# STATE OF MICHIGAN

# COURT OF APPEALS

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| LIQUID DUSTLAYER, INC.,<br><br>Petitioner-Appellant, | UNPUBLISHED<br>September 15, 2000 |
| v | No. 217912<br>Tax Tribunal |
| DEPARTMENT OF TREASURY,<br><br>Respondent-Appellee. | LC No. 240837 |

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

Petitioner appeals as of right from the Tax Tribunal's opinion and judgment affirming an assessment[1] under the Use Tax Act, MCL 205.91 *et seq.*; MSA 7.555(1) *et seq.*, on transactions involving petitioner's provision and application of liquid calcium chloride to public roads for various governmental entities. We reverse.

I

The parties stipulated below to the following facts:

> Liquid Dustlayer is in the business of providing liquid calcium chloride to various governmental entities. (Attached as Exhibit A is the Affidavit of H. John Schimke.) Usually, the liquid calcium chloride is delivered to the storage tanks of the applicable governmental entity, however, sometimes the governmental entity requests that the liquid calcium chloride be delivered by spreading it on roadways according to instructions of the governmental entity.
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> In formulating Assessment Number H598441, the Department of Treasury assessed a use tax on only those transactions in which Liquid Dustlayer delivers the liquid calcium

[1] Assessment H598441 of $22,365.00, and interest of $1,803.33, for the period of April 1, 1991 through October 31, 1994.

chloride by spreading it on roadways. Accordingly, this appeal concerns only those transactions and at issue is Liquid Dustlayer's liability for use tax on those transactions.

Bids for liquid calcium chloride are prepared at a per gallon price. (Attached as collective Exhibit B are bid specifications sheets from various governmental entities and bids from Liquid Dustlayer.) Some bid specifications require quotes for delivery to storage tanks only, some require quotes for storage and continuous and spot application, some require quotes for continuous and spot application and some specifically request a separate application quote. For the transactions at issue in this appeal, Liquid Dustlayer when preparing a bid computes the charge for spreading separate from the charge for the liquid calcium chloride itself. As indicated by the bids, the charge for liquid calcium chloride which is spread is not significantly higher than the charge for liquid calcium chloride which is delivered to storage tanks.

When delivery of the product is to be made by spreading, the sole responsibility of Liquid Dustlayer, Inc., for delivery of the product is to release it according to the bid specifications and the instructions of the agent or employee of the applicable governmental entity. Liquid Dustlayer, Inc. has no responsibility for the actual application of the product to the road surface after the moment the product is released according to the bid specifications and the instructions received.

Petitioner argued below that no sales or use tax applies to the transactions at issue. It argued that the transactions are predominantly sales of liquid calcium chloride, subject to the sales tax and a sales tax exemption because made to governmental entities, plus a separate application service not subject to the use tax because the governmental entities, and not petitioner, consumed the product.

The Tribunal disagreed, concluding that petitioner was providing a dust-control service subject to the use tax. The Tribunal's conclusions of law stated in pertinent part:

> In this matter, Petitioner claims entitlement to exemption from sales tax and claims the use tax is inapplicable. Since tax exemptions are disfavored, the burden of proving entitlement to exemption rests on the party asserting a right to exemption. Elias Bros Restaurants v Treasury Department, 452 Mich 144; 549 NW2d 837 (1996). Moreover, the Michigan Court of Appeals in Advo-Systems, Inc v Department of Treasury, 186 Mich App 419; 465 NW2d 349 (1989), held exemptions are to be strictly construed against the taxpayer.[2] Accordingly, Petitioner has the burden to prove that the transactions where Petitioner applied the liquid calcium chloride to road surfaces, pursuant to the direction of various governmental agencies, are non-taxable transactions. The Tribunal finds Petitioner failed to meet its burden. The transactions where Petitioner delivered liquid calcium chloride into storage tanks of local government agencies are not at issue in this matter.

