*[48], which held that an exemption:

> [M]ust not be enlarged by construction, since the reasonable presumption is that the [Legislature] has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant.[49]

Respondent argues that "[i]t is well settled that 'the burden to prove entitlement to a tax exemption rests upon the person claiming the exemption.'"[50] Respondent contends that Petitioner cannot meet that burden because: (1) Petitioner is not an

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[44] Petitioner's Brief at 12.
[45] Petitioner's Brief at 11-12.
[46] *AFSCME v City of Detroit*, 468 Mich 388; 662 NW2d 695 (2003).
[47] *Id*. at 400.
[48] *Evanston YMCA Camp v State Tax Commission*, 369 Mich 1; 118 NW2d 818 (1962).
[49] *Id*. at 8.
[50] Respondent's Motion and Brief in Support of Summary Disposition (Respondent's Motion) at 9.

industrial processor as defined by MLC 205.94o(7)(b); (2) Petitioner does not use the equipment to perform an industrial processing activity for or on behalf of an industrial processor pursuant to MCL 205.94o(1)(c); (3) Petitioner has not proven that the RAP is ultimately sold at retail; and (4) Petitioner's activities are those of "road construction and maintenance of real property, which is specifically excluded from eligibility for the industrial processing exemption"[51] under MCL 205.94o(6)(d).

Respondent asserts that Petitioner is not an "industrial processor" as defined by MCL 205.94o(7)(b) because it does not convert or condition "tangible personal property." [The Tribunal notes that the premise behind this argument is intertwined with Respondent's argument that Petitioner's activities are, in fact, construction or maintenance of real property.] Respondent argues that "[b]y Petitioner's own description, cold milling is the process of removing 'existing pavement surface.' (Petition, ¶ 15.) . . . Paved surfaces are more accurately characterized as real property."[52] In support of this argument, Respondent cites Section 2 of the General Property Tax Act[53] which states, in pertinent part: "For the purpose of taxation, real property includes all of the following: (a) All land within this state, all buildings and fixtures on the land, and all appurtenances to the land, except as expressly exempted by law." [54]

Even if it is determined that the cold milling process converts real property to personal property, Respondent argues that Petitioner still would not meet the definition of industrial processor because it has not proven that the property, either real or

[51] Respondent's Motion at 2.
[52] Respondent's Motion at 9-10.
[53] MCL 211.1 *et seq*.
[54] MCL 211.2(1).

tangible personal, is ultimately sold at retail or used in the manufacturing of a product ultimately sold at retail, as required under the definition of industrial processor. Respondent contends that Petitioner did not meet this burden of proof because it refused to identify the customers for which it performs cold milling services and, as a result, Respondent was unable to confirm that Petitioner's customers ultimately sold the RAP at retail or used it to manufacture a product sold at retail.

Because Respondent did not have access to Petitioner's customers, "[t]he only information in the record to support Petitioner's claim is self-serving statements."[55] Respondent cites the deposition of Mr. Bradley Shaw,[56] President, Secretary and Treasurer of Shaw Contracting Co., in which "Mr. Shaw explicitly testified that the customer names were withheld based on a desire to prevent contact with those entities."[57] Respondent argues that:

> A more appropriate source to supply this information would be testimony or documents from the customers themselves explaining if and how they used the material Petitioner removed from the roadway. However, Petitioner not only failed to provide this type of evidence in support of its argument, it refused to voluntarily identify its customers during the discovery period . . . Mr. Shaw's testimony demonstrates that he has little first-hand knowledge of what actually happens to the materials removed from the roadway after they are loaded onto trucks and transported from the job site . . . A recent appellate decision makes clear that something more than a "trust me, take my word for it" approach is needed to meet [Petitioner's] burden. See *EBI-Detroit, Inc v Dept of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued March 7, 2019 (Docket No. 343932) (holding that an unsupported affidavit from the taxpayer was not sufficient to establish that assertions about a third-party were accurate . . . .[58]

[55] Motion at 11.
[56] See Mr. Shaw's deposition at 8.
[57] Motion at 11.
[58] Respondent's Response in Opposition to Petitioner's Summary Disposition Motion (Response) at 7-8.

