STATE OF MICHIGAN

COURT OF APPEALS

HOV SERVICES, INC., Petitioner-Appellee,	UNPUBLISHED March 21, 2013
v	No. 309575 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellant.	LC No. 00-385121

Before: BORRELLO, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

Respondent appeals as of right a March 19, 2012, order of the Michigan Tax Tribunal granting summary disposition in favor of petitioner. For the reasons set forth in this opinion, we affirm.

I. FACTS & PROCEDURAL HISTORY

Petitioner has facilities around the world including Michigan, located in Troy and Livonia. According to James Reynolds, petitioner's Chief Financial Officer (CFO), petitioner provides services at its Troy facility. Specifically, in an affidavit, Reynolds averred that petitioner provides "business process outsourcing, including processing claims," where petitioner receives data from a customer, sometimes electronically, captures and extracts the data, and transmits the data to an offshore facility in Mexico, China, or India where a claim form is prepared. Once the claim form is prepared, petitioner adjudicates its customer's claims. In contrast, according to Reynolds, none of these services are provided at the Livonia facility. Reynolds averred that petitioner's Livonia facility handles customers' contracts for "mass printing of documents." Specifically, Reynolds explained that the Livonia facility receives electronic PDF files from its customers that contain information including the name and address of the recipient. For example, petitioner processes letters from the State of Michigan to parents who are delinquent on child support payments, and letters from Ford Motor Credit Co. (FMC) to borrowers regarding loan payment information. Reynolds stated that petitioner does not add anything to the PDF before printing and mailing the document, and that it does not "supply or develop market information, or perform data mining related to the documents." Instead, according to Reynolds, petitioner uses high-speed printers to print the documents onto paper, and then stuffs the paper into envelopes via a mechanical process or a manual process depending on the size of the order. The envelopes are then sealed and postage is applied by a postage meter

machine. A sorting machine reads barcodes on the envelopes and sorts them into batches of the same zip code. Once pre-sorted, customers can pick up the mailings, or, alternatively, United States Postal Service personnel inspects the mailings onsite and then takes the mail to Postal Service facilities for mail delivery.

Reynolds attached to his affidavit, three representative contracts from petitioner's customers as illustrative of the type of work performed at the Livonia facility including contracts from FMC, TransUnion, and the State of Michigan. Reynolds explained that the agreements covered activities both at petitioner's Troy facility and the Livonia facility and he stated, "[t]he term 'services' was used generically in the Agreements to describe a variety of activities to be performed by [petitioner] and was not intended by [petitioner] to characterize the transactions at [petitioner's] Livonia facility as services." Instead, Reynolds stated that at the Livonia facility, petitioner produced tangible personal property (TPP), "the printed paper in a sealed envelope, addressed to the recipient with necessary postage affixed . . . to be mailed to the recipient."

Another executive, Edward Stephenson, averred that the Livonia facility "is a print facility only where correspondence is manufactured." Stephenson stated that petitioner "maintains a separate database, separate accounting records, separate invoicing for its Livonia facility, and otherwise treat[s] the Livonia facility as a separate business unit." Finally, in an affidavit, Patrick Ramsey, a former employee at FMC who managed FFC's contract with petitioner from 2005 through 2010, emphasized that FMC provided all of the necessary information to petitioner for the printing, and he stated that FMC did not contract with petitioner for provision of services related to the PDF printing. A manager from TransUnion submitted an affidavit that was similar to Ramsey's.

Petitioner filed tax returns for tax years 2004 through 2006 and apportioned sales for its Livonia facility as sales of TPP. Thereafter, respondent conducted an audit. Petitioner provided respondent with three sample contracts as illustrative of its business activities performed at the facility. Respondent ultimately concluded that petitioner's Livonia facility provided a service, as opposed to selling TPP. This dramatically altered petitioner's tax liability for the tax years in question. Specifically, respondent issued two assessments, one under the Single Business Tax Act (SBTA), MCL 208.1 *et seq.*[1], and one under the Use Tax Act (UTA), MCL 205.91 *et seq*. With interest, the SBTA assessment amounted to $401,352.27 and the UTA assessment amounted to $1,027,273.84.

Thereafter, petitioner requested and was granted an informal conference before a hearing referee. Respondent argued that petitioner was involved in the sale of a service and that any TPP conveyed was incidental to the transaction. Petitioner, in contrast, argued that the Livonia facility was completely separate from the Troy facility, which admittedly was a provider of services.

After the conference, the referee issued an informal conference recommendation. In the recommendation, the referee explained that petitioner's tax liability turned on whether

[1] The SBTA was repealed by 2006 PA 325.

petitioner's sales were the result of the sale of TPP or of the sale of services. To answer that question, the referee applied the "incidental to service" test set forth in *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004). The referee concluded that petitioner was providing a service from its Livonia facility. The referee based its conclusion on sample contracts that petitioner provided to respondent during the audit and recommended that the tax assessments be finalized. Thereafter, on February 12, 2010, respondent entered a Decision and Order of Determination wherein it adopted the hearing referee's recommendation and finalized the assessments.

