

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
MICHIGAN TAX TRIBUNAL

Michiana Metronet, Inc.,  
Petitioner,

v

MTT Docket No. 383664

Michigan Department of Treasury,  
Respondent.

Tribunal Judge Presiding  
Cynthia J. Knoll

ORDER GRANTING PETITIONER'S MOTION TO AMEND PETITION

ORDER GRANTING PETITIONER'S MOTION FOR IMMEDIATE CONSIDERATION

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION

ORDER GRANTING PETITIONER'S MOTION FOR IMMEDIATE CONSIDERATION

ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF PETITIONER

ORDER ADJOURNING AUGUST 30, 2011, HEARING

On August 22, 2011, Petitioner filed a Motion to Amend its Petition and a Motion for Reconsideration of the Tribunal's August 16, 2011, Order Denying Petitioner's Motion for Summary Disposition. In its Motions, Petitioner contends that:

- a. "Petitioner is no longer contesting the Michigan Single Business Tax assessment issued by Respondent of the tax year ended 5/31/2006, and will timely pay the tax and interest due upon notice from Respondent."
- b. "Pursuant to this Honorable Tribunal's Order Granting Petitioner's Motion for Partial Summary Disposition, issued on August 11, 2011, for the tax year ending 5/31/2006 the Tribunal finds that a genuine issue of material fact exists relating to whether greater than 50% of Petitioner's business activities were performed in Michigan during the tax year."
- c. "[T]he hearing in this matter scheduled for August 30, 2011 will be in regards to the tax year ended May 31, 2006 only."
- d. "Petitioner is no longer contesting the Michigan Single Business Tax assessment issued by Respondent for the tax year ended 5/31/2006, and will timely pay the tax and interest due upon notice from Respondent."

- e. "Petitioner has withdrawn its refund claim for the tax period ended 5/31/2006."
- f. "Petitioner submits that upon an order of this Honorable Tribunal granting this Motion, and subsequently an order granting Petitioner's Motion for Summary Disposition all issues in the matter at hand will be resolved and the hearing in this matter, set to commence on August 30, 2011, will not be necessary."

Respondent has not filed responses to Petitioner's Motions.

The Tribunal, having given due consideration to the Motions and the case file, finds that:

1. Leave to amend a pleading should be freely given when justice so requires, and should be denied only because of (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility. See *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997). The Tribunal does not find any reason to deny Petitioner's motion to amend its petition to withdraw its appeal with regard to the 2006 Michigan Single Business Tax assessment for tax year ended May 31, 2006. As such, Petitioner's Motion shall be granted.
2. Further, the only remaining Michigan Single Business Tax assessments at issue in this appeal are the assessments issued by Respondent for tax years ended 5/31/2003, 5/31/2004, and 5/31/2005. The Tribunal determined in its August 11, 2011, Order Granting Petitioner's Motion for Partial Summary Disposition that ". . . for tax years ending May 31, 2003, May 31, 2004, and May 31, 2005, a greater proportion of business activity was performed outside this state than was performed in this state. . . . the hearing scheduled for August 30, 2011, shall go forward with regard to [the tax year ending May 31, 2006] only."
3. On August 16, 2011, the Tribunal entered an order denying Petitioner's Motion for Summary Disposition. The Order states that the Tribunal's previous August 11, 2011, Order granting Petitioner's Motion for Partial Summary Disposition determined that ". . . a hearing is required to determine the facts regarding direct costs as they pertain to the costs of performance for the tax year ended May 31, 2006." However, in light of Petitioner's Motion to Amend Petition to withdraw the tax assessment for tax year ending May 31, 2006, summary disposition in favor of Petitioner is appropriate as there are no remaining issues to be resolved.
4. Petitioner has not demonstrated a palpable error that misled the Tribunal and the parties that would have resulted in a different disposition if the error was corrected. See MCR 2.119. Thus, Petitioner has not shown good cause for reconsideration of the Tribunal's August 16, 2011, Order denying Petitioner's Motion for Summary Disposition. The withdrawal of the remaining issue in this appeal did not occur until after the Tribunal denied Petitioner's Motion for Summary Disposition. However, in light of the findings herein, the Tribunal finds that granting Summary Disposition in favor of Petitioner is

appropriate. Further, in light of the findings herein, the Tribunal determines that adjourning the August 30, 2011, hearing is appropriate.

IT IS ORDERED that Petitioner's Motion to Amend Petition is GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion for Immediate Consideration is GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion for Reconsideration is DENIED.

IT IS FURTHER ORDERED that Petitioner's Motion for Immediate Consideration is GRANTED.

