

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

Viviano Flower Shop, Inc.,
Petitioner,

v

MTT Docket No. 342546

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith, III

FINAL OPINION AND JUDGMENT

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION
IN PART WITH RESPECT TO VACATING THE SBT ASSESSMENT AND INTEREST
RESULTING FROM THE INCLUSION OF GROSS RECEIPTS FROM PETITIONER'S
TELEFLORA SALES

ORDER PARTIALLY GRANTING SUMMARY DISPOSITION FOR RESPONDENT
PURSUANT TO MCR 2.116(I)(2) AND MCR 2.116(C)(10) WITH RESPECT TO
INCLUDING SALES TAX AS GROSS RECEIPTS

I. INTRODUCTION

The two issues in this case involve the Michigan Single Business Tax Act, MCL 208.1 et seq. The first issue involves whether Petitioner should be required to report the entire sales price plus the sales taxes collected as gross receipts under the SBT when Petitioner merely forwards an order and deducts a commission. The second issue involves whether Petitioner is required to include sales tax collected from customers as gross receipts for SBT purposes. Respondent assessed Petitioner for unpaid SBT taxes for the years at issue in the aggregate amount of \$114,163 plus interest. On October 31, 2008, Petitioner filed this Motion for Summary Disposition. Respondent has not filed a response to Petitioner's Motion.

II. PETITIONER'S CONTENTIONS

Petitioner contends that "Respondent's opinion regarding the language of MCL 208.73(b)(3) is that the word 'gross receipts' is to be read very broadly to include any amount

received by a Petitioner including sales taxes collected by a Petitioner when the sales tax is passed along to the consumer.” In this case, Petitioner passes the cost of sales tax on to consumers pursuant to MCL 205.73 and holds the proceeds in trust for the State of Michigan. Petitioner argues that “sales taxes collected from customers are not gross receipts for SBT purposes.”

Petitioner also argues that “gross receipts received and forwarded to Teleflora [a floral clearinghouse that Petitioner forwards orders to and receives a commission] are not its gross receipts for SBT purposes.” When Petitioner takes an order for Teleflora, it “collects the sales price of the order (including sales tax) from the customer, and then forwards the order electronically to Teleflora. In the normal course agreed upon by Petitioner and Teleflora by written agreement, Petitioner forwards the funds collected from the customer reduced only by Petitioner’s commission and a nominal relay fee, and the sales taxes remitted to the State.” Petitioner contends that “...Respondent included 100 percent of the amount collected from customers by Petitioners for Teleflora sales (including sales taxes) in Petitioner’s gross receipts.”

III. APPLICABLE LAW

Petitioner moves for summary disposition pursuant to MCR 2.116(C)(10). 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. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the 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.

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

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. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider.

Neubacher v Globe Furniture Rentals, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.

Id. 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.

McCart v J Walter Thompson, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992). However, if the opposing party is entitled to judgment, the Tribunal may grant Summary Disposition to the non-moving party even absent a request pursuant to MCR 2.116(I)(2).

IV. CONCLUSIONS OF LAW

This Tribunal has carefully considered Petitioner's Motion for Summary Disposition under the criteria for MCR 2.116(C)(10), and based on the pleadings and other documentary evidence filed with the Tribunal, determines that granting Petitioner's Motion is appropriate in part.

Summary Disposition can be granted under MCR 2.116(C)(10), because the parties' documentary evidence demonstrates that there is no genuine issue of material fact. However, Petitioner should have included sales tax that it collected as a part of its gross receipts.

This case involves two legal issues, whether Petitioner has to include sales tax as a part of gross receipts under MCL 208.7(3) for purposes of the SBT, MCL 208.1 et. seq. and whether Petitioner has to include in gross receipts the entire sum of money received when it acts as a conduit for a third party.

