

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

MISS DIG SYSTEM, INC.,
Petitioner,

v

MTT Docket No. 350051

CITY OF AUBURN HILLS,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

FINAL OPINION AND JUDGMENT

A hearing was held in the above-captioned matter on February 3, 2011. Petitioner was represented Amy J. DeNise. Respondent was represented by Stephanie Simon Morita.

This matter involves one parcel of real and one parcel of personal property, identified by tax parcels 02-14-11-126-007 and 02-99-00-008-002, respectively, located in the City of Auburn Hills, Oakland County, Michigan. Petitioner timely invoked the jurisdiction of the Tribunal for tax year 2008. Tax years 2009 and 2010 were automatically added, pursuant to MCL 205.737(5)(a), as this matter concerns the exemption of the above parcels from taxation. At issue is whether the parcels are exempt from taxation under MCL 211.7o.

Information relevant to the property's contested true cash, assessed and taxable values on the assessment roll is as follows:

Parcel Number	Year	TCV	SEV	TV
02-14-11-126-007	2008	\$1,548,460	\$ 740,230	\$ 740,230
02-99-00-008-002	2008	\$ 337,560	\$ 168,530	\$ 168,530
02-14-11-126-007	2009	\$1,451,020	\$ 725,510	\$ 725,510
02-99-00-008-002	2009	\$ 337,560	\$ 168,530	\$ 168,530
02-14-11-126-007	2010	\$ 1,219,060	\$ 609,530	\$ 609,530
02-99-00-008-002	2010	\$ 337,560	\$ 168,530	\$ 168,530

It is Petitioner's contention that the parcels are exempt from taxation under MCL 211.7o for all years under appeal.

It is Respondent's position that both parcels do not qualify for an exemption under MCL 211.7o and, as a result, the exemption has been properly denied by Respondent.

FINAL VALUES

Parcel Number	Year	TCV	SEV	TV
02-14-11-126-007	2008	\$1,548,460	\$ 740,230	\$ 740,230
02-99-00-008-002	2008	\$ 337,560	\$ 168,530	\$ 168,530
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02-14-11-126-007	2010	\$ 1,219,060	\$ 609,530	\$ 609,530
02-99-00-008-002	2010	\$ 337,560	\$ 168,530	\$ 168,530

PETITIONER'S CASE

In support of Petitioner's position, Petitioner presented three witnesses and 14 of its exhibits were entered into evidence.

Petitioner's Exhibits:

- P-1 Warranty Deed of 3285 W. Lapeer Road, Auburn Hills, Michigan
- P-2 Articles of incorporation for Miss Dig System, Inc.
- P-3 Certificate of Amendment to the Articles of Organization
- P-4 Amended and Restated ByLaws of Miss Dig System, Inc.
- P-5 June 9, 1996 letter from IRS re 501(c)(4) exempt status of Miss Dig System, Inc.
- P-6 2008 Personal Property Statement
- P-7 Statement of Activity through December 2008
- P-8 Balance Sheet as of December 31, 2008
- P-9 Return of Organization Exempt from Income Tax Year 2008
- P-11 Newspaper clippings regarding public safety issues
(Admitted over objection of Respondent)
- P-12 Opinion and Order of Michigan Public Service Commission, dated November 9, 2006, Case No. U-14923, In the matter of the Commission's own motion, to commence proceeding form implementation of the 8-1-1 abbreviated dialing number
*admitted over Respondent's objection
- P-13 Brief in Support of Petitioner's Motion for Summary Disposition

P-14 State one-call damage prevention program

The following exhibit was offered but not admitted:

PR-10 Stipulation for Entry of Consent Judgment, MTT No. 258862, *Miss Dig System, Inc v City of Pontiac*, executed by Secret Wardle consenting to Charitable exemption for Petitioner
(The Tribunal determined that the proposed exhibit was not relevant to this matter.)

Petitioner's Witnesses:

Kathleen Fournier, Executive Director and assistant treasurer of Petitioner, testified that she had been involved with Petitioner or its predecessor for in excess of 25 years. She explained that Petitioner owns and occupies real and personal property at 3285 Lapeer Road West in the City of Auburn Hills (the "subject property") to operate and administer its one-call notification system. She explained that the one-call system receives calls 24 hours a day, seven days a week and then transmits the information it receives regarding upcoming construction activities to public utilities, both private and municipal, for staking of underground facilities in the area that it has been advised of upcoming construction activities. Anyone who is about to dig can call Petitioner's toll free phone line and the information regarding the upcoming dig will be forwarded to members who have

underground utilities on the property where the digging is to occur and those utilities are required to stake the property (lines, etc.) within 72 hours.

Petitioner's costs of operation are funded by dues (assessments of its members utilities) based upon the number of its customers. Petitioner's charges to its members do not exceed the costs of the successful maintenance of Petitioner's operation and excess income over expenses after provision for adequate reserves are rebated or refunded to its members.

