

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Hunderman & Sons Redi-Mix, Inc.,
Petitioner,

v

MTT Docket No. 342101

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

ORDER GRANTING PETITIONER'S MOTION FOR LEAVE TO FILE LATE WRITTEN
OPPOSITION TO MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER OF DISMISSAL

I. INTRODUCTION

Petitioner is a manufacturer and retailer of concrete. At issue in this case is Assessment No. O389163 (the subject assessment), in which Respondent assessed use tax on Petitioner's two 2003 Concorde Concrete Pump Trucks (the pump trucks), its two Cement Tanker Trailers (the tanker trailers), and its Smith Trailer and parts (the Smith Trailer) pursuant to an audit for the period of November 1, 2002 to June 30, 2006.

On November 24, 2008, Respondent filed a Motion for Summary Disposition under MCR 2.116(A)(2) and (C)(10) and its Brief in Support of its Motion. On December 18, 2008, Petitioner filed a Motion for Leave to File Written Opposition to Motion for Summary Disposition, its Opposition to Respondent's Motion for Summary Disposition, its Answer to Respondent's Brief in Support of its Motion for Summary Disposition, and the affidavit of Mr. Benjamin L. Hunderman, Petitioner's General Manager of Operations.

As of September 5, 2007, the subject assessment had accumulated \$12,320.08 in interest on a tax liability of \$52,277 for a combined total of \$64,597.08 as reflected in the table below:

Tax Year Purchased	Vehicle	Taxable Amount at Issue	Tax at Issue	Interest*
2003	2003 Concorde Concrete Pump Truck	\$320,000	\$ 19,200	\$
2003	2003 Concorde Concrete Pump Truck	\$335,000	\$ 20,100	\$
2004	Smith Trailer and Parts	\$ 39,390.50	\$ 2,363	\$
2005	Cement Tanker Trailer	\$ 88,446	\$ 5,307	\$
2005	Cement Tanker Trailer	\$ 88,446	\$ 5,307	\$

*Interest accruing and to be computed in accordance with §§ 23 and 24 of 1941 PA 122.

II. PETITIONER'S CONTENTIONS

Petitioner contends that “[t]hrough no fault of Petitioner, . . . Petitioner’s Representative, . . . failed to timely file written opposition to the motion for summary disposition. Petitioner’s representative confused the 28 day requirement to file with most answers to the 14 day requirement to file written opposition to a motion.”¹

In its Answer to Respondent’s Brief, Petitioner contends that it is an “industrial processor” engaged in an “industrial processing” activity, as those terms are defined in MCL 205.94o(7)(b) and (7)(a) respectively.²

MCL 205.94o(7)(a) states that industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing.³ The first step in converting the raw materials to concrete is the initial mixing of the cement powder with sand, gravel, and water.⁴ The tanker trailers are used in the industrial processing activity by moving cement powder to Petitioner’s batch plant⁵ while the Smith Trailer is used to move sand and gravel to the batch plant⁶. These materials are moved to the batch plant to be mixed and agitated with other raw materials, thereby satisfying MCL 205.94o(5)(g).⁷

Raw materials are mixed at the batch plant to start the process of manufacturing concrete and then transferred into cement mixer trucks.⁸ “In the cement mixer trucks, the sand, gravel, and cement are mixed and additional water; chemicals and coloring are added to facilitate the exact mixture of concrete ordered by the customer.”⁹ Concrete must be continuously mixed and agitated up to the point of delivery at the job site.¹⁰ MCL 205.94o(7)(a) states that industrial processing ends when finished goods first come to rest in finished goods inventory storage.¹¹ Petitioner states that there are two independently valid arguments as to why pump trucks are exempt from use tax.