Respondent recognized that while Petitioner is not an industrial processor, this does not preclude Petitioner from qualifying for the exemption under MCL 205.94o(1)(c). However, to qualify under this provision, Petitioner must establish that it used the equipment "to perform an industrial processing activity for or on behalf of an industrial processor,"[59] which, as discussed, requires proof that the RAP was ultimately sold at retail or used in the manufacturing of a product sold at retail.

As discussed, Petitioner denied Respondent access to its customers, depriving Respondent of the opportunity to confirm whether Petitioner's customers were industrial processors. Respondent acknowledged that Petitioner submitted copies of contracts it had with its customers. However, Respondent argued that these contracts did not establish that these customers were industrial processors or that they ultimately sold the RAP at retail or manufactured a product using the RAP that was sold at retail. For these reasons, Respondent argues that Petitioner has not proven it performs an industrial processing activity for or on behalf of an industrial processor.

As for Petitioner's argument that it recycles used materials, an industrial processing activity under MCL 205.94o(3)(i), Respondent contends that Petitioner's activities are, in actuality, construction and maintenance of real property, which are excluded from the exemption under MCL 205.94o(6)(d). Respondent argues that Petitioner agrees with this classification, referring to Petitioner's frequent statements that it is involved in road, site, and utility construction. Respondent also refers to statements made by Mr. Shaw in his deposition. According to Respondent, Mr. Shaw "reluctantly agreed that the work Petitioner is hired to perform is part of a larger process

[59] MCL 205.94o(1)(c).

intended to further the purpose of constructing or maintaining roads."[60] Finally, Respondent argued that the customer contracts submitted by Petitioner contain no references to recycling.

In response to Petitioner's equitable estoppel argument, Respondent contends that this relief is not applicable under the facts of this case.

> Equitable estoppel is not an independent cause of action, and instead is a doctrine that may be employed by one party to prevent the opposing party from asserting or denying the existence of a particular fact. At no point in this litigation has Treasury attempted to deny that when Petitioner was previously advised by a different auditor that the asphalt mills at issue in that audit were tax exempt. (Answer, ¶28.) Instead, Treasury has asserted that it is not bound by a prior erroneous conclusion made by an employee. But, because Treasury has not disputed the fact that the erroneous determination was made, the doctrine is inapplicable here.[61]

Respondent further argues that an administrative agency, such as the Michigan Department of Treasury, may reexamine its prior decisions. In support of this argument, Respondent cites *Melvindale-Northern Allen Park Federation of Teachers, Local 1051 v Melvindale-Northern Allen Park Public Schools*.[62]

Finally, Respondent asserts that Petitioner's equitable estoppel argument is "misplaced given the forum Petitioner elected to bring its claim."[63] Respondent contends that the Tribunal is a quasi-judicial body and, as such, its powers are limited by statute. Citing *Federal-Mogul Corp v Department of Treasury,*[64] Respondent argues that, unlike the Court of Claims, the Tax Tribunal does not have equitable powers.

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[60] Respondent's Motion at 12.
[61] Respondent's Response at 3.
[62] *Melvindale-Northern Allen Park Federation of Teachers, Local 1051 v Melvindale-Northern Allen Park Public Schools*, 216 Mich App 31; 549 NW2d 6 (1996).
[63] Respondent's Response at 4.
[64] *Federal-Mogul Corp v Department of Treasury*, 161 Mich App 346, 359; 411 NW2d 169 (1987).

Respondent further argues that because the Tribunal cannot grant equitable relief, Petitioner's equitable estoppel argument fails as a matter of law.

In conclusion, Respondent cites MCL 205.104a, which states in pertinent part that a use tax "assessment is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer."[65] Respondent argues that Petitioner failed to meet that burden.

V. MOTIONS FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court (MCR) in rendering a decision on such motions.[66] In this case, both parties filed motions for summary disposition under 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. A (C)(10) motion will be granted "when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law."[67]

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 most favorable to the non-moving party.[68] The moving party bears the

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[65] Respondent also cites *Andrie, Inc v Department of Treasury*, 496 Mich 161, 176; 853 NW2d 310 (2014), in support of its argument regarding burden of proof.
[66] See Tax Tribunal Rule (TTR) 215.
[67] *Lowrey v LMPS & LMPJ, Inc,* 500 Mich 1, 5; 890 NW2d 344 (2016) (citation omitted).
[68] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5).

initial burden of supporting its position by presenting its documentary evidence for the court to consider.[69] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[70] 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.[71] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[72]

VI. CONCLUSIONS OF LAW

Pursuant to Section 93 of the UTA[73], every person in Michigan who purchases tangible personal property is subject to use tax "for the privilege of using, storing, or consuming" the property in this state, unless otherwise exempt. Petitioner does not dispute that the equipment was used, stored, or consumed in Michigan and would otherwise be subject to use tax. Instead, Petitioner contends that the equipment is exempt under MCL 205.94o, the industrial processing exemption.