On March 25, 2010, petitioner petitioned the Michigan Tax Tribunal (MTT) to set aside the Decision and Order of Determination, arguing, in part, that its Livonia facility was engaged in the sale of TPP during the tax years in question. In particular, petitioner argued that its Livonia facility primarily engaged in printing electronic documents, stuffing them into envelopes, applying postage, and mailing the envelopes. Petitioner claimed that a printed piece of paper in an envelope was a piece of TPP.

Thereafter, petitioner submitted a proposed joint statement of facts, which respondent refused to stipulate to[2] and on November 14, 2011, petitioner moved for summary disposition pursuant to MCR 2.116(C)(10). In its motion, petitioner argued that the Livonia facility was exclusively used for printing, folding, inserting, sealing, and applying postage to documents and was designed for mass printing. Petitioner argued that the only potential service related to the printing could be considered the sorting of the envelopes, but it maintained that the sorting was incidental to the TPP it produced. Petitioner argued that the mere fact that the contracts referenced "services," was not dispositive where the substance of the transaction involved the sale of TPP. Petitioner maintained that its business activity was distinguishable from other services that involved printing such as targeted printing and delivery of checkout-lane coupons at issue in *Catalina*, 470 Mich at 13, tax returns prepared by a certified public accountant (CPA), architectural plans or legal opinions. In all of those examples, petitioner argued, delivery of printed material occurred; however, intangible content of the printed material was created by the service provider. In contrast, petitioner's customers created 100-percent of the intangible content—petitioner simply placed the intangible content onto paper for delivery. The actual physical paper was the essence of what was being sold.

Respondent replied, arguing that under *Catalina*, "the correct conclusion would be that the exchange of tangible personal property was only incidental to the purpose of the entire transaction. The paper and the ink were only created to establish the medium by which notice was made to the Petitioner's customers." Respondent argued, "[t]he notice was what the buyer was seeking. Along with all the ancillary services provided (sorting, stuffing, mailing, updating)." According to respondent, "the letters, statements and checks themselves are so targeted and individualized to the customers that the emphasis of the transaction is on the personalized intangible service that was provided by Petitioner."

[2] The MTT granted petitioner's motion to hold respondent in default for failing to stipulate to any facts.

An oral argument was held on December 5, 2011, before an administrative law judge (ALJ), where both parties agreed that if petitioner was involved in the production and sale of TPP at its Livonia facility, then the tax assessments were invalid. Both parties agreed that *Catalina* was controlling with respect to that legal question. Respondent argued that the ALJ should look at the Livonia and Troy facilities together as part of a larger overall service agreement between petitioner and its customers. In other words, respondent argued that the overriding service contracts controlled whether petitioner was involved in the production and sale of services as opposed to TPP. The paper mailings were merely incidental to the data management services that petitioner provided to its customers.

Petitioner, in contrast, argued that the ALJ should look to the transactional level to determine whether petitioner's activities at the Livonia facility involved the production and sale of TPP. Petitioner argued that the affidavits it submitted with its motion showed that it treated the Troy facility and the Livonia facility as distinct entities. Petitioner argued that, even though the contracts as a whole provided that petitioner would perform some services for its customers, petitioner maintained that individual transactions arose within the scope of those contracts that exclusively involved the production and sale of TPP at the Livonia complex. Petitioner argued that the ALJ should look to unique purchase orders that arose under the contracts to see that its customers purchased printed goods from its Livonia facility. Petitioner also argued that its costs analysis depicted in one of the affidavits showed that the vast majority of the costs associated with the Livonia facility were related to the printing of documents.

Respondent countered that summary disposition was not appropriate because there were genuine issues of fact left to be resolved, and that an evidentiary hearing was necessary to determine if petitioner was selling a service or TPP. Respondent argued that, even under the contracts that petitioner attached to its motion for summary disposition, petitioner was engaged in the production and sale of a service. Respondent also argued that petitioner provided services at the Livonia facility where petitioner received and stored documents, scheduled and performed printing, placed the documents in appropriate order, and coded, stuffed, and weighed documents.