First, the pump trucks continuously mix the concrete while in transport and up to the point of delivery to complete processing and to prevent premature hardening.¹² “Pump trucks are used to mix different loads simultaneously to achieve the desired mix . . .”¹³ at the point of delivery. “Pump trucks are used to continuously mix and agitate the concrete during pouring or truck delays.”¹⁴ According to Petitioner, these activities satisfy MCL 205.94o(7)(a) because they

¹ Petitioner’s Motion for Leave to File Late Written Opposition to Motion for Summary Disposition, p 2.

² Petitioner’s Answer to Respondent’s Brief in Support of its Motion for Summary Disposition, p 5, 6, 7, 13.

³ *Id* at 5, 7-8, 9.

⁴ *Id* at 8, 9.

⁵ *Id* at 8.

⁶ *Id* at 9.

⁷ *Id* at 8, 9.

⁸ Affidavit of Benjamin L. Hunderman, ¶¶ 12, 14.

⁹ Petitioner’s Answer to Respondent’s Brief, p 10; Affidavit of Benjamin L. Hunderman, ¶ 14.

¹⁰ Affidavit of Benjamin Hunderman, ¶¶ 15, 16.

¹¹ Petitioner’s Answer to Respondent’s Brief, p 6, 11, 12.

¹² Petitioner’s Answer to Respondent’s Brief, p 10; Affidavit of Benjamin L. Hunderman, ¶ 18.

¹³ Petitioner’s Answer to Respondent’s Brief, p 10-11; Affidavit of Benjamin L. Hunderman, ¶ 19.

¹⁴ Petitioner’s Answer to Respondent’s Brief, p 11; Affidavit of Benjamin L. Hunderman, ¶ 20.

either convert or conditional tangible personal property by changing the form, composition, quality, combination, or character of the property.¹⁵

Second, the pump trucks are used to deliver concrete from the cement mixer truck to the hard-to-reach locations of the job site.¹⁶ The mixture of the raw materials is in a constant state of mixing and agitation from the time it leaves the batch plant to the moment it reaches the point of delivery at the job site.¹⁷ “The activity of delivering the material to its ultimate destination is an exempt activity.”¹⁸ As such, the pump trucks are used to mix and agitate the raw materials at the job site before the finished good first come to rest in finished goods inventory storage, thereby satisfying MCL 205.94o(5)(g).¹⁹

III. RESPONDENT’S CONTENTIONS

In its Motion for Summary Disposition, Respondent contends that Petitioner mistakenly relies on MCL 205.94o(5)(g) as its basis for claiming entitlement to an industrial processing exemption. Respondent disqualifies the Smith Trailer and the tanker trailers as eligible for the exemption under this provision by pointing out that it requires a vehicle “to mix and agitate materials at a plant or job site”; the stipulated facts state that no concrete materials were mixed in the trailers as “they were used solely to transport separate concrete materials to Petitioner’s batch plant before the liquid concrete was made.”²⁰

Next, Respondent disqualifies the pump trucks as eligible for the exemption because they do not mix and agitate materials at a plant or job site in the concrete manufacturing process – the pump trucks merely transport and agitate the liquid concrete to prevent premature hardening.²¹ Petitioner does not allege that any of the ingredients used to make concrete are separately added to the pump trucks, nor does it dispute the fact that concrete materials are combined at the plant and later added to the pump trucks.²²

Moreover, “no *materials* are mixed in the concrete pump trucks themselves. Indeed, the definition of the term ‘mix’ demonstrates that the term refers to the combining of more than one thing because ‘mix’ means to ‘combine or blend’ or ‘[t]o create or form by combining ingredients.’ (American Heritage College Dictionary, 3rd ed.)”²³ “Petitioner is alleging that the pump trucks *mix* the liquid concrete by *agitating* it.”²⁴ “However, the Legislature’s use of the phrase ‘mix and agitate’ must be construed as intentional, and meaning must be given to every word in the statute, which Petitioner’s interpretation simply does not do.”²⁵

¹⁵ Petitioner’s Answer to Respondent’s Brief, p 11.

¹⁶ Petitioner’s Answer to Respondent’s Brief, p 11; Affidavit of Benjamin L. Hunderman, ¶ 17.