Pursuant to MCL 205.104a(4), a use tax "assessment is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer."[74] Petitioner's burden of proof is by a preponderance of the evidence.[75]

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[69] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[70] *Id.*
[71] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[72] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[73] MCL 205.93(1).
[74] Respondent also cites *Andrie, Inc v Department of Treasury*, 496 Mich 161, 176; 853 NW2d 310 (2014), in support of its argument regarding burden of proof.
[75] *ProMed Healthcare v City of Kalamazoo*, 249 Mich App 490, 494-495; 644 NW2d 47 (2002).

To qualify for an industrial processing exemption, the tangible personal property at issue must have been sold to: (1) an industrial processor;[76] or (2) a person who used that property to "perform an industrial processing activity for or on behalf of an industrial processor."[77] "Industrial processor" is defined in the UTA as "a person who performs the activity of converting or conditioning tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state."[78]

As discussed, Petitioner's argument is two-fold. First, Petitioner argues that it is entitled to an industrial processing exemption under MCL 205.94o(1)(c) because it performs an industrial processing activity for or on behalf of an industrial processor, and that this activity is "recycling of used materials for ultimate sale at retail or reuse" under MCL 205.94o(3)(i). Petitioner's second argument is that it is entitled to judgment as a matter of law under the doctrine of equitable estoppel.

Respondent argues that Petitioner is not an industrial processor because it does not convert or condition tangible personal property. Instead, Petitioner uses its equipment to make changes to real property. Respondent also argues these activities are road construction and maintenance of real property, which are excluded from the industrial processing exemption under MCL 205.94o(6)(d). Finally, Respondent argues that Petitioner has not proven that the RAP is ultimately sold at retail.

As a starting point, the Tribunal finds that asphalt, and for that matter concrete, is a manufactured product that begins its life as tangible personal property. Eventually,

[76] MCL 205.94o(1)(a).
[77] MCL 205.94o(1)(c).
[78] MCL 205.94o(7)(b).

the asphalt and concrete take its final form and at that point the use of the property becomes key. A simple example is concrete used to make a garden statute or a stepping-stone. In this example, the final product remains tangible personal property, available for sale at retail. Another example is concrete that is used in the construction of a basement or a building foundation. In this example, the concrete has been converted from tangible personal property to real property. The question in this case is how to characterize asphalt (or concrete) that is used as pavement? Does it remain tangible personal property, or does it become real property?

In *Tuinier v Bedford Charter Township*[79], the court dealt with the question of whether the petitioner's greenhouses were real or tangible personal property for purposes of taxation. To determine the answer, the court applied the following three tests:

> (1) whether the property was actually or constructively annexed to the real estate; (2) whether the property was adapted or applied to the use or purpose of that part of the realty to which the property in question is connected or appropriated; and (3) whether the property owner intended to make the property a permanent accession to the realty.[80] [Citations omitted.]

After applying these tests, the court found that the petitioner's greenhouses were "clearly annexed to the real estate because the structures are bolted to stubs embedded in concrete and attached to the realty by both bolts and gravity."[81] Thus, the court considered concrete in this form to be realty. It is likely that the court would have reached a similar conclusion had the pavement been asphalt and not concrete.

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[79] *Tuinier v Bedford Charter Township,* 235 Mich App 663; 599 NW2d 116 (1999).
[80] *Id*. at 688.
[81] *Id*. at 670-671.

As to the second test, the Tribunal finds that the asphalt was applied to the use or purpose of the realty to which it was connected or appropriated, i.e., the asphalt was laid on the land for the purpose of turning the land into a paved surface. In other words, the asphalt facilitated the use of the land, making the land more valuable in and of itself.

