

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

Green Thumb Landscaping, Inc.,
Petitioner,

v

MTT Docket No. 342253

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner appeals Respondent's Assessment No. O722924 for failure to pay use tax for the tax periods September 1, 2002 to September 30, 2006. An informal conference was conducted by the Department of Treasury on August 15, 2007. The Department of Treasury issued its Decision and Order of Determination on November 28, 2007, adopting the Hearing Referee's Recommendation and determining "that Intent No. O722924 shall be assessed as originally determined." A hearing was held in the above-captioned case on May 8, 2009. Petitioner was represented by Joseph N. Kuptz, Winegarden, Haley, Lindholm & Robertson, PLC. Respondent was represented by Drew Taylor, Assistant Attorney General.

BACKGROUND

Petitioner is a corporation with its principal office in Grand Blanc, Michigan. Petitioner is an infrastructure contractor that specializes in, among similar other activities, road building, earth moving, sewer constructions, and water main construction.¹ Respondent performed an audit of Petitioner for the period September 1, 2002 to September 30, 2006. Respondent determined a use tax liability of \$539,602 plus interest. Petitioner agree to and paid \$479,133.00. Petitioner paid

¹ Petitioner's post hearing brief

and contested the difference, the contested amount herein appealed, plus accumulated interest.

Petitioner asserts an industrial processing exemption from tax for two pieces of equipment, which Respondent denied. Additionally, Respondent assessed Petitioner use tax on the purchase of equipment and also materials from an out of state vendor Petitioner asserts that it is not responsible for. Respondent assessed tax on certain outdoor furnishings the purchase of which Petitioner asserts was not during the tax periods at issue.

The tax, interest, and penalty due as assessed by the Michigan Department of Treasury are:

Tax	\$ 60,469.00
Penalty	\$ 0
Interest *	\$ 40,019.29
Total	\$100,488.29

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

PETITIONER'S CONTENTIONS

Petitioner offered the following proposed exhibits:

- P-1 Use Tax Certificate of Exemption for 375 excavator, dated 6/10/2003
- P-2 Invoice for 375 excavator, dated 06/12/2003
- P-3 Snapshot of company's website, showing crushed concrete for sale, created 08/07/2003
- P-4 Equipment Sales and Security Agreement for 627 scraper, dated 07/02/2004
- P-5 Invoice for 627 scraper, dated 07/21/2004
- P-6 Use Tax Certificate of Exemption for 627 scraper, dated 07/29/2004
- P-7 Picture of broken concrete pile at crushing site, taken 12/31/2004
- P-8 Picture of mountain of broken concrete at crushing site, taken 12/30/2005
- P-9 Picture of gravel made from crushed concrete at crushing site, taken 12/30/2005
- P-10 Letter from Genesee County accepting watermain, dated 02/17/2006
- P-11 Letter from Genesee County with material costs, dated 11/20/2006
- P-12 Picture of 375 excavator with pulverizer attachment next to crushing operation, taken 03/31/2007
- P-13 Picture of 375 excavator next to concrete piles, taken 03/31/2007
- P-14 Picture of 375 excavator next to concrete piles, taken 03/31/2007
- P-15 Letter from Genesee County transmitting final pay estimate, dated 06/20/2007
- P-16 Picture of 375 excavator next to broken concrete piles, taken 12/31/2007
- P-17 Picture of pile of 1x3 crushed concrete, taken 12/31/2007
- P-18 Picture of gravel made from crushed concrete, taken 12/31/2007

P-19 Pictures of 627 scraper, taken 05/05/2009

Petitioner appeals Respondent's assessment of use tax on "a scraper and excavator, and related repair parts, purchased by Petitioner to be used exclusively in the processing of large pieces of broken concrete into various sized of gravel/aggregate. The gravel material was then offered for retail sale to unrelated third parties."² Petitioner contends that the purchase was entitled to an industrial processing exemption.

Petitioner appeals Respondent's assessment of a use tax on equipment and materials purchased by Petitioner and used in construction projects. Respondent assessed use tax against Petitioner based on its assumption that the seller of the equipment did not collect the sales tax due on those purchases.

Petitioner appeals Respondent's assessment of interest related to a phased project performed for the Genesee County Drain Commission. Petitioner asserts that Respondent calculated the interest before the value of the property on which the use tax was assessed was determined.