The witness further explained that Petitioner has been a Michigan nonprofit corporation since 1994, the original purpose of which as stated in its Articles of Incorporation (P-2) was:

to establish, promote, maintain and operate a one call system in Michigan, to receive and transmit information concerning excavation, blasting, drilling or other activity having the potential to affect underground and aboveground utility facilities, in order to prevent damage to those facilities and to protect the public safety and the environment.

Ms. Fournier explained that in 1996 the purpose of the corporation was amended to provide:

the purpose or purposes for which the corporation is organized are: to establish, maintain and promote a 24 hour one-call system in Michigan to receive and transmit information concerning excavation, blasting, drilling or other activities

having the potential to affect underground and above ground utility facilities, in order to prevent damage to those facilities and to protect the public safety and environment; to provide consulting, educational, operational and other related services to one-call systems and others consistent with its purpose of preventing damage to facilities and protecting the public safety and environment; and to perform related services. (P-3)

Since 1995, Petitioner has qualified as a 501(c)(4) organization by the Internal Revenue Service. (P-5)

The witness further explained that Act 53 of 1974 is the basis of Petitioner's activities as is commonly known as the Miss Dig act.

Daniel J. Canter, CPA, testified that he prepares Petitioner's annual 990 Return of Organization Exempt from Income Tax (P-9), together with Petitioner's annual statement of activity for 2008 (P-9), and for 2008 Petitioner's income in excess of expenses was \$157,302.80. The witness indicated that this amount was considered a reasonable reserve and amounts to less than one month's operating expenses.

The witness further indicated that he had been responsible for preparing the application that resulted in Petitioner's designation as a 501(c)(4) tax exempt organization from the IRS. (P-5)

Catherine Washabaugh, a pipeline safety engineer with the Michigan Public Service Commission for over 20 years, explained that her duties included enforcement of Michigan Gas Safety Standards and damage prevention and that Michigan had adopted a “one-call” system of which Petitioner had been designated the one-call provider. The Michigan Public Service Commission had issued a Decision and Order in Case No. U-1923 (P12) designating Petitioner as the sole 8-1-1 designee for the State of Michigan, and that, pursuant to the order, “all beneficiaries should share the costs for the service. (P-13).

RESPONDENT’S CASE

In support of Respondent’s position, Respondent called one witness, Victor Bennett, assessor, and introduced 17 exhibits without objection.

Respondent’s Exhibits:

- R-1 Respondent’s answer to Petition
- R-2 Respondent’s Discovery requests
- R-3 Property Record Cards
- R-4 Michigan Department of Labor & Economic Growth
Non profit corporation Information Update
- R-5 Response to Motion for Summary Disposition

- R-6 Letter of March 31, 2007 to Thomas E. Maier of Clark Hill, PLC
- R-7 Financial Statements
- R-8 Annual reports
- R-9 July 20, 2007, letter to Victor Bennett from Thomas E. Maier of Clark Hill, PLC
- R-10 Miss Dig annual Membership Fees Invoice-2009, dated November 25, 2008
- R-11 Affidavit of Kathie Fournier
- R-12 Amended and Restated Bylaws of Miss Dig System, Inc.
- R-13 Act 53 of 1974
- R-14 Portions of IRC 301(c)(4) Organizations by John Francis Reilly, Carter C. Hull and Barbara A. Braig Allen
- R-15 Miss Dig website print-outs
- R-16 26 USC Subsection 510
- R-17 CFR 49 191-192.614

Respondent's Witness:

Victor Bennett, City Assessor, testified in support of his decision to deny Petitioner's request for exemption for both its real and personal property under 211.7o.

FINDINGS OF FACT

The Tribunal, having considered all of the documentary evidence and testimony submitted by the parties, and based upon the record before it, concludes:

Petitioner, Miss Dig System, Inc., is a Michigan Nonprofit corporation being duly incorporated on December 15, 1994.

The corporate purpose of Petitioner as stated in its amended Articles of Incorporation is

the purpose or purposes for which the corporation is organized are: to establish maintain and promote a 24 hour one-call system in Michigan to receive and transmit information concerning excavation, blasting, drilling or other activities having the potential to affect underground and above ground utility facilities, in order to prevent damage to those facilities and to protect the public safety and environment; to provide consulting, educational, operational and other related services to one-call systems and others consistent with its purpose of preventing damage to facilities and protecting the public safety and environment; and to perform related services. (P-3)

Petitioner is the owner of real property located at 285 W. Lapeer Road in the City of Auburn Hills, Michigan, identified as parcel # 02-14-11-126-007 and owns personal property located at said address identified as parcel number 02-99-00-008-002.

For each tax year in dispute, Petitioner has owned and occupied the subject tax parcels solely in furtherance of its stated corporate purposes.

Petitioner operates a 24 hour a day, 7 day a week call center pursuant to Act 53 of 1974, together with providing educational and other related services to its members and the public as a whole. The one call services provided to the general public in accordance with Act 53 is without charge.

The costs for operating the call center is borne pursuant to said Act 53 by the members and by nonmembers. Public utilities owned by a public agency shall participate in and receive the services furnished by the association and shall pay their share of the costs and services furnished, but shall not be required to become a member of the association.

Petitioner has a 501(c)(4) tax exemption from the Internal Revenue Service for the tax years under dispute.

To the extent that Petitioner's income exceeds expenses in any year the excess income over expenses is set aside as reserves for future expenses or rebated.

APPLICABLE LAW

The General Property Tax Act provides “[t]hat all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation.” MCL 211.1 Exemption statutes are subject to a rule of strict construction in favor of the taxing authority. *Retirement Homes v Sylvan Township*, 416 Mich 340; 330 NW2d 682 (1982). The statute, MCL 211.7o, creates the property tax exemption for charitable institutions. Section 7o states “[r]eal or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act.”

The meaning of “charitable institution,” which is not legislatively defined for purposes of MCL 211.7o, has developed in case law. In *Michigan United Conservation Clubs v Lansing Township*, 423 Mich 661, the Supreme Court explained the proper test for determining whether the charitable institution exemption applies focuses on the definition of charity adopted in *Retirement Homes*, 416 Mich 340, 348-349; 330 NW2d 682 (1982):

[C]harity ... [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, ...

or by erecting or maintaining public buildings or works *or otherwise lessening the burdens of the government*. (Emphasis added).

Additionally, the Michigan Supreme Court reviewed the charitable institution exemption in *Wexford Medical Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006). The *Wexford* Court determined there are three basic elements for the charitable exemption under MCL §211.7o(1):

1. The real property must be owned and occupied by the exemption claimant;
2. The exemption claimant must be a nonprofit charitable institution; and
3. The exemption exists only when the buildings and other property at issue are occupied by the claimant solely for the purposes for which the claimant was incorporated.

Id., at 203. The *Wexford* Court further identified six factors to determine whether an institution is a “charitable institution” under MCL §211.7o:

1. A “charitable institution” must be a nonprofit institution.
2. A “charitable institution” is one that is organized chiefly, if not solely, for charity.
3. A “charitable institution” does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a ‘charitable institution’ serves any person who needs the particular type of charity being offered.

4. A “charitable institution” ... erects or maintains public buildings or works; or otherwise lessens the burden of the government.
5. A “charitable institution” can charge for its services as long as the charges are not more than what is needed for its successful maintenance.
6. A “charitable institution” need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a “charitable institution” regardless of how much money it devotes to charitable activities in a particular year. *Id.*, at 215.

CONCLUSIONS OF LAW

The issue before the Tribunal is quite simply “is Petitioner a charitable institution within the meaning of MCL.211.7 o”?

The fact that Petitioner is a nonprofit corporation that owns and occupies the subject property solely in accordance with its corporate purpose does not automatically make it a charitable institution exempt from taxation under MCL.211.7o.

Petitioner is a nonprofit corporation created under Act 53 of 1974, which mandates that

Public utilities having underground facilities shall form and operate an association providing for mutual receipt of notification of construction activities in those areas served by public utilities having underground facilities.

The Act further provides that:

A public utility owned by a public agency shall participate in and receive the services furnished by the association and shall pay their share of the costs and services furnished, but shall not be required to become a member of the association.

Nothing in the Act or promulgated rules requires that the association formed under Act 53 be a nonprofit or charitable institution. Although clearly not determinative on the ultimate issue before the Tribunal, a review of §198.39 entitled Qualifications for operation of one-call notification system (Part 198-Org., 55 FR 3869, Sept 20, 1990) will indicate that a one-call notification system qualifies to operate under this subpart if it complies with the following:

- (1) A person who operates underground pipeline facilities or other underground facilities.
- (2) A private contractor.
- (3) A State or local government agency
- (4) A person who is otherwise eligible under State law to operate a one – call center.

The decision to operate under the banner of “nonprofit” corporation was a decision of Petitioner and not as a result of any legislative requirement. In fact, Petitioner is assured that as a result of the legislative mandate all public utilities having underground facilities shall become members of (and inferentially pay for) the one-call service, together with making municipal utilities, although not members, also pay their fair share.

Nothing before the Tribunal, be it documentary evidence or testimony, leads the Tribunal to the conclusion that Petitioner was organized chiefly if not solely as a charity. The Tribunal believes that the record is clear that Petitioner was formed as a result of the legislative mandate contained in Act 53 of 1974 that required certain utilities to form an association to operate a one-call system as a condition to being able to operate as utilities in the State of Michigan. Although the effect of the one-call system may be of benefit to the general public, that benefit does not constitute a gift to an indefinite number of individuals and does not “. . . erect or maintain public buildings or works; or otherwise lessen the burden of the government.” It is therefore not a charitable institution within the meaning of MCL 211.7o and not exempt from ad valorem taxation.

The real and personal property of Petitioner identified under Tax Parcel ID Nos. 02-14-11-126-007 and 02-99-00-008-002, for the reasons heretofore set forth, do not for the tax years in dispute qualify for exemption from ad valorem taxation under applicable Michigan statutes.

JUDGMENT

IT IS ORDERED that Petitioner's appeal is dismissed and the assessments as set forth above are affirmed.

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

Entered: February 25, 2011

MICHIGAN TAX TRIBUNAL

By: Kimbal R. Smith III, Tribunal Judge