IT IS FURTHER ORDERED that Summary Disposition is GRANTED in Favor of Petitioner.

IT IS FURTHER ORDERED that the August 30, 2011, Hearing is ADJOURNED.

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

MICHIGAN TAX TRIBUNAL

Entered: August 31, 2011

By: Cynthia J Knoll

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STATE OF MICHIGAN  
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
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MTT Docket No. 383664

Michigan Department of Treasury,  
Respondent.

Tribunal Judge Presiding  
Cynthia J. Knoll

ORDER GRANTING PETITIONER'S MOTION FOR  
PARTIAL SUMMARY DISPOSITION

## INTRODUCTION

On July 15, 2011, Petitioner filed a Motion for Partial Summary Disposition requesting the Tribunal find that it properly sourced its sales based on the costs of performance, pursuant to MCL 208.53(b). Respondent filed a response to Petitioner's Partial Motion for Summary Disposition on July 29, 2011. Respondent states that it ". . . cannot fully develop an argument that MCL 208.53(a) is applicable to this case." The Tribunal agrees with Petitioner and finds that granting its Motion is appropriate.

## PETITIONER'S CONTENTIONS

Petitioner contends that "[t]he key issue for the Tribunal's consideration is whether Petitioner's sales of other than tangible personal property for the tax periods at issue are properly sourced under MCL 208.53(a) or MCL 208.53(b) for Michigan SBT sales factor purposes." Petitioner's Brief in Support of its Motion, p 5. Petitioner contends that it provides a service which ". . . is the provision of an integrated wireless communication network that allows for the routing and completion of wireless communication transmissions including voice calls, text messages, data, and other associated services." *Id.* at 6. Petitioner argues that the network requires multiple pieces to function and the ". . . network assets that enabled it to provide the wireless communications services at issue were located in Indiana and Michigan." *Id.* Petitioner argues that the ". . . provision of an integrated wireless communication network (its 'business activity') occurred both inside and outside Michigan and the revenue associated with the provision of the wireless communications network must be appropriately sourced based on a cost of performance analysis under MCL 208.53(b)." *Id.*

Petitioner states that:

In Internal Policy Directive 2006-8 issued by Respondent September 29, 2006, Respondent states that it has adopted a 'transactional approach' if a business activity of a taxpayer is the performance of a service. That is that 'costs of performance' must be considered for each transaction separately. Under a 'transactional' approach, it is possible to argue that Petitioner must calculate the cost of each of the millions of wireless phone calls or text messages sent by its subscribers.

*Id.* at 6-7. Petitioner contends that, ultimately, the entire wireless network is necessary to complete the call and the network assets are located in Indiana and Michigan. Therefore, the business activity is performed both inside and outside Michigan and receipts from the business activity are properly sourced pursuant to MCL 208.53(b).

Petitioner cites *AT&T Corporation v Commissioner*, Mass. App. Tax Bd., No C293831 (2011)<sup>1</sup> and *AT&T Corporation and Includible Subsidiaries v Department of Revenue*, TC 4814 (2011)<sup>2</sup>.

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<sup>1</sup> Massachusetts Appellate Tax Board

<sup>2</sup> Oregon Tax Court

Petitioner states that “. . . it is important to highlight that neither state attempted to assert that the income producing activity was performed wholly in the state. Said differently, both the state and the taxpayer in both cases agreed that the sales should be sourced on a cost of performance basis because AT&T operated a multistate network but disagreed on how to apply a cost of performance analysis.” *Id.* at 8.

Petitioner refutes Respondent’s contention that one must look to the billing address of the customer to source Michigan sales of services. Petitioner states that “[t]he issuance of a bill is not a revenue generating business activity for Petitioner. The issuance of a bill does not entitle Petitioner to revenue. Rather, the completion of wireless calls or the provision of the network to the subscriber does.” *Id.* at 9.

### **RESPONDENT’S CONTENTIONS**

Respondent indicated that it “. . . will not be filing a brief in response to Petitioner’s motion . . .,” because it “. . . cannot fully develop an argument that MCL 208.53(a) applies to this case.”

### **APPLICABLE LAW**

Petitioner moves for summary disposition pursuant to MCR 2.116(C)(10). 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 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. *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).

### **FINDINGS OF FACT**

The Tribunal finds that Petitioner is a regional wireless service provider that operates in two geographic clusters. The Midwest cluster includes services in parts of Indiana, Michigan and Ohio. Fort Wayne, Indiana is the corporate center of Petitioner's Midwest cluster and equipment based in Fort Wayne is used to service the Michigan market. Specifically, the engineering, billing, and customer service departments that support the entire cluster are located in Fort Wayne. All Michigan services were provided through the network and other equipment located in Indiana. Prior to May 2005, the only investments made in Michigan were cellular towers and retail stores. In May 2005, additional network assets were built in Michigan. However, the infrastructure that provided services such as internet access, e-mail delivery, billing, text messaging, and other services remained in Indiana.