Petitioner offered the testimony of Mr. Vito Zito. Mr. Vito Zito testified that he is the bookkeeper for Petitioner and has been for 20 years.³ Mr. Vito Zito testified that Petitioner's concrete crushing operation began in 2002 or 2003⁴ and that although Petitioner offered crushed concrete as early as 2003, no sales were made until 2006.⁵

² Petitioner's post hearing brief, page 5

³ Transcript page 17, ll 18-25

⁴ Transcript page 20, ll 20-23

⁵ Transcript page 23, ll 7-15

Mr. Vito Zito explained that a 627 scraper moves large amounts of aggregate.⁶ Petitioner offered several pictures of piles of crushed concrete purportedly taken at different times showing different types of aggregate and piles of varying sizes.⁷ Respondent objected to the admission of the exhibits. The Tribunal overruled Respondent's objection and allowed the pictures for the limited purpose of showing that there were piles of crushed concrete on Petitioner's property during the tax periods at issue. Petitioner offered a picture of the Cat 375 excavator,⁸ one of the pieces of equipment the purchase of which is the subject of this appeal, with a pulverizer on the end of the arm. The purpose of this equipment is to "pick up large pieces of concrete and . . . crunch together and reduce the concrete to smaller sizes."⁹

Mr. Vito Zito testified that "in 2003, . . . the material we made . . . didn't meet specifications. . . also the quality wasn't the greatest."¹⁰ For purposes of their own operation, Petitioner used material from "[m]any different suppliers"¹¹ but did not use the aggregate they produced.

Mr. Vito Zito testified that Petitioner did "a project for the Genesee County Drain Commission that started in October 2004"¹² to place a water main that would be used to supply drinking water to residents of the county. The County notified Petitioner by letter,¹³ date stamped by Petitioner February 18, 2006, that "the water main was acceptable and ready for use."¹⁴ In a letter dated

⁶ Transcript page 32, l 4

⁷ Petitioner's exhibits 6, 8, 9, 13, and 14. Petitioner's exhibits 17 and 18 were not admitted as depicting the property more than one year after the end of the audit period.

⁸ Petitioner's exhibit 12

⁹ Transcript page 44, ll 6-8

¹⁰ Transcript page 52, ll 16-23

¹¹ Transcript page 53, l 20

¹² Transcript page 55, ll 5-6

¹³ Petitioner's exhibit 10

¹⁴ Transcript page 55, l25

November 20, 2006,¹⁵ the Genesee County Drain Commissioner's office notified Petitioner of "the amount of materials purchased for this water main project."¹⁶ The letter informed Petitioner that it "must pay use tax. . . on 7.4 million dollars, which is material cost."¹⁷ Petitioner received a second letter¹⁸ which specified "that the final pay application was processed for the project."¹⁹

On cross examination, Respondent asked Mr. Vito Zito to identify the invoice for an excavator²⁰ and the witness testified that that piece of equipment had attachments and could be used for activities other than crushing stone and could be transported to various job sites. Mr. Vito Zito also identified the Michigan Sales and Use Tax Certificate of Exemption for the excavator.²¹ Mr. Vito Zito further identified the sales and security agreement for the purchase of "one new Caterpillar 627 G push pull together with all its attachments."²² Respondent questioned Mr. Vito Zito to make clear that, although there was no designation of the equipment to which it referred, the second Michigan Sales and Use Tax Certificate of Exemption²³ "goes with the 627 scraper."²⁴

In response to Respondent's questions, Mr. Vito Zito testified that the stone crushed by Petitioner "didn't meet specifications for us to use in a government project initially."²⁵ In

¹⁵ Petitioner's exhibit 11

¹⁶ Transcript page 57, ll 9-10

¹⁷ Transcript page 59, ll 3-6

¹⁸ Petitioner's exhibit 15

¹⁹ Transcript page 60, ll 9-10

²⁰ Petitioner's exhibit 2

²¹ Petitioner's exhibit 1

²² Petitioner's exhibit 4

²³ Petitioner's exhibit 6

²⁴ Transcript page 67, l 11

²⁵ Transcript page 75, ll 13-14

response to Respondent's questions, Mr. Vito Zito further testified that no sales were made before 2006 because Petitioner "[d]idn't have any customers."²⁶

Respondent asked Mr. Vito Zito to identify the invoice from JGM Valve Corporation and Bueche Trucking Invoices.²⁷ Mr. Vito Zito confirmed that there was no entry, or an entry of zero, on the line designated for the sales tax amount on any of the invoices. In response to Respondent's question, "[i]sn't true that on all of these contracts and all these invoices that weren't remitting – that Bueche wasn't charging you sales tax,"²⁸ Mr. Vito Zito responded that he did not know and "it could have been included in the prices."²⁹

Respondent asked Mr. Vito Zito to review annual sales, use and withholding tax returns for tax years 2000 to 2005.³⁰ Mr. Vito Zito testified that there was a \$1.00 entry for sales tax and no entry for use tax for tax years 2000, 2001, 2002, 2003, and 2004. For the 2005 tax year, Petitioner's tax return showed \$9,407.84 as actual sales tax payments. Mr. Vito Zito explained that 2005 was the year in which Petitioner "started making sales of crushed concrete."³¹

On redirect, Mr. Vito Zito testified that neither "the 375 or the 627 [were] used on a project other than at the concrete crushing site."³²

²⁶ Transcript page 76, l 12

²⁷ Respondent's exhibit 7

²⁸ Transcript page 79, ll 6-8

²⁹ Transcript page 79, ll 9-10

³⁰ Respondent's exhibit 5

³¹ Transcript page 86, l 25

³² Transcript page 88, ll 14-15

Petitioner offered the testimony of Mr. John Zito. Mr. John Zito testified that Petitioner began as a landscaping business but “moved into a little heavier type work which involves sewers and roads.”³³ He testified that he is very familiar with the concrete crushing operation and that Petitioner started accepting broken concrete to the business site in 2003. Mr. John Zito further testified that he was familiar with the 375 excavator and identified the invoice for its purchase.³⁴ The invoice indicated that the equipment was “nontaxable -- industrial processing.”³⁵ Mr. John Zito testified that Petitioner eventually “started incorporating it (the concrete crushed by the equipment) into road projects”³⁶ but Petitioner did not use any of the material for its own operations. Mr. John Zito identified the invoice for a 627 G scraper³⁷ on which the notation “nontaxable -- industrial processing”³⁸ was also found. This piece of equipment was not “used in an operation of Zito Construction other than the concrete processing operation.”³⁹ Mr. John Zito identified the sales agreement for the 627 G scraper that indicated it was purchased some time during July, 2004.⁴⁰ Petitioner first put “the 627 into service . . . [in] July or August of 2004”⁴¹ and the first sale of aggregate material processed with the use of the equipment was in “2006, fall of 2006.”⁴² When asked why it took so long to begin selling crushed concrete, Mr. John Zito stated “we did have some problems when we started out making material within specifications, and we didn’t have everything that we needed there on the site. . . it’s taken a while for it to catch on with governmental agencies.”⁴³

³³ Transcript page 94, ll 3-4

³⁴ Petitioner’s exhibit 2

³⁵ Transcript page 95, l 23

³⁶ Transcript page 97, ll 3-7

³⁷ Petitioner’s exhibit 6

³⁸ Transcript page 98, l 25 – page 99, l 1

³⁹ Transcript page 101, ll 3-7

⁴⁰ Petitioner’s exhibit 4

⁴¹ Transcript page 102, ll 22-24

⁴² Transcript page 104, l 2

⁴³ Transcript page 104, ll 6-11

On cross examination, Mr. John Zito was asked to review the sales and use tax exemption certificate for the 375 excavator.⁴⁴ He testified that the form was completed by the seller and he signed and dated it. Respondent asked him to read into the record the declaration statement⁴⁵ asked him if he complied with the provisions. Mr. John Zito admitted a similar statement was contained in the exemption certificate for the 627 scraper.⁴⁶

RESPONDENT'S CONTENTIONS

Respondent offered the following proposed exhibits:

- R-1 Decision and Order of Determination and Informal Conference Recommendation
- R-2 Final Assessment No. O722924
- R-3 Audit Report of Findings
- R-4 Audit Results and Supporting Workpapers
- R-5 2000-2007 Annual Returns for Sales, Use, and Withholding Taxes
- R-6 Combined Returns for March, September, October, November, December 2006
- R-7 J.G.M. Valve Corporation Invoice & Bueche Trucking Invoices
- R-8 Caterpillar excavator 375L pictures & 6/12/03 Invoice
- R-9 Caterpillar scraper 627G picture
- R-10 Concrete rubble pictures

Respondent asserts that Petitioner's claim of exemption from sales tax for the purchase of the excavator/crusher and scraper were disallowed "because while the equipment at issue was purchased in 2003 and 2004, Petitioner did not make any retail sales of crushed stone until October 2006, which was after the years at issue."⁴⁷ Respondent further notes that Petitioner did not have a sales tax license during the audit period.

⁴⁴ Petitioner's exhibit 2

⁴⁵ Transcript page 106, ll 10-20, "I declare under penalty of perjury that the information on the certificate is true and that I have consulted the statutes, administrative rules and other sources of law applicable to my exemption, and that I have exercised reasonable care in assuring that my claim of exemption is valid under Michigan law. In the event this claim is disallowed I accept full responsibility for payment of tax, penalty and any accrued interest including, if necessary, a reimbursement to the vendor for the tax and accrued interest."

⁴⁶ Petitioner's exhibit 6

⁴⁷ Respondent's prehearing statement

Respondent asserts that Petitioner claimed that “taxes were included in all material purchased from a particular vendor.”⁴⁸ Respondent’s auditor review of all invoices found that “no sales tax was collected.”⁴⁹

Respondent offered the testimony of Mr. Abraham Odunuga, senior auditor with the Department of Treasury. Mr. Odunuga was the second auditor on Petitioner’s case. The original auditor left his position. Although Mr. Odunuga’s assignment came after Petitioner sent a letter to the Department asking that the first auditor be replaced because “of the behavior of the prior auditor,”⁵⁰ Mr. Odunuga stated the letter was not related to the reassignment.

At a preaudit conference with Petitioner’s representatives, Mr. Odunuga reviewed general ledgers, the depreciation schedule, and some purchase invoices. Mr. Odunuga stated that he conducted the pre-audit conference “because we don’t really know what the taxpayer is doing . . . in order to give us a good idea of what is going on with the business.”⁵¹ A plan for the review was set out at that conference and Mr. Odunuga testified that Mr. Vito was “[v]ery cooperative. . . he was friendly and cooperative.”⁵²

In his review of Petitioner’s general ledger, Mr. Odunuga noted an “allocation of money for tax [and] Mr. Vito indicated it was allocated to pay use tax, it was accrued, but never remitted to the state. . . on the Genesee County project.”⁵³ Mr. Odunuga was told that the actual amounts on the

⁴⁸ Respondent’s prehearing statement

⁴⁹ Respondent’s prehearing statement

⁵⁰ Transcript page 113, l 23

⁵¹ Transcript page 115, ll 10-15

⁵² Transcript page 115, l 25-page 116, l 1

⁵³ Transcript page 116, ll 10-15

project was not yet known at the time of the pre-audit conference. Mr. Vito provided copies of requested contracts related to the project which had been completed in four phases. When the letter from Genesee County⁵⁴ and the actual amount owed by Petitioner was determined, Mr. Odunuga completed the audit.

Mr. Odunuga testified that he found the “construction equipment, the excavator and the scraper were . . . exceptions”⁵⁵ noted in the audit. Petitioner objected to Respondent’s inclusion of the equipment that Petitioner designated as industrial processing in the determination of the final tax liability. Mr. Odunuga asked for, and was provided, the documents used by Petitioner to claim the industrial processing exemption. He testified that he asked “how the equipment was used, and Mr. Vito told me that they were used in crushing stones, and I asked them, are you making retail sales, or are you consuming the crushed stones yourself, and he said they were going to be making retail sales.”⁵⁶ Mr. Odunuga testified that this conversation took place in 2006, after the audit period and that he informed Mr. Vito at that time that “they do not qualify for industrial processing, because they were not making retail sales, and when they start making retail sales, they need to register for sales tax because currently they were not registered for sales tax.”⁵⁷ Mr. Odunuga stated that Petitioner was “registered for”⁵⁸ single business tax and withholding tax during the tax years at issue and prior tax years but “it’s only use tax and sales tax that they were not registered for.”⁵⁹ Mr. Odunuga testified that “the annual return for sales use and withholding taxes showed that they were not remitting any sales tax to Treasury. . . . because they were not

⁵⁴ Respondent’s exhibit 11

⁵⁵ Transcript page 120, ll 9-11

⁵⁶ Transcript page 127, ll 3-8

⁵⁷ Transcript page 127, ll 21-25

⁵⁸ Transcript page 128, l 8

⁵⁹ Transcript page 128, ll 12-13

making sales, and they were not registered for sales.”⁶⁰ Mr. Odunuga further testified that it is a requirement to register for a sales tax license if sales are being made. Mr. Odunuga testified regarding the internal department documents⁶¹ he prepared that “allows the people that would process the audit, and also the management, to easily see what’s the audit period, and . . . whether to assess the audit or payments had been made.”⁶² That document further specified the amount of tax and interest to be assessed and notified the Respondent that Petitioner “was not registered for use tax.”⁶³

Mr. Odunuga testified that in his “review of the tax payable invoices,⁶⁴ I found they were making purchases of materials from a Patrick M. Bueche Trucking.”⁶⁵ The “sales tax line showed zero, so it showed that there was no tax paid on these purchases.”⁶⁶ Mr. Odunuga testified that in his experience, “[i]f sales tax was included in the price,. . . it would not be separately itemized on the invoice. . . . the way this invoice⁶⁷ read, the tax is to be paid by the purchaser.”⁶⁸ Further, he testified if the tax was included it would expressly state so on the invoice. Mr. Odunuga testified that the same applied to the invoice from JGM Valve Corporation.⁶⁹

Mr. Odunuga read portions of MCL 204.94o, the statutory provision that provides for an exemption from use tax for tangible personal property purchased for industrial processing, into the record. Mr. Odunuga testified that he concluded that the equipment did not qualify for the

⁶⁰ Transcript page 128, ll 18-23

⁶¹ Respondent’s exhibit 4

⁶² Transcript page 129, ll 6-10

⁶³ Transcript page 129, ll 17-18

⁶⁴ Respondent’s exhibit 7

⁶⁵ Transcript page 133, ll 11-13

⁶⁶ Transcript page 134, ll 9-11

⁶⁷ Respondent’s exhibit 7

⁶⁸ Transcript page 134, ll 17-23

⁶⁹ Respondent’s exhibit 4

exemption, and explained this to Mr. Zito. He testified that he “made that conclusion because Mr. Zito was not making any sales, any retail sales prior to my audit, and during my audit period.”⁷⁰ Mr. Odunuga stated that “there wasn’t a problem that they were, you know, crushing stones. . . . how it was related was they were not making retail sales which is required by the statute.”⁷¹

Respondent offered Respondent’s Decision and Order of Determination and Informal Conference Recommendation.⁷² Mr. Odunuga testified that Respondent’s hearing referee and Administrator of Office of Hearings determined that the Intent should be assessed as originally determined by the audit and a final assessment⁷³ was issued.

On cross examination, Mr. Odunuga testified that, for the Genesee County Drain Project, the interest on the tax due was calculated by computer program that assessed interest for the entire year in which the purchase was made and tax was due, “[b]ecause it’s the interest on the amount of tax due.”⁷⁴ Mr. Odunuga testified that because the Genesee County Drain project was a phased project, “[o]nce the phase of the projects was completed, the taxpayer could have asked how much material was consumed on this project.”⁷⁵ Petitioner knew, or could have ascertained, the amount of tax due on material consumed for each phase. Tax should have been paid for each phase contrary to Petitioner’s assertion that no tax was due until the entire project was completed and Genesee County informed Petitioner of the total cost of materials and amount of tax due.

⁷⁰ Transcript page 139, ll 23-25

⁷¹ Transcript page 140, ll 1-14

⁷² Respondent’s exhibit 1

⁷³ Respondent’s exhibit 2

⁷⁴ Transcript page 153, ll 1-2

⁷⁵ Transcript page 155, ll 8-11

In response to questions regarding Respondent's position that Petitioner was responsible to pay tax on the purchases from Bueche Trucking and JGM Valve, Mr. Odunuga testified that it is Respondent's belief that sales tax wasn't included in the sale when these purchases were made. He stated that if "the taxpayer disagreed with review, we . . . allow the taxpayer . . . to go back to the vendor, and get something in writing . . . to indicate what their intent was. Even though looking at this invoice, I can easily tell the tax was not included."⁷⁶ Mr. Odunuga testified that Petitioner did not provide any additional information. Mr. Odunuga further testified that "it is the seller's responsibility to collect sales tax, but . . . if sales tax is not collected by the seller, then the purchaser is responsible for the use tax."⁷⁷

On cross examination, Mr. Odunuga acknowledged that MCL 205.94o did not define when an ultimate sale at retail must occur for eligibility for the industrial processing exemption. Mr. Odunuga testified that he asked Mr. Vito if Petitioner used the aggregate product they were producing on their site in their own operations and "he said no."⁷⁸ Mr. Vito also told Mr. Odunuga that Petitioner was not continually crushing stone and that the equipment was in storage when not in use. Mr. Odunuga testified that "it was difficult for me to believe that they paid that much money for something that just remained idle, while in the business of construction."⁷⁹

⁷⁶ Transcript page 166, ll 12-17

⁷⁷ Transcript page 167, ll 3-6

⁷⁸ Transcript page 168, l 24

⁷⁹ Transcript page 169, ll 11-14

FINDINGS OF FACT

Petitioner appeals Respondent's use tax assessment. The assessment reflects liabilities based upon separate and distinct transactions. Petitioner has paid the entire assessment and seeks a refund.