On December 13, 2011, following oral argument, the ALJ entered a proposed order granting petitioner's motion for summary disposition. The ALJ concluded that the word "services" that was used in the contracts was not dispositive and that, "for each contract, the essence of the entire transaction is the sale of printed materials, with the services being incidental to those sales. As such, the transactions are properly treated as sales of tangible personal property for use tax and SBT purposes." The ALJ reasoned that petitioner's printing activities was unlike other services provided on printed paper such as an attorney's legal brief where the customer pays for the attorney's "knowledge and skill." In this case, the ALJ reasoned,

> Petitioner does not create the content that is printed on the paper. Rather, Petitioner's customers create or provide the images and other content and petitioner's job is to produce the printed paper that is placed in envelopes, which are mailed to individuals designated by petitioner's customers.
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> * * *

> In our present case, Petitioner does not own or create the printed content. Petitioner performs no service in this regard. Petitioner's customers seek to acquire a printed document that is enclosed in an envelope that is suitable for immediate mailing. The predominant factor, thrust, or purpose of the transaction is the tangible property.

The ALJ also reasoned that petitioner's use of the word "services" in its contracts did not dictate "the tax consequences of a transaction," because "the contracts require Petitioner to produce and sell tangible products. The customer pays for the tangible property on a per unit basis." The ALJ further reasoned that there was no evidence to contradict that petitioner was a printer, and noted that respondent's "Administrative Rule 205.113 (1979)", "recognizes that printed material sold by a 'printer' is a 'sale of tangible personal property,'" and that the rule "indicates that printers are generally eligible for an industrial processing exemption, which presupposes that a printer's work product is tangible personal property for use tax purposes." The ALJ concluded that under the *Catalina* test petitioner was "engaged in the manufacture and sale of tangible personal property" and was entitled to judgment in its favor. This appeal ensued.

II. ANALYSIS

Respondent argues that the tax tribunal erred in denying respondent's motion to submit an affidavit during oral argument. We review the MTT's decision whether to admit evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when the tribunal's outcome falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Summary disposition under MCR 2.116(C)(10) is appropriate when the moving party is able to demonstrate that no genuine issues of fact exist. *Coblentz v Novi*, 475 Mich 558, 568; 719 NW2d 73 (2006). The moving party can submit affidavits, deposition, admissions, and other documentary evidence to support the position that no genuine issue of material fact exists. *Id.*; MCR 2.116(G)(4). The non-moving party then has the burden of demonstrating through similar documentary evidence that there is a genuine issue of material fact. *Coblentz*, 475 Mich at 568-569. The trial court must examine the evidence provided by the parties in a light most favorable to the non-moving party when deciding the motion. *Watts v Mich Multi-King, Inc.*, 291 Mich App 98, 102; 804 NW2d 530 (2010). If genuine issues of material fact exist then summary disposition is inappropriate. *Id.* at 103. However, if the non-moving party fails to respond with the appropriate documentary evidence, the trial court must enter judgment for the moving party if appropriate. MCR 2.116(G)(4).

When determining whether to admit evidence, the MTT must follow the rules of evidence as far as practicable. *Georgetown Place Coop v Taylor*, 226 Mich App 33, 52; 572 NW2d 232 (1997). However, the MTT is permitted to "admit and give probative effect to evidence of a type commonly relied on by reasonable prudent men in the conduct of their affairs." *Id.* (internal quotation marks and citation omitted). MCR 2.116(G)(1)(*ii*) states that "any response to the motion (*including brief and any affidavits*) must be filed and served at least 7 days before the hearing" (emphasis added). MCR 2.116(G)(5) provides that the court must consider any "affidavits, together with the pleadings, depositions, admissions, and documentary evidence *then filed* in the action or submitted by the parties[]" (emphasis added).

Petitioner moved for summary disposition under MCR 2.116(C)(10). Respondent filed an untimely answer and brief. At oral argument, respondent attempted to submit an affidavit in support of its response. The MTT declined to admit the affidavit as untimely and prejudicial to the opposing party. The MTT further clarified that even with respondent's offered affidavit the determination to grant petitioner's motion would stand. The MTT held that petitioner was not presented with the affidavit until the day of oral argument and it would be prejudicial to allow respondent to surprise petitioner in that manner.

The MTT was required to consider the affidavits "then filed." MCR 2.116(G)(5). Respondent filed no affidavits before oral argument. Any responses to a motion, including affidavits, "must be filed and served at least 7 days before the hearing." MCR 2.116(G)(1)(*ii*). Respondent had ample time to submit the affidavit in support of its response and failed to do so. Respondent has failed to demonstrate that the MTT abused its discretion or otherwise committed an error of law in refusing to admit the affidavit. *Georgetown Place Coop*, 226 Mich App at 50; *Craig*, 471 Mich at 76.

Respondent next argues that the MTT erroneously granted summary disposition in favor of petitioner because petitioner was selling services, not TPP.