Finally, as to the third test, the *Tuinier* court held:

> With respect to the intention of the property owner, the permanence required is not equated with perpetuity. It is sufficient if the item is intended to remain where affixed until worn out, until the purpose to which the realty is devoted is accomplished or until the item is superseded by another item more suitable for the purpose.[82] [Citation omitted.]

In this case, it cannot be denied that the asphalt pavement was intended to remain in place until it was worn out or ready to be replaced. It is at this point that Petitioner's services are employed.

For these reasons, it is clear that asphalt pavement is real property. Given this, it follows that Petitioner's activities do not convert or condition "tangible personal property" as required under the definition of both "industrial processing," subsection (7)(a), and "industrial processor," subsection 7(b). Instead, Petitioner's activities convert real property (asphalt pavement) into a small aggregate product. It is questionable whether at that point the RAP would be considered tangible personal property or raw material.

In *Great Lakes Hydrodemolition Services Inc v Michigan Department of Treasury*,[83] the Tribunal dealt with an issue similar to that presented in this case. In *Great Lakes*, the petitioner argued it was an industrial processor because it used the property at issue to reclaim concrete by cutting the concrete from a roadbed and, using

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[82] *Id*. at 668.
[83] *Great Lakes Hydrodemolition Services Inc v Michigan Department of Treasury*, (Docket No. 461232), issued January 13, 2015.

water to vacuum the reclaimed concrete in into a vactor machine, which changed the "form composition, quality [,] combination[,] or character of the property."[84] In response, the respondent argued, among other things, that the petitioner was not an industrial processor because it performed demolition services on real property.

Ultimately, the Tribunal held that the petitioner was not an industrial processor, and that the petitioner's property was not used to convert or condition tangible personal property. Instead, the Tribunal held that the industrial processing activity did "not start until *after* Petitioner [ ] completed its services by placing the byproduct of its hydro-demolition services (i.e., concrete rubble) in raw materials storage either on the jobsite or with a local crushed concrete yard for future conversion of that concrete."[85] [Emphasis in original.] The Tribunal also held the petitioner's equipment was not eligible for the industrial processing exemption because it was used to construct and maintain real property, an activity specifically excluded from the exemption under MCL 205.94o(6)(d).

Respondent makes a similar argument in this case, asserting that Petitioner's cold milling services "are actually road construction and road maintenance activities."[86]

Petitioner describes its business as "cold milling services" or "asphalt milling," which is "the controlled removal of the existing pavement surface to a desired depth and processing the pavement into a small aggregate product."[87] Therefore, it follows that Petitioner's cold milling, or asphalt milling, services are, in actuality, maintenance of real

[84] *Id*.
[85] *Id*.
[86] Respondent's Motion at 12.
[87] Petitioner's Brief at 5.

property. Given this, Petitioner's activities are specifically excluded from the definition of "industrial processing" under MCL 205.94o(6)(d).

Respondent's next argument is that Petitioner did not prove that the RAP is ultimately sold at retail or used in the manufacturing of a product that is ultimately sold at retail. The Tribunal agrees.

As discussed, Petitioner refused to disclose the names of customers who took possession of the RAP once it was placed in the dump trucks. Although Mr. Shaw testified in his deposition as to what he believes happens to the RAP once it is hauled away, it is Petitioner's customers who determine the fate of the RAP, not Petitioner. Because none of Petitioner's customers provided testimony or evidence as to what they do with the RAP, the record contains no first-hand testimony or evidence that the RAP gleaned from Petitioner's activities is ultimately sold at retail or reused. Given this, the Tribunal has no alternative but to find that Petitioner did not prove that the RAP is ultimately sold at retail or used in the manufacturing of a product ultimately sold at retail.

The requirement that converted or conditioned tangible personal property be sold at retail or used in the manufacturing of a product that is sold at retail is contained in both the definition of "industrial processing" and "industrial processor." As a result, Petitioner failed to prove that it performs an industrial processing activity under MCL 205.94o(7)(a) or that it is an industrial processor under MCL 205.94o(7)(b). In addition, because Petitioner failed to prove that the RAP was sold at retail or used in the manufacturing of a product ultimately sold at retail, it also failed to prove that it uses the equipment to "perform an industrial processing activity for or on behalf of an industrial processor," as required under MCL 205.94o(1)(c).