There is no dispute that Petitioner purchased a 375 excavator in 2003 and a 627 scraper in 2004. Petitioner filed a use tax exemption certificate for each piece of equipment. Petitioner asserts, and Respondent agrees,⁸⁰ that the equipment was used for a manufacturing process that met the criteria for exemption from the collection of use tax under MCL 205.94o. The parties agree that the equipment was used for the exempt purpose. Petitioner's testimony that it did not consume any of the product manufactured for its own purposes is credible. Respondent asserts that the building of piles of aggregate and the use of some the aggregate to provide access to those piles is a use for Petitioner's own business purposes making the purchase subject to tax. The Tribunal disagrees. The Tribunal accepts Petitioner's explanation that this activity of stockpiling of aggregate and reprocessing it was related to future sales to potential buyers.

Respondent supports its assessment based on its finding that Petitioner did not have a sales tax license for the tax period at issue and that product was not sold within a year of its manufacture. Petitioner admits that it did not have a sales tax license as it made no sales during the tax years at issue. The statute provides that to qualify for exemption under MCL 205.94o, the industrial processing product must be "intended for ultimate use in and is used in industrial processing by

⁸⁰ Transcript page 174-175

an industrial processor.”⁸¹ Petitioner did “ultimately” sell the product it manufactured, albeit after the tax period at issue. Petitioner did secure a sales tax license, and remit sales tax, when it began to sell its product. The Tribunal finds that Petitioner is an entity that performs the activity of converting tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail. The activity that Petitioner performs is the converting of 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.⁸² The Tribunal finds credible Petitioner’s testimony that it did not consume any product for its own purposes and that it did not make sales until 2006, at which time it secured its sales tax license.

Respondent also assessed Petitioner for unpaid use tax based upon invoices⁸³ for purchases by Petitioner from J.G.M. Valve Corporation and Bueche Trucking and Excavating its auditor found during his audit. The invoices either show “\$0.00” or are blank on the line designated as “sales tax.” Respondent and Petitioner acknowledge that these transactions were sales at retail and were subject to sales tax. Petitioner asserts that it believes the tax may have been included in the sale price. Respondent’s auditor contends that if that is the case, there would have been some notation to that effect. Respondent’s assumption from these documents is that Petitioner did not pay sales tax. That assumption, however, is not sufficient to support a use tax assessment against Petitioner. Petitioner has offered a reasonable alternate explanation. Respondent did not provide any evidence that sales tax on these purchases was not paid. Furthermore, the sales tax act is

⁸¹ MCL 205.94o(1)(b)

⁸² MCL 205.94o(1)(7)(a) and (b)

⁸³ Respondent’s exhibit 7

clear. It is the seller's responsibility to collect and remit the sales tax. Petitioner is the purchaser in these transactions.

Respondent assessed \$35,282 in interest related to Petitioner's Genesee County Drain Commission project. For that project, Petitioner placed water main in the ground in four phases. The supplies needed for the project were purchased by Genesee County Drain Commission and provided to Petitioner. The parties agree that Petitioner owed, and paid, use tax on these materials. The assessment is for interest on that taxable amount that was unpaid during the tax periods at issue. The project began in 2004 and was completed in 2006. Petitioner used and consumed the supplies and materials provided by Genesee County Drain Commission during this period. Respondent assessed interest from January 1, 2006 through September 30, 2006.

Respondent did not assess interest on a month by month basis beginning in the first month Petitioner used and consumed supplies and materials because those monthly statistics were not available. Instead, Respondent devised a proration formula for the 2006 year only and applied interest to the entire unpaid amount. Petitioner asserts that it did not, and could not, know how much use tax was owed on the project until the all phases were completed and Genesee County Drain Commission provided it with the total value of supplies and equipment used. Petitioner asserts that "[t]his did not happen until November 20, 2006. Further, Green Thumb did not receive final pay . . . until June 20, 2006. . . Therefore, Use Tax should not have been assessed before this date."⁸⁴ The Tribunal finds that Petitioner used the supplies and materials throughout the course of the project. The use tax act requires the filing of a return within 15 days after the close of the month during which the tax accrued. Tax accrued each month that Petitioner used, stored, or consumed tangible personal property related to this project. Petitioner was responsible

⁸⁴ Petitioner's post hearing brief, page 17

for determining its liability and could have gotten the necessary information. That Genesee County Drain Commission did not provide Petitioner with the information, did not relieve Petitioner of its obligation under the statute to report and pay.

Respondent contends that Mr. John Zito signed the sales tax exemption certificates which each contained a declaration that the person signing, under penalty of perjury, declares that he or she has read the applicable statutes, administrative rules, and other sources of law. Respondent asserts that Petitioner did not do this. However, Respondent failed to demonstrate how this allegation impacts the determination of Petitioner's liability for the taxes at issue. The Tribunal is not the venue in which to pursue relief related to this issue.