The Tribunal finds that Petitioner must include sales tax as a part of gross receipts pursuant to MCL 208.7(3)(a). MCL 208.7(3)(a) states, "'Gross receipts' means that entire amount received by the taxpayer from any activity whether in intrastate, interstate, or foreign commerce carried on for direct or indirect gain, benefit, or advantage to the taxpayer or to others except for the following: (a) proceeds from sales by a principal that the taxpayer collects in an agency capacity solely on behalf of the principal and delivers to the principal...." Petitioner is the taxpayer in regards to sales tax, because sales tax is a tax on the merchant. The merchant may pass the cost on to its customers, but the sales tax is on the merchant. MCL 205.73(1) states:

a person engaged in the business of selling tangible personal property at retail shall not advertise or hold out to the public in any manner, directly or indirectly, that the tax imposed under this act is not considered as an element in the price to the consumer. This act does not prohibit any taxpayer from reimbursing himself or herself by adding to the sales price any tax levied by this act.

Further, the Office of the Attorney General issued an Opinion No. 5998 on October 19, 1981 which states, "It is my opinion, therefore, that merchant sellers are neither agent collectors of the Michigan sales tax nor remitters of sales taxes collected, but, rather, they are, in fact, the taxpayers under the General Sales Tax Act, [MCL 205.51 et. seq.], and are liable for the payment of the tax." Based on the aforementioned authority, the retailer, Petitioner, is subject to pay the

sales tax as the taxpayer, and Petitioner is not an agent for the State of Michigan when it collects the tax and holds the proceeds. MCL 205.73(1) specifies that the sales tax is an element of the price of the product. As such, sales tax should be considered as a part of the gross receipts, because Petitioner is not an agent for the State of Michigan, and the sales tax is an element of the price of Petitioner's products.

The second legal issue involves whether Petitioner must include the entire purchase price of its Teleflora transactions in gross receipts. 1979 Rule 205.80, Rule 30(2) states, "on all orders taken by a Michigan florist and telegraphed to a second florist, either in Michigan or to a point outside the state, the florist taking the order is liable for the tax." However, 1979 Rule 205.80 refers only to sales and use tax. Here, Petitioner is already remitting the sales tax to the State of Michigan. The issue in this case is whether the purchase price should be included under gross receipts. Pursuant to MCL 208.7(3)(a), the agent, while acting for the principal, does not have to include the principal's proceeds under the agent's gross receipts. Here, Petitioner is acting as an agent for Teleflora, and as such, does not have to include the net amount under gross receipts; Petitioner does have to report its commission, relay fee, and sales tax under its gross receipts.

Petitioner has established that no genuine issues of fact exist. Petitioner is required to include sales tax as gross receipts. As such, summary disposition should be partially granted in favor of Respondent pursuant to MCR 2.116(C)(10) and MCR 2.116(I)(2). However, Petitioner should be partially granted summary disposition, because Petitioner is not required to include the net amount of proceeds when acting for a third party under gross receipts pursuant to MCL 208.7(3)(a).

V. JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition is PARTIALLY GRANTED as Petitioner does not have to include its Teleflora sales (excluding sales tax, relay fees, and commission fees) as gross receipts for SBT purposes.

IT IS FURTHER ORDERED that the assessment for Single Business Taxes for the tax years 01/01/2001 to 12/31/2004 resulting from the addition of gross receipts to Petitioner's Single Business Taxes resulting from its Teleflora sales (excluding sales tax, relay fees, and commission fees) including interest is VACATED.

IT IS FURTHER ORDERED that, pursuant to MCR 2.116(C)(10) and MCR 2.116(I)(2), Summary Disposition is PARTIALLY GRANTED for Respondent, as Petitioner is required to include sales tax as gross receipts and Petitioner's appeal of Respondent's assessment of sales tax to be reported as gross receipts is DISMISSED.

IT IS FURTHER ORDERED that the assessment for Single Business Tax purposes is AFFIRMED in regards to the including of sales tax as gross receipts.

IT IS FURTHER ORDERED that Respondent shall recalculate Assessment N504279 in accordance with this Opinion and Judgment within 21 days of entry of this Order and provide the Tribunal with a copy of such recalculation.

MICHIGAN TAX TRIBUNAL

Entered: February 12, 2009
lns

By: Kimbal R. Smith III