¹⁷ Petitioner’s Answer to Respondent’s Brief, p 12; Affidavit of Benjamin L. Hunderman, ¶¶ 15, 16.

¹⁸ Petitioner’s Answer to Respondent’s Brief, p 12.

¹⁹ Petitioner’s Answer to Respondent’s Brief, p 12.

²⁰ Respondent’s Brief in Support of its Motion, p 5 (referencing Joint Stip, ¶¶ 16-17).

²¹ *Id.* at 7.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 8.

²⁵ *Id.*

IV. FINDINGS OF FACT

The Tribunal incorporates the parties' Joint Stipulation of Uncontroverted Facts. In addition, based on the documentary evidence before it, the Tribunal finds that:

1. As to its Motion for Leave to File Written Opposition to Motion for Summary Disposition, Petitioner has shown good cause and Respondent has not been unduly prejudiced.
2. Petitioner is an "industrial processor," as defined in MCL 205.94o(7)(b), engaged in the manufacturing of liquid concrete.
3. The process of manufacturing liquid concrete is an "industrial processing" activity, as defined in MCL 205.94o(7)(a).
4. Petitioner does not use its Smith Trailer, tanker trailers, or pump trucks to mix and agitate materials at a plant or job site in the concrete manufacturing process.

V. APPLICABLE LAW

Respondent moves for summary disposition pursuant to MCR 2.116(A)(2) and (C)(10).

MCR 2.116(A)(1) provides that "[t]he parties to a civil action may submit an agreed-upon stipulation of facts to the court."²⁶ The Michigan Supreme Court has stated:

[O]nce stipulations have been received and approved they are sacrosanct. Neither a hearing officer nor a judge may thereafter alter them. This holding requires no supporting citation. The necessity of the rule is apparent. A party must be able to rest secure on the premise that the stipulated facts and stipulated ultimate conclusionary facts as accepted will be those upon which adjudication is based. Any deviation therefrom results in a denial of due process for the obvious reason that both parties by accepting the stipulation have been foreclosed from making any testimonial or other evidentiary record.²⁷

MCR 2.116(A)(2) provides that "[i]f the parties have stipulated to facts sufficient to enable the court to render judgment in the action, the court shall do so."²⁸

In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004), the Tribunal stated "[a] motion for 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.²⁹ In the

²⁶ *Signature Villas, LLC v City of Ann Arbor*, 269 Mich App 694, 706; 714 NW2d 392 (2006).

²⁷ *Dana Corp v Employment Security Comm*, 371 Mich 107, 110; 123 NW2d 277 (1963).

²⁸ *Signature Villas, LLC v City of Ann Arbor*, 269 Mich App 694, 707; 714 NW2d 392 (2006).

²⁹ *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

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.³⁰

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.³¹ The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider.³² The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.³³ 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.³⁴ If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.³⁵

VI. CONCLUSIONS OF LAW

The assessment at issue in this matter is for unpaid use tax. The Use Tax Act, 1937 PA 94, provides for the levy, assessment, and collection of a specific excise tax on the storage, use, or consumption in this state of tangible personal property and certain services.

Section 4o of the Act, MCL 205.94o, provides an exemption (industrial processing exemption) to property, sold to an industrial processor for use or consumption in industrial processing, to the extent that the property is used for the exempt purpose stated in this section.

However, MCL 205.94o(5)(g) states that the following property is ineligible to receive an industrial processing exemption:

Vehicles, including special bodies or attachments, required to display a vehicle permit or license plate to operate on public highways, except for a vehicle bearing a manufacturer's plate or a specially designed vehicle, together with parts, used to mix and agitate materials at a plant or job site in the concrete manufacturing process.