Further, Respondent asserts that Petitioner was not registered for sales tax or use tax. If Respondent wishes to pursue sanctions against Petitioner for not registering during the years in question, Respondent's remedy lies within the statutes related to those taxes and not with the Tribunal.⁸⁵

CONCLUSIONS OF LAW

The assessment at issue in this matter is for unpaid use tax and interest. The burden of proof to refute the assessment lies with Petitioner. The Tax Tribunal has authority to allocate the burden of proof in a manner consistent with the legislative scheme. *Zenith Industrial Corp. v Dep't of Treasury*, 130 Mich App 464, 343 NW2d 495 (1983). Although the revenue statute at issue here, MCL 205.21, does not state which party has the burden of proof, imposing the burden on the

⁸⁵ MCL 205.105 provided, Sec. 15. Any seller who fails to register with the department as required under this act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined the sum of \$25.00 for each day such failure, neglect or refusal to so register continues after notice to such seller from the department that he is required to register under this act.

taxpayer is consistent with the overall scheme of the tax statutes and the Legislature's intent to give the Department a means of basing an assessment on the best information available to it under the circumstances. See *Vomvolakis v Dep't of Treasury*, 145 Mich App 238, 377 NW2d 309 (1985), lv den. 424 Mich 887 (1986). Further, it is well settled that “[b]ecause tax exemptions are disfavored, the burden of proving entitlement to an exemption rests on . . . the party asserting the right to the exemption.” *Tercheck v Treasury*, 171 Mich App 508, 431 NW2d 208 (1988). And it is well established that a statute granting a tax exemption or refund must be strictly construed against the taxpayer and in favor of the taxing authority. *Michigan Baptist Home & Development Co v Ann Arbor*, 396 Mich 660; 242 NW2d 749 (1976).

The Use Tax Act, 1937 PA 94, provides for the levy and collection of a use tax for the privilege of using, storing, or consuming tangible personal property in this state. Section 3 of the act provides,

Sec. 3. (1) There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property or services specified in section 3a or 3b. . . . Penalties and interest shall be added to the tax if applicable as provided in this act. MCL 205.93

Section 6 of the act provides,

Sec. 6. (1) Every person storing, using, or consuming tangible personal property or services, the storage, use, or consumption of which is subject to the tax imposed by this act when the tax was not paid to a seller, and every seller collecting the tax from the purchaser, unless otherwise prescribed by the department under the provisions of subsection (2) or (3), on or before the twentieth day of each calendar month shall file with the department a return for the preceding calendar month, in a form prescribed by the department, showing the price of each purchase of tangible personal property or services during the preceding month, and other information the department considers necessary for the proper administration of this act. At the same time, each person shall pay to the department the amount of tax imposed by this act with respect to the purchases covered by the return. MCL 205.96

Section 7 of the act provides,

Sec. 7(1) Each person storing, using, or consuming in this state tangible personal property or services is liable for the tax levied under this act, and that liability shall not be extinguished until the tax levied under this act has been paid to the department. MCL 205.97

Section 4o of the act provides,

(1) The tax levied under this act does not apply to property sold to the following after March 30, 1999, subject to subsection (2):

- (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.
- (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) As used in this section:

- (a) "Industrial processing" means the 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.
- (b) "Industrial processor" means 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. MCL 205.94o

The Sales Tax Act, 1933 PA 167, provides for the levy and collection of a sales tax on the transfer of ownership of tangible personal property. Section 2 of the act provides,

Sec. 2. (1) Except as provided in section 2a, there is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act. MCL 205.52

Petitioner's purchase of the 375 excavator and the 627 scraper is subject to tax unless otherwise eligible for exemption under the statute. The Tribunal concludes, as Petitioner asserts and Respondent's witness agrees, that Petitioner meets the criteria of an industrial processor. The Tribunal concludes, as Petitioner asserts and Respondent's witness agrees, that the activities performed using the equipment in question qualifies as industrial processing. The Tribunal concludes, as Petitioner asserts and Respondent's witness agrees, that the converted tangible personal property was intended for ultimate sale at retail and was in fact ultimately sold at retail. However, to support its assessment, Respondent seeks to add language to the applicable statutory provision to include a time period in which the ultimate sale of the goods produced must be made. Respondent asserts that the product must be sold within a year of its production.⁸⁶ There is simply no statutory support for this position. When the Legislature has unambiguously conveyed its intent, the statute speaks for itself and judicial construction is neither necessary nor permitted. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). The language in MCL 205.94o is clear and unambiguous. Judicial construction is not necessary and is therefore not permitted. The Legislature did not, though it could have, specify a time frame in which the use or sale must take place. It is beyond Respondent's authority to amend the statute to include such a limiter.