However, Petitioner also argued that its cold milling services are an exempt recycling activity under MCL 205.94o(3)(i). In *Tomra of North America, Inc v Department of Treasury*, the Michigan Supreme Court reiterated that:

> "[T]he statute also provides that certain specific activities that do not satisfy the general MCL 205.94o(7)(a) definition nonetheless constitute "industrial processing" activity for purpose of the statute," such as the activity described in MCL205.94o(3)(h). In other words, we made it clear that Subsection (7)(a) and Subsection (3) are discrete inquiries – Subsection (7)(a) does not establish a threshold requirement for an exemption as long as Subsection (3) applies."[88]

Therefore, even though Petitioner's activities are not industrial processing activities under MCL 205.94o(7)(a), it is still possible that they are industrial processing activities under MCL 205.94o(3)(i).

MCL 205.94o(3)(i) defines industrial processing as including "[r]ecycling of used materials **for ultimate sale at retail or reuse**." [Emphasis added.] Because Petitioner failed to establish that the RAP is ultimately sold at retail or whether it is reused, Petitioner's claim that its activities are the "recycling of used materials" under MCL 205.94o(3)(i), also fails. Given this, there is no need to reach a conclusion as to whether Petitioner's activities are, in fact, recycling.

In support of its recycling claim, Petitioner argues that the issue of recycled paving material is not one of first impression. Petitioner cites *Green Thumb Lawnscaping*[89], wherein "[t]he litigated issue was whether there was an ultimate sale at retail."[90] As this statement would indicate, the property's exempt status was not an

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[88] *Tomra of North America, Inc v Department of Treasury*, 505 Mich 333, 348; 952 NW2d 394 (2020), citing *Detroit Edison Co v Department of Treasury*, 498 Mich 28; 869 NW2d 810 (2015).
[89] *Green Thumb Lawnscaping, Inc v Michigan Department of Treasury*, (Docket No. 342253), issued July 31, 2009.
[90] Petitioner's Response at 14.

issue in that case, as the parties agreed that it was exempt. Thus, while not on point, it must be noted that the petitioner in *Green Thumb Lawnscaping* provided the name of at least one of its customers in support of its argument that the tangible personal property was ultimately sold at retail.

Petitioner's final argument is that it is entitled to judgment as a matter of law under the doctrine of equitable estoppel. However, as Respondent argued, the Tribunal is not a court of equity. In *Federal-Mogul Corp v Department of Treasury*, the court explained that:

> In contrast to the powers of a circuit court, the powers of the Tax Tribunal are limited to those authorized by statute. MCL § 205.731; MSA § 7.650(31) describes the Tax Tribunal's jurisdiction; MCL § 205.732; MSA § 7.650(32) describes the Tax Tribunal's express powers. The Tax Tribunal does not have powers of equity. In short, the Tax Tribunal does not possess the power to balance the equities and award interest since it has no equitable powers.[91]

While it is unfortunate that Respondent did not issue any type of written guidance once it determined that its treatment of property like Petitioner's equipment had changed, the Tribunal is precluded by statute from providing Petitioner the equitable relief it seeks.

For the reasons set forth herein, the Tribunal finds that Petitioner did not meet its burden of proof in establishing that it is entitled to an exemption from use tax under MCL 205.94o for the tax periods at issue. The Tribunal further finds that there are no genuine issues of material fact and, as such, Respondent is entitled to judgment as a matter of law. Respondent's Motion for Summary Disposition under MCR 2.116(C)(10)

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[91] *Federal-Mogul Corp v Department of Treasury*, 161 Mich App 346, 359; 411 NW2d 169 (1987)

is granted. Petitioner's Motion for Summary Disposition under MCR 2.116(C)(10) is denied.

JUDGMENT

IT IS ORDERED that Final Assessments VA3RT6T, VA3RT6U, and VA3RT6V are AFFIRMED as set forth in the Introduction 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 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 Order within 28 days of entry of this Final Opinion and Judgment.

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

APPEAL RIGHTS

If you disagree with the final decision and judgment 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. 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 filing fee for such motions is $50.00 in

the Entire Tribunal. 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. Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.

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." A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal. The fee for certification is $100.00.

By Patricia L. Haem

Entered: June 21, 2021
plh