As stated in paragraph 9 of the parties' Joint Stipulation of Uncontroverted Facts, "[a]ll of the vehicles at issue are required to display a vehicle permit or license plate to operate on public roads." Therefore, following the general rule of MCL 205.94o(5)(g), the pump trucks, the tanker trailers, and the Smith Trailer (the vehicles) are not eligible to receive an industrial processing exemption. The seminal issue in this matter is whether each vehicle is used to mix and agitate materials added at a plant or job site in the concrete manufacturing process, thus satisfying the exception provided in MCL 205.94o(5)(g).

³⁰ *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

³¹ *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).

³² *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

³³ *Id.*

³⁴ *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991).

³⁵ *McCormick v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

As to the Smith Trailer and tanker trailers, the parties have stipulated to facts sufficient to enable the Tribunal to render judgment in this case. As stated in the parties' Joint Stipulation of Uncontroverted Facts, "Petitioner uses the cement tanker trailers . . . to move and hold cement powder until processing begins at their batch plant" and "Petitioner uses their Smith utility trailers, . . . to move sand and gravel to processing at their batch plant."³⁶ "During the audit period, concrete materials were neither mixed nor agitated in the tanker trailers or the Smith Trailer"³⁷ Because of these stipulations, there exists no genuine issue of material fact regarding whether the tanker trailers or the Smith Trailer "mix and agitate materials"; Petitioner has only shown that it uses the tanker trailers and the Smith Trailer in an industrial processing activity, which on its own does not satisfy MCL 205.940(5)(g). Therefore, as to the tankers trailers and the Smith Trailer, Respondent is entitled to Summary Disposition under MCR 2.116(A)(2).

As to the pump trucks, the parties have not stipulated to facts sufficient to enable the Tribunal to render judgment in this action as Petitioner could show that the pump trucks are used to mix and agitate materials at a plant or job site in the concrete manufacturing process without contradicting the stipulated facts. But, because Petitioner is claiming an industrial processing exemption, and therefore bears the burden of proof at trial³⁸, it cannot rely on mere allegations or denials in the pleadings; instead, it must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.³⁹

In this regard, Petitioner points out that concrete must be continually mixed and agitated up to the point of delivery at the job site to avoid premature hardening.⁴⁰ Petitioner contends that the pump trucks continually mix the concrete during pouring, truck delays, while in transport, and up to the point of delivery at the job site.⁴¹ In addition, Petitioner contends that the pump trucks are used to mix different loads of concrete simultaneously to achieve desired product mix.⁴²

However, Petitioner did not specifically state which, if any, materials are added directly to the pump trucks to be mixed, nor when such materials are added. In contrast, when describing the activity involving its cement mixer trucks, Petitioner stated that "sand, gravel and cement are mixed and additional water, chemicals and coloring are added to facilitate the exact mixture of concrete ordered by the customers."⁴³ Petitioner showed that materials are undoubtedly "mixed and agitated" in the cement mixer trucks. But Petitioner did not show a genuine issue of material fact as to whether materials are actually mixed in the pump trucks; Petitioner showed only that materials are agitated in the pump trucks. Therefore, as to the pump trucks, Respondent is entitled to Summary Disposition as a matter of law under MCR 2.116(C)(10).

³⁶ Joint Stipulation of Uncontroverted Facts, ¶¶ 16, 17.

³⁷ *Id.* at ¶ 16.

³⁸ *Betten Auto Ctr, Inc, v Department of Treasury*, 272 Mich App 14; 723 NW2d 914 (2006).

³⁹ *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991).

⁴⁰ Joint Stipulation of Uncontroverted Facts, ¶¶ 15, 16, 17.

⁴¹ *Id.* at ¶¶ 18, 20.

⁴² *Id.* at ¶ 19.

⁴³ *Id.* at ¶ 14.

VII. JUDGMENT

IT IS ORDERED that Petitioner's Motion for Leave to File Written Opposition to Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is GRANTED.

This Order resolves all pending claims in this matter and closes the case.

MICHIGAN TAX TRIBUNAL

Entered: April 2, 2009
gmf

By: Kimbal R. Smith III