[2] We note that petitioner is not claiming an exemption. Rather, petitioner asserts that the use tax does not apply to the transactions at issue.

The use tax is imposed on the privilege of storing, using or consuming personal property in Michigan. MCL 205.93; MSA 7.555(3).[3] The Use Tax Act, MCL 205.91 et seq.; MSA 7.555(1) et seq., is intended to cover transactions not covered by the General Sales Tax Act, MCL 205.51 et seq.; MSA 7.521 et seq. The two taxes are complimentary [sic] and the imposition of one precludes the imposition of the other.

A "sale at retail" is defined [under the General Sales Tax Act, MCL 205.51 *et seq.*; MSA 7.521 *et seq.*] at MCL 205.51(b); MSA 7.521(b)[4] which states, in part, as follows:

> "Sale at retail" means a transaction by which the ownership of tangible personal property is transferred for consideration, if the transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any other purpose other than for resale, . . . .

Sales to governmental agencies are not subject to tax. MCL 205.54(6); MSA 7.524(6).[5]

The Tribunal finds the transactions at issue involved no "sales at retail" to governmental entities and, therefore, no sales tax exemption applied. Petitioner argues transfer of ownership of the liquid calcium chloride occurred when the governmental entity accepted Petitioner's bid and ordered the liquid calcium chloride before application to the roadways. The Tribunal disagrees. A review of Exhibit B, the bid agreements attached to the parties' Stipulation of Facts, reveals the governmental entities, **after** accepting a bid, issue purchase orders for the actual delivery and possession of the liquid calcium chloride. Bid acceptance and orders are not simultaneous. Moreover, the bid agreements do not reflect a separate sale for the liquid calcium chloride followed by a subsequent application service. Exhibit B further reflects that purchase orders

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[3] MCL 205.93(1); MSA 7.555(3)(1), which is part of the Use Tax Act, provides:

> 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 [MCL 205.93a; MSA 7.555(3a)]. Penalties and interest shall be added to the tax if applicable as provided in this act. . . .

[4] The Tribunal noted that the amendment to this section effective January 1, 1998 was inapplicable to the audit period involved in this matter.

[5] Under an amendment of MCL 205.54; MSA 7.524 effective July 17, 1998, the provision is now subsection (7).

were often made on an "as needed" basis. The Tribunal finds the factual evidence contradicts Petitioner's claim regarding when transfer of ownership occurred. The Tribunal further finds Petitioner failed to provide evidence to prove that "ownership of tangible property [was] transferred for consideration" when the governmental entities accepted Petitioner's bids. Petitioner failed to provide proofs necessary to carry the burden of proof. Argument is not evidence.[6]

Similarly, Petitioner's contention that it completed delivery and transferred title when it arrived at the governmental entity with the subject product and relinquished control, is unsupported. Petitioner had no evidence to document or otherwise support this contention. Notwithstanding the fact that Petitioner prepared bids for transactions at issue by computing the charge for spreading separate from the charge for the liquid calcium chloride, the Tribunal finds this fact does not merit a finding that two separate transactions occurred, a sale at retail and a service. On the contrary, the Tribunal finds the governmental entities never took receipt of the liquid calcium chloride itself but, rather, received a dust control service. The Tribunal finds the transactions at issue do not consist of separate sales and service transactions but, rather, each transaction constitutes a single transaction for a provision of a service in which Petitioner used the tangible personal property. "'Use' means the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given." MCL 205.92(b); MSA 7.555(2)(b). The Tribunal finds that, for the subject transactions, Petitioner was the "user" of the liquid calcium chloride in the performance of a service - namely, the provision of the application service. Therefore, Petitioner is liable for the use tax as user of the subject tangible personal property pursuant to MCL 205.93(1); MSA 7.555(3)(1).

* * *

Even if the Tribunal were to accept, and it does not, that a sale at retail occurred, Petitioner would fail to meet the requirement for exemption. MCL 205.52(2); MSA 7.522 states:

> Any person engaged in the business of making sales at retail who is at the same time engaged in some other kind of business, occupation, or profession not taxable under this act, shall keep books to show separately the transactions used in determining the tax levied by this act. If the person fails to keep separate books, there shall be levied upon him or her the tax provided for in subsection (1) equal to 6% of the

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[6] We do not disagree with the Tribunal's conclusion that ownership was not transferred at the time petitioner's bids were accepted. Clearly, separate orders were later placed according to the governmental entities' needs. However, we do not regard this finding as significant.

> entire gross proceeds of both or all of his or her businesses. The taxes levied by this section are a personal obligation to the taxpayer.
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> The facts presented indicate Petitioner failed to keep separate records of its alleged sales and application portions of the subject transactions. Moreover, Petitioner failed to provide any evidence to support the claim that for the transactions at issue it was engaged in two businesses. The Tribunal finds Petitioner's contention that "nothing in MCL 205.52(2) . . . requires Petitioner to maintain separate records" is erroneous and contrary to the clear language of the statute itself. If there had been sales at retail involved in the instant matter as Petitioner claims, Petitioner would be liable for the entire assessment H598841 pursuant to MSA 7.522; MCL 205.52(2) based on the facts presented.
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> The Tribunal finds Petitioner's performance of the subject transaction is taxable under Michigan's Use Tax Act . . . and upholds assessment . . . .

A

We will assume that petitioner had the burden of proof before the Tax Tribunal to establish by a preponderance of the evidence that the assessment is in error. *Allen v Dep't of Treasury*, Michigan Tax Tribunal (Docket No. 249514, issued 5/1/00); 2000 WL 1121394, slip op at 7. In the absence of fraud, this Court's review of the Tribunal's decision is limited to determining whether the Tribunal erred in applying the law or adopted a wrong legal principle. *Michigan Bell Telephone Co v Dep't of Treasury*, 229 Mich App 200, 206; 581 NW2d 770 (1998). The Tribunal's factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record. *Czars, Inc v Treasury Dep't*, 233 Mich App 632, 637; 593 NW2d 209 (1999).

B

Petitioner argues that the facts and the applicable law do not support a finding that it performed a dust control service, and that the Tribunal adopted wrong principles and committed errors of law in holding the transactions at issue to be services involving petitioner's consumption of the liquid calcium chloride, to which the use tax applied. We agree.

The parties stipulated to the fact that petitioner is in the business of providing liquid calcium chloride to various government entities, that its bids are prepared at a per gallon price, that it computes the amount charged for spreading or application of the liquid calcium chloride separately from the product sale, that its sole responsibility for delivery of the liquid calcium chloride is to release it according to specifications and instructions of the governmental entities, and that it has no responsibility for the actual application of the product to the road surface. We agree with petitioner that the language

of the bid sheets[7] and other documentary evidence submitted below indicate that the governmental entities sought primarily to purchase liquid calcium chloride.[8]

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[7] For example, the invitation to bid of the Ingham County Road Commission stated "ITEM: To furnish . . . 450,000 gallons, more or less, of various concentrations of liquid calcium chloride as outlined below," and had sections for the bidder to complete pertinent to delivery to a storage tank, and a separate section for stating the price per gallon of the product if applied by the supplier's spread units. The Ottawa County Road Commission invitation to bid stated that it would receive bids for the "1992-93 season requirements" and asked for "Price Per 1000 Gallons F.O.B." for various locations. The Missaukee County Road Commission invitation to bid stated that the bidder was to state the price per gallon of liquid calcium chloride "both spread and placed in storage at the Lake City garage." Petitioner's bid set forth per gallon prices for storage, separate prices for spread, and hourly rates for spreading. Petitioner's bids for the Newaygo and Cheboygan County Road Commissions set forth cost per gallon for continuous spread and spot spread, and hourly rates for spreading. The specification sheet of the City of Marquette stated under "Intent" "[t]o contract with a vendor and establish pricing for furnishing" liquid calcium chloride. Under "Delivery," the City stated that all prices bid were to be F.O.B. the City's warehouse, and further stated that the City "may require that material supplied to be used as a dust palliative be applied by the shipper on gravel streets. Please include in your proposal the cost per gallon for application." The Muskegon County Road Commission invitation to bid stated that it would receive bids for "one year's requirements" "delivered and applied." Petitioner's bid contained a per gallon price for storage, spot application, and continuous application. The Kent County Road Commission's invitation to bid stated "Purchase of 1993 Requirements of Liquid Calcium/Magnesium Chloride," and stated that quantities would be ordered on an "as needed" basis and should be pumped into storage tanks.

[8] Petitioner argues that only tax statutes are controlling in determining the propriety of tax assessments, and that respondent Treasury Department improperly relied on Revenue Administrative Bulletin (RAB) 1993-6 in its assessment. We find no error.

The Treasury Department hearing referee's decision relied on tax statutes and case law. The referee's decision referred to RAB 1993-6 as representing the Department's position, and in the context of petitioner's argument that the Department had not applied the position announced therein uniformly.

On appeal, respondent refers to RAB 1993-6 to counter petitioner's argument that it "is at a competitive disadvantage until all industry members are brought into compliance with the Department's relatively recent decision to tax liquid calcium chloride transactions."

RAB No. 1993-6 provides in pertinent part:

> The purpose of this bulletin is to clarify the sales and use tax treatment of transactions involving the application of various substances, including liquid calcium chloride, to gravel roads.
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> **Background**
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> The Department is aware of some public confusion that concerns the tax status of transactions involving the application of liquid calcium chloride to road surfaces. The application of liquid calcium chloride helps to minimize dust dispersion on roadways.

(continued…)

Petitioner relied on *RCA Corp v Dep't of Treasury*, 135 Mich App 807; 355 NW2d 679 (1984), *Natural Aggregates v Dep't of Treasury*, 133 Mich App 441; 350 NW2d 272 (1984), and *Kal-Aero v Dep't of Treasury*, 123 Mich App 46; 333 NW2d 171 (1983).

In *Natural Aggregates, supra,* the petitioner mined, processed, and sold sand and gravel, and owned a fleet of trucks which it used for deliveries to customers who requested delivery of the sand and gravel. Noting that the question presented was whether trucking charges the petitioner collected were subject to sales tax, this Court stated:

> The [General Sales Tax Act] provides that a "sale at retail" is a transaction where tangible personal property ownership is transferred. Respondent argues that "some other kind of business" in MCL 205.52; MSA 7.522 [quoted *supra*] refers to a second business totally unrelated to the transfer of ownership of tangible personal property. We disagree. In *Sims v Firestone Tire & Rubber Co,* 397 Mich 469; 245 NW2d 13 (1976), the Michigan Supreme Court addressed the question of whether a retailer

(…continued)

> Typically, the provider delivers liquid calcium chloride to a governmental entity (municipality or county road commission) in a tank truck. Upon delivery, or before, the governmental entity instructs the provider to spread the liquid calcium chloride on designated road surfaces. This situation poses the following question: is the transaction a sale of liquid calcium chloride and a sale of the spraying service, or is the transaction a service transaction wherein liquid calcium chloride is consumed by the service provider?
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> **Position Statement**
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> The Department views the previously described transaction and similar transactions as the rendition of a service in which the service provider consumes tangible personal property. The spreading of chemicals does not constitute a "sale at retail." The providers consume the chemicals while performing a service.
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> The service provider must pay use tax on chemicals and other materials consumed, unless sales tax was paid at the time these chemicals and materials were acquired. It is immaterial that an employee of the municipality or county road commission may board the vehicle and direct the spreading of the chemicals.
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> The chemical provider who only delivers these items into the purchaser's storage tank is making a "sale at retail." Sales tax is due, unless a valid claim for exemption is obtained from the purchaser. It does not matter whether the storage tank is stationary or whether it is mounted on a vehicle owned or leased by the purchaser.
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> Approved April 15, 1993

engaged in both sales and services may pass along to its customers the amount of a penalty imposed for the retailer's failure to maintain separate records of taxable sales and nontaxable services. Although not at issue, the Supreme Court assumed that wheel rotation and wheel balancing were nontaxable services provided by Firestone. Obviously then, some relationship between the service and transfer of ownership will not *ipso facto* render the service taxable.

In examining the relationship between the delivery service and the transfer of ownership, the lower courts have looked to the time title to the property passes to the purchaser. Thus in *Pine Lumber Co v Dep't of Treasury,* [Michigan Court of Claims No. 5325 (October 26, 1978)] fn 2, the court found that the particular circumstances indicated that the parties did not consider title to pass until delivery.

In the instant case, customers who purchase sand and gravel pay the same price whether they use their own vehicles to carry the product away from petitioner's premises or utilize petitioner's trucking services to have the product delivered for them. Those who opt for petitioner's delivery service negotiate and contract separately for the service and pay a separate price. Secondly, the trucking charges are not a cost figured in calculating the gross price of the product. Moreover, the delivery charge can hardly be characterized as incidental to the purchase price where the price of gravel was $.30 per ton and the price of trucking services was between $1.30 and $1.55 per ton. These circumstances strongly suggest that delivery is a separate conceptual and temporal transaction from the sale.

. . . . The Michigan General Sales Tax Act evinces a recognition that a retail seller may simultaneously engage in a service business the proceeds of which are not subject to a sales tax. We believe the act is reasonably construed to classify petitioner's trucking service in the latter category. "[I]n doubtful cases, revenue statutes must be construed against the taxing authority." *Ecorse Screw Machine Products Co v Corporation & Securities Comm,* 378 Mich 415, 418; 145 NW2d 46 (1966). We, therefore, reverse the order of the State Board of Tax Appeals and remand this case to the Tax Tribunal for determination of a refund, MCL 205.773; MSA 7.650(73).

In *Kal-Aero, supra,* the plaintiff was in the business of selling and servicing aircraft, and also provided aircraft for rent or charter and offered flight instruction and pilot services. At the time the plaintiff bought aircraft for use in its rental and charter operations, it elected not to pay sales tax, but rather to pay use tax on rental receipts attributable to aircraft it owned. The plaintiff excluded from the rental receipts it reported for use tax purposes the income it earned from pilot services and instructional services. *Kal-Aero, supra* at 49-50. This Court concluded that the revenues the plaintiff received from flight instruction and pilot services were not subject to the use tax:

Use tax is defined in §3 of the Use Tax Act, MCL 205.93; MSA 7.555(3), as "a specific tax for the privilege of using, storing or consuming tangible personal property in this state, which tax shall be equal to 4% of the price of such property * * * ".

> We agree with plaintiff that, under the particular facts present in this case, income attributable to instructional and pilot services rendered was not part of the "price" of the aircraft to which the use tax applies.
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> "Price" is defined in § 2 of the Use Tax Act, MCL 205.92(f); MSA 7.555(2)(f).
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> "(f) 'Price' means the aggregate value in money of any thing, or things, paid or delivered, or promised to be paid or delivered by a consumer to a seller *in the consummation and complete performance of the transaction by which tangible person[al] property or services shall have been purchased or rented for* storage, use or other consumption in this state, without any deduction therefrom on account of the cost of the property sold; cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever." (Emphasis added.)
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> Pilot and instructional services were not always part of the "complete performance of the transaction" by which plaintiff rented aircraft to its customers. These services were neither necessary nor incidental to complete performance of the taxable transaction, i.e., the rental of the aircraft. Customers were free to and did rent aircraft without purchasing these services; services could be and were purchased by customers who did not rent aircraft from plaintiff. Charges for pilot services and instructional services were calculated using a separate hourly rate and were stipulated to be reasonable.
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> Each case must, of course, turn on its own facts. On the particular facts of this case, we conclude that the distinct and identifiable service transactions, which may or may not occur contemporaneously with the taxable aircraft rental transaction, are clearly severable from the latter and thus not subject to the use tax. [*Kal-Aero, supra* at 51-52.]

In *RCA, supra*, RCA leased radio communication equipment to another company under an agreement that placed responsibility for service and maintenance of the equipment on the lessee. *RCA, supra* at 809. The lessee investigated its options with other companies for maintenance and service of the equipment, but ultimately contracted with RCA for the services. *Id*. This Court, citing *Kal-Aero*, held that the use tax did not apply to RCA's receipts derived from the service and maintenance agreement, emphasizing that the lessee had no obligation to contract with RCA for maintenance and service, and determined that the rental and service/maintenance agreements were "separable and distinct." *Id*. at 811.

In the instant case, the Tribunal found that petitioner failed to meet its burden of proof that the sales and service transactions were separable and distinct. We disagree.

In *Kal-Aero*, the plaintiff's pilot and instructional services were available to those who did not rent the plaintiff's aircraft. Further, the plaintiff charged a separate hourly rate for its pilot and instructional services. *Kal-Aero, supra* at 52. In the present case, the parties stipulated that "when preparing a bid [petitioner] computes the charge for spreading separate from the charge for the liquid calcium chloride itself," and that "[a]s indicated by the bids, the charge for liquid calcium chloride which

is spread is not significantly higher than the charge for liquid calcium chloride which is delivered to storage tanks," which supports petitioner's argument that the transactions primarily contemplated a sale of tangible personal property, plus a separately calculated application service. Further, petitioner's quotes and bids provided per gallon prices only, even where the governmental entity invited alternative quotations based on mileage to be covered, indicating that petitioner's business was selling designated quantities of liquid calcium chloride, to be delivered to storage tanks or by spraying on the road, as requested by the purchaser, and that petitioner was not in the business of providing a dust-control service. Additionally, the bids set forth a maximum unloading/spreading time, after which additional charges applied, indicating that delivery, whether to a storage tank or by spreading, was an incident of the sale, and that any extraordinary time involved would be charged to the customer. This is inconsistent with viewing the spread-delivery transactions as service, rather than sale, transactions. Also, the *Kal-Aero* Court noted that the service transactions it determined were not subject to the use tax "may or may not occur contemporaneously" with the taxable aircraft rental transaction.

In *RCA*, this Court emphasized that the lessee of the equipment was under no obligation to contract with RCA for the provision of service and maintenance. *RCA*, *supra* at 811. In the present case, the parties stipulated that petitioner usually delivered the materials to the client's storage tanks, and that "sometimes the governmental entity requests that the liquid calcium chloride be delivered by spreading it on roadways according to instructions of the governmental entity." Moreover, petitioner's vice president, H. John Schimke, stated in an affidavit that a "governmental entity will often choose and separately negotiate whether to have delivery in bulk to storage facilities or by spreading." This evidence indicates that petitioner performed the application service at its clients' request, rather than requiring the governmental entities to purchase petitioner's application service along with the liquid calcium chloride. Schimke's affidavit also stated that

> when delivery of the product is to be made by spreading, the sole responsibility of Liquid Dustlayer, Inc. for delivery of the product is to release it according to the instructions of the agent or employee of the applicable governmental entity. Liquid Dustlayer, Inc. has no responsibility for the actual application of the product to the road surface after the moment the product is released according to the instructions received. The manner and method of application is under the control and direction of the governmental entity.

We have found no authority to support the Tribunal's implicit determination that in order for the governmental entities to take receipt of the liquid calcium chloride so as to constitute a sale at retail, the liquid calcium chloride had to be physically placed into a contained area such as a storage tank, rather than be spread on the roads. Because neither the General Sales Tax Act nor the Use Tax Act[9] defines "transfer," we may consult dictionary definitions to determine the common meaning of the term. *Random House Webster's College Dictionary* (2d ed), p 1366, defines "transfer" as:

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[9] In *Elias Bros v Dep't of Treasury*, 452 Mich 144, 153; 549 NW2d 837 (1996), the Supreme Court looked to the Sales Tax Act where the Use Tax Act failed to define terms central to its inquiry.

> 1. to convey or remove from one place, person, or position to another. 2. To cause to pass from one person to another, as thought or power; transmit. 3. *Law*. to make over the possession or control of: to transfer a title to land. . . .

*Black's Law Dictionary* (7th ed), p 1504, defines "transfer" as "1. To convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of. 2. To sell or give."

In the instant case, the parties stipulated to the fact that petitioner's sole responsibility when the product is delivered by spreading is "to release it according to the bid specifications and the instructions of the agent or employee of the applicable entity," and that petitioner had no responsibility for the actual application of the product to the road surface after the moment the product was released according to bid specifications and instructions. We conclude that if the common meaning of "transfer" is applied, petitioner transferred the liquid calcium chloride when the governmental entities assumed control of it, i.e., when the governmental entities directed and controlled the application by instructing petitioner in this regard, and that the Tribunal misapplied the law in concluding otherwise. *Natural Aggregates, supra*. The Tribunal improperly concluded that the facts in this case did not support that the service transaction was distinct and identifiable from the alleged sales transaction. *Kal-Aero, supra*. As discussed above, the documentary evidence submitted below and the facts to which the parties stipulated do not support that conclusion.

We conclude that the sales at issue were "at retail," MCL 205.51(1)(b); MSA 7.521(1)(b), exempted from sales tax due to the tax-exempt status of the government purchasers, MCL 205.54(7); MSA 7.524(7), and not taxable under the Use Tax Act because petitioner did not "use, store, or consume tangible personal property" when it applied the liquid calcium chloride according to the governmental entities' directions. MCL 205.93; MSA 7.555(3).

III

Petitioner argues that the Tribunal erred in concluding that it was required to maintain separate records of its sales of liquid calcium chloride and its application services. MCL 205.52(2); MSA 7.522 provides:

> Any person engaged in the business of making sales at retail who is at the same time engaged in some other kind of business, occupation, or profession not taxable under this act shall keep books to show separately the transactions used in determining the tax levied by this act. If the person fails to keep separate books, there shall be levied upon him or her the tax provided for in subsection (1) equal to 6% of the entire gross proceeds of both or all of his or her businesses. The taxes levied by this section are a personal obligation of the taxpayer.

MCL 205.52(2); MSA 7.522 is contained within the General Sales Tax Act, not the Use Tax Act. Petitioner argues that this provision merely permits taxpayers to restrict their sales tax liability by documenting separately sales and service transactions, and that it had no reason to separate its records because neither the liquid calcium chloride sales nor application service transactions were taxable. The

statute provides that if the taxpayer fails to keep books showing the separate non-sales component of the transactions, the entire gross proceeds of the businesses shall be subject to tax under the act. Thus, accepting that the instant transactions are sales, §52(2) provides that if the transactions were not exempt because made to governmental entities, the entire proceeds, including the five cent per gallon spreading charge, would be subject to the sales tax. Contrary to the tribunal's apparent interpretation, the statute does not provide that if books showing the separate transactions are not kept, the non-sales component will be subject to the use tax.

In light of our disposition we need not reach petitioner's arguments that the "real object test" contained in RAB 1995-1 does not apply to this case, that imposition of the use tax in this case is contrary to public policy, or that imposing the use tax on the transactions at issue results in an improper tax on a governmental entity.

Reversed and remanded for determination of a refund. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Helene N. White