During the tax periods at issue, Petitioner engaged in the sale of tangible personal property and sales of other than tangible personal property.

### **CONCLUSIONS OF LAW**

This Tribunal has carefully considered Petitioner's Motion for Partial 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 for Summary Disposition is appropriate.

The Tribunal finds that there are no genuine issues with respect to any material facts regarding whether Petitioner's sales of other than tangible personal property, for the tax years at issue, are properly sourced under MCL 208.53(a) or MCL 208.53(b) for Michigan Single Business Tax ("SBT") sales factor purposes. For the reasons set forth herein, Petitioner's sales of other than tangible personal property are sourced under MCL 208.53(b).

The Single Business Tax Act ("SBTA") provided for the sourcing of sales, other than sales of tangible personal property pursuant to MCL 208.53, which states that:

“[s]ales, other than sales of tangible personal property are in this state if:

- a) The business activity is performed in this state;
- b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of business activity is performed in this state than is performed outside this state.”

This statute determines where in the sales factor receipts are included. Specifically, if receipts are generated from business activities performed entirely in Michigan, the receipts are included in both the numerator and denominator of the Michigan sales factor. If receipts are generated from a business activity performed both in and outside Michigan, they are sourced to Michigan only if greater than 50% of the business activities giving rise to those receipts are performed in Michigan.

The performance of Petitioner's service is a sale under the SBTA. Pursuant to MCL 208.7(1), "sale" is defined as "[t]he performance of services, which constitute business activities . . ." As defined by the SBTA, business activity is:

“[A] transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof . . . with the object of gain, benefit, or advantage . . .”

MCL 208.3(2). Here, Petitioner's business activity is providing an integrated wireless communication network that allows for the routing and completion of wireless communication transmissions including voice calls, text messages, data, and other associated services. The network assets that enable Petitioner to provide its services were located in Indiana and Michigan. As such, the services involved are performed both in and outside Michigan. The equipment based in Fort Wayne, Indiana was necessary to perform the services in Michigan. The entire wireless network, located in both Indiana and Michigan, was necessary for Petitioner to provide its services.

Further, despite its previous arguments, Respondent admits, in its response to Petitioner's Motion, that it “. . . cannot fully develop an argument that MCL 208.53(a) applies to this case.” As such, Petitioner's business activity is performed both in and outside Michigan and receipts from the business activity must be sourced pursuant to MCL 208.53(b).

The Tribunal does not find that Respondent's approach to sourcing Petitioner's receipts based on the billing address of the customer is supported by statute. The law clearly and unambiguously provides that a sale is sourced to Michigan only if a greater proportion of the business activity is performed in Michigan than is performed outside Michigan **based on costs of performance**. Petitioner has proven that its service is performed through the completion of wireless calls and the provision of the network to the subscriber. Because Petitioner's entire wireless network is necessary to complete Petitioner's service, looking to the billing address of the customer may have no direct correlation to where the costs were incurred to generate the sales. Rather, the costs to perform the services include the use of the network equipment and the manpower to support the wireless services, not some arbitrary attachment to a customer billing address.

The Tribunal finds that for tax years ending May 31, 2003, May 31, 2004, and May 31, 2005, a greater proportion of business activity was performed outside this state than was performed in this state. The facts show that prior to May 2005, the only investments made in Michigan were cellular towers and retail stores. Thus, over 50% of the costs to provide Petitioner's services were incurred in Indiana as all other equipment used to service the Michigan market were based in Fort Wayne, Indiana. This is true even on a "transactional" approach, as determined appropriate in *Honigman Miller Schwartz and Cohn LLP v Michigan Department of Treasury*, Mich. Ct. of Appeals, No. 282768 (June 30, 2009).

With regard to the tax year ending May 31, 2006, Petitioner admits it installed additional network assets in Michigan. However, Petitioner also states that the infrastructure that provided services such as internet access, e-mail delivery, text messaging, and other services remained in

Indiana. The Tribunal finds that a genuine issue of material fact exists relating to whether greater than 50% of Petitioner's business activities were performed in Michigan during that tax year. As such, the hearing scheduled for August 30, 2011, shall go forward with regard to this issue only.

**JUDGMENT**

IT IS ORDERED that Petitioner's Motion for Partial Summary Disposition is GRANTED.

MICHIGAN TAX TRIBUNAL

Entered: August 11, 2011

By: Cynthia J Knoll