Additionally, the Supreme Court has stated,

Nowhere in the statute is there a requirement that there must be a "sale" by the industrial processor to qualify for this exemption. *Elias Brothers Restaurants, Inc v Department of Treasury*, 452 Mich 144, 155 (1996). Contrary to the position of the department, the industrial processing exemption does not depend on the nature or existence of a transaction between the processor and the retailer. Rather, the application of the industrial processing exemption depends on the use to which equipment is put. *Id* at 158

⁸⁶ Transcript page 173, ll 5-10

The Tribunal concludes that Petitioner's purchases of the 375 excavator and the 627 scraper were exempt from use tax under MCL 205.94o and the assessment of use tax on these transactions should be cancelled.

Petitioner's purchases from J.G.M. Valve Company and Bueche Trucking & Excavating of equipment and supplies were sales at retail. Ownership of tangible personal property was transferred from J.G.M and Bueche to Petitioner. J.G.M and Bueche are persons engaged in the business of making sales at retail. The sales tax on the sale of this equipment and supplies was required by statute to be collected and remitted to Respondent by J.G.M and Bueche, the sellers. Respondent argues that the "use tax is a complementary tax and does not apply in situations in which the Michigan sales tax has been paid."⁸⁷ Respondent further argues that the use tax "is designed to impose a tax equivalent to the sales tax upon users and consumers of tangible personal property acquired through transaction not subject to sales tax *or upon which no sales tax was levied or was not paid.*"⁸⁸ (emphasis added) The Tribunal notes that emphasized language is Respondent's and not found in the Court of Appeals' *Master Craft* opinion Respondent cites for this quote. Respondent offered no other support for its position and assertion that if sales tax is not collected on a sale at retail, the Department of Treasury can collect a use tax from a purchaser in a sale at retail. To follow Respondent's reasoning, all transactions would be subject to both taxes. There is no evidence that this was the Legislature's intent. The nature of the transaction governs which statute applies. There is no question that the transactions in question were sales at retail. Thus, if sales tax was not paid, Respondent's remedy

⁸⁷ Respondent's post-hearing brief, page 10

⁸⁸ Respondent's post-hearing brief, page 10, quoting *Master Craft Engineering Inc v Dep't of Treasury*, 141 Mich App 56, 68-69; 336 NW2d 235 (1985)

is with the sellers in question, not the purchasers. The Tribunal concludes that the assessment of use tax on these transactions should be cancelled.

Respondent assessed \$35,282 in interest related to Petitioner's Genesee County Drain Commission project. The supplies needed for the project were purchased by Genesee County Drain Commission and provided to Petitioner. Petitioner owed, and paid, use tax on these materials. Petitioner used and consumed the supplies and materials from the first day of the project through its completion. Pursuant to section 6 of the Use Tax Act, MCL 205.96,

Every person storing, using, or consuming tangible personal property or services, the storage, use, or consumption of which is subject to the tax imposed by this act, . . . on or before the twentieth day of each calendar month shall file with the department a return for the preceding calendar month, in a form prescribed by the department, showing the price of each purchase of tangible personal property or services during the preceding month, and other information the department considers necessary for the proper administration of this act. At the same time, each person shall pay to the department the amount of tax imposed by this act with respect to the purchases covered by the return.

Petitioner was subject to this provision and should have paid the tax on the supplies and materials used. It was Petitioner's obligation to file and its responsibility to secure the information needed to so file. Respondent's assessment of interest is in the nature of a compromise, which the Tribunal accepts as Respondent's determination of the interest due on the unpaid tax. The Tribunal concludes that the assessment of interest on these transactions should be affirmed.

JUDGMENT

IT IS ORDERED that Assessment No. O722924 is AFFIRMED AS MODIFIED.

IT IS FURTHER ORDERED that Assessment No. O722924 is MODIFIED as follows:

Tax	\$ 0
Penalty	\$ 0
Interest *	\$ 35,963
Total	\$ 35,963

IT IS FURTHER ORDERED that all sums collected from Petitioner in payment of Assessment Number O722924 be refunded to Petitioner with interest at the rate calculated pursuant to MCL 205.30 and MCL 205.23.

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

MICHIGAN TAX TRIBUNAL

Entered: July 31, 2009

By: Rachel J. Asbury