We review de novo a decision on a motion for summary disposition. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010). We must examine the "affidavits, pleadings, and other documentary evidence in the light most favorable to" the non-moving party to determine whether a genuine issue of material fact has been raised. *Id.*; MCR 2.116(C)(10). The MTT's factual findings are "to be affirmed if supported by competent, material, and substantial evidence." *Paris Meadows*, 287 Mich App at 141. Our review is limited to the evidence before the tribunal at the time it decided the motion. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

Sales tax is imposed on the sale of TPP but not a service. *Catalina*, 470 Mich at 19. Sales tax is imposed on the gross proceeds generated by a business. MCL 205.52(1); *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 237; 644 NW2d 734 (2002). The UTA governs use tax and indicates that use tax is imposed "on the privilege of using, storing, or consuming tangible personal property." *General Motors Corp*, 466 Mich at 237 (internal quotations and citations omitted). "The sales and use taxes, while imposed in different ways, do not operate in isolation. Rather, provisions of the UTA and the GTA are supplemental and complementary." *Id.* The taxes are mutually exclusive and use tax applies to TPP while sales tax applies to sales. *Fisher & Co v Dep't of Treasury*, 282 Mich App 207, 210; 769 NW2d 740 (2009). There are exemptions from use tax under the UTA. MCL 205.94o(1)(a) indicates that use tax does not apply to TPP sold to industrial processors for use or consumption in industrial processing.

The parties agree that resolution of this case can be determined using the test set forth in *Catalina*, 470 Mich at 13, to determine whether petitioner was providing a service or selling tangible personal property. If petitioner was providing TPP then petitioner was entitled to the industrial processor exemption of MCL 205.94o and was not liable for additional taxes under the SBTA. See MCL 208.52(b); MCL 208.53(a). We have utilized the *Catalina* test in tax cases

where there is a question regarding whether the transaction was a sale of service or TPP. See *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 340-341; 793 NW2d 246 (2010).

The *Catalina* Court established a test to determine whether a mixed transaction was a sale of services or a sale of TPP. *Catalina*, 470 Mich at 26. Our Supreme Court adopted the "incidental to service" test and indicated that the whole transaction should be looked at objectively to determine the principal component. *Id.* at 24. The Court also laid out six factors to consider:

> . . . what the buyer sought as the object of the transaction, what the seller or service provider is in the business of doing, whether the goods were provided as a retail enterprise with a profit-making motive, whether the tangible goods were available for sale without the service, the extent to which intangible services have contributed to the value of the physical item that is transferred, and any other factors relevant to the particular transaction. [*Id.* at 26.]

In this case, the record supports that the object of the transactions at petitioner's Livonia facility involved the production of TPP and that petitioner is in the business of producing TPP at that facility. *Id*. Petitioner presented uncontroverted evidence from two buyers who indicated that they sought to purchase TPP produced by petitioner and not petitioner's services. Importantly, with respect to the printing at the Livonia facility, petitioner did not have any input over the content of the documents that were printed. Petitioner did not create, modify, edit, delete or add to the content of the electronic documents. It did not input an algorithm to identify recipients of the documents, nor did it provide any other intellectual services with respect to the document and petitioner employed a per-unit pricing scheme. In this respect, petitioner's activities were dissimilar to the service of creating custom checkout lane coupons. See e.g. *Catalina Marketing Sales Corp v Dep't of Treasury (On Remand)*, Michigan Tax Tribunal, issued July 29, 2004 (Docket No. 231397). Similarly, petitioner did not perform any specialized service like verification that persons had previously graduated from a university and qualified for a replacement diploma. See e.g. *Univ of Mich Bd of Regents v Dep't of Treasury*, 217 Mich App 665, 670-671; 553 NW2d 349 (1996) (holding that the printing of replacement diplomas involved provision of a service). Instead, petitioner performed mass-printing operations at the Livonia facility to produce ready-to-mail documents. In contrast to intellectual functions where the paper document is incidental to the services provided, here, petitioner was primarily engaged in the production of a tangible paper product on a grand scale.

Additionally, petitioner's chief financial officer and the senior vice president attested that the Livonia facility was a commercial printing facility that manufactured correspondence. Respondent did not provide any evidence to rebut those assertions. Customers contracted with petitioner for mass printing of documents. The object of the contracts was the printed statement that was enclosed in the envelope for mailing. Moreover, the printed documents were produced in a profit-making transaction. Petitioner profited from offering mass production of the documents, and the economies of scale provided cost-savings to its customers. Further, while petitioner may have provided ancillary services such as sorting, the final tangible product would have been available without the provision of that service. Finally, as noted, petitioner did not contribute any intangible services to the final printed document. Petitioner did not have any

input into the content of the documents and instead simply produced printed letters in a ready-to-mail format. *Catalina*, 470 Mich at 26.

In sum, having reviewed the record, we cannot conclude that the MTT erred in granting summary disposition in favor of petitioner where the evidence as a whole supports that petitioner was engaged in the sale and production of tangible personal property at its Livonia facility.

Affirmed.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly