STATE OF MICHIGAN

COURT OF APPEALS

KNIGHT FACILITIES MANAGEMENT, INC, Petitioner-Appellee,	UNPUBLISHED September 27, 2012
v	No. 305787 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellant.	LC No. 00-319568

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Respondent Michigan Department of Treasury appeals as of right the Michigan Tax Tribunal's grant of summary disposition in favor of petitioner. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Petitioner and General Motors entered into a contract pursuant to which petitioner provides General Motors (GM) with managers who supervise GM's janitorial employees. Petitioner purchases the majority of the supplies used by the janitorial staff from Supply Pro, which ships the supplies directly to the appropriate GM facility. Petitioner provided Supply Pro with its resale exemption certificate. GM also provided petitioner with a "direct pay permit" that instructed petitioner not to charge sales or use tax as further provided in GM's master purchase agreement, which stated:

> Do not bill sales or use tax on items delivered to [or] shipped to locations within the states listed below. GM holds direct pay authority with these states. As a result, in all of the identified states GM will remit directly to taxing authorities, all sales or use tax liability related to its purchase and use of tangible personal property and services. . . . Listed below are the direct pay permit or sales tax license numbers for the eighteen states, or GM locations within a state, where GM holds direct pay authority: MI #ME-0900440.

Respondent conducted an audit and, based on its finding that petitioner was a service provider and not a seller of tangible property, determined that petitioner was liable for use tax from November 1, 2000, to April 30, 2004, on $16,287,136.00 of taxable purchases at a 6% tax rate. Petitioner was assessed $983,812.00 in tax and $156,203.04 in applicable interest.

Petitioner challenged respondent's assessment in the Tax Tribunal. Petitioner asserted that of the $16,287.136.00 in purchases attributed to it, $15,263,365.00 in purchases was resold to GM. Petitioner maintained that it was exempt from use tax pursuant to MCL 204.94(1)(c) and 205.54(1)(b) because the property was purchased for resale to GM and was not consumed or used by petitioner. Petitioner also maintained that it was not liable for sales tax with respect to its sale of goods to GM under GM's Direct Pay Permit and MCL 205.98.

In an order dated October 21, 2010, the tribunal denied petitioner's motion for summary disposition and granted summary disposition in favor of respondent pursuant to MCR 2.116(I)(2). The tribunal divided the case into two types of transactions: (1) petitioner's purchase of supplies and equipment, and (2) petitioner's sale of supplies and equipment to GM. As to the first class of transactions, the tribunal determined that petitioner was not liable for use tax because it did not use, store, or consume the tangible personal property at issue. Instead, the tribunal found that petitioner purchased the property for resale to GM and that GM's janitors used the property. Thus, the tribunal concluded that the property was exempt from use tax under MCL 205.94(1)(c)(i). Analyzing the second class of transactions, the tribunal held:

> In this case, there is no doubt that GM purchased the supplies and equipment and that it was GM's janitors who used these items. Because GM's direct pay authorization does not apply to "[t]angible personal property consumed by a *person* performing any service activity for your company," the Tribunal finds that GM is responsible for payment of use tax on supplies and equipment purchased from Petitioner.

The tribunal concluded that petitioner was liable for sales tax and interest because "the products Petitioner sold to GM are not covered by GM's direct payment authorization" pursuant to exclusion 8 of the direct payment authorization.[1] The tribunal also determined that GM was

[1] The tribunal reasoned as follows:

> The authorization includes several exclusions, including one relating to contractors and one relating to "company employees." At issue is the authorization's eighth exclusion, which provides that "[t]angible personal property consumed by a <u>person</u> performing any service activity for your company" is not authorized by the authorization. (Emphasis added.) . . . Because the authorization specifically utilized the words "contractor" and "company employees" in other exclusions, the Tribunal finds that use of the word "person" in this exemption means that the exclusion does not apply to tangible personal property consumed by <u>anyone</u> performing a service activity for GM, be it a GM employee or not.
>
> There is no dispute that GM's janitors consumed the tangible personal property at issue while performing janitorial services for GM. Therefore, the products Petitioner sold to GM are not covered by GM's direct payment authorization. Because these sales are not covered by GM's authorization, these transactions are subject to sales tax.

liable for use tax on petitioner's sale of supplies to GM. The tribunal recognized, however, that either sales or use tax may be incurred, not both, on the same taxable transaction. The tribunal concluded that, because sales tax is imposed first and that the use tax is only imposed on transactions not covered by the sales tax, that petitioner was responsible for sales tax on its sales of supplies to GM.

Petitioner moved for reconsideration, asserting that the tribunal wrongfully interpreted the language of exclusion 8 and that, regardless of that interpretation, petitioner was per se exempt from collecting sales tax because GM presented petitioner with a direct pay permit. Petitioner asserted that no statutory burden is placed on sellers to construe the precise language of a direct pay permit. The tribunal subsequently entered an order on July 29, 2011, granting petitioner's motion for partial reconsideration, vacating the October 21, 2010, order granting summary disposition in favor of respondent "to the extent that it conflicts with the statements and conclusions reached in the July 29, 2011, order," granting summary disposition in favor of petitioner, and canceling the assessment in its entirety. The tribunal concluded that:

> Petitioner is correct in its argument that "[n]o statutory burden is placed on sellers to construe the language of the direct pay permits . . . Subsection (1)(n) does not provide any exceptions – the statute simply provides that any sale to a direct pay permit holder is per se exempt to the seller." . . . MCL 205.54a(1)(n) states: "A sale of tangible personal property to a person holding a direct pay permit under section 8 of the use tax act, 1937 PA 94, MCL 205.98" is exempt from sales tax. The statute does not require the seller to review or certify that the tangible personal property it is selling to the buyer is within the scope of the buyer's direct pay permit.

Thus, the tribunal found that "[p]etitioner has met its burden of proof in establishing that it is not liable for the use tax, interest, and penalty assessed by Respondent[.][2]

II. ANALYSIS

Appeals from the Michigan Tax Tribunal are subject to a "multifaceted" standard of review. See *Wexford Med Group v Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006). "Where fraud is not claimed, this Court reviews the tribunal's decision for misapplication of the law or adoption of a wrong principle." *Id*. We will "deem the tribunal's factual findings conclusive if they are supported by 'competent, material, and substantial evidence on the whole record.'" *Id*., quoting *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994). Issues of statutory interpretation are reviewed de novo. *Danse Corp v Madison Hts*, 466 Mich 175, 178; 644 NW2d 721 (2002).

This appeal involves the application of the Use Tax Act (UTA), MCL 205.91 *et seq*. Generally, the use tax is designed to cover transactions that fall outside the ambit of the general

[2] The tribunal recognized that "Respondent appears to concede that the tax may be collected from GM as stated in its response."

sales tax. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136-137; 761 NW2d 470 (2008).

Respondent does not contest the tribunal's conclusion that petitioner is not liable for sales tax. Rather, respondent contends that petitioner is liable for use tax on the supplies purchased from Supply Pro and used during the tax years at issue.

'"[*T*]*ax exemptions* are strictly construed against the taxpayer and in favor of the taxing authority."' *Betten Auto Ctr v Dep't of Treasury*, 272 Mich App 14, 19; 723 NW2d 914 (2006), aff'd in part and vacated in part 478 Mich 864 (2007),[3] quoting *Nomads, Inc v Romulus*, 154 Mich App 46, 55; 397 NW2d 210 (1986) (emphasis in original). "Because tax exemptions are disfavored, the taxpayer has the burden of proving entitlement to a tax exemption." *Betten Auto Ctr*, 272 Mich App at 19-20. "This Court should not, however, produce a strained construction that is adverse to legislative intent." *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 493; 618 NW2d 917 (2000). "[A]mbiguities in the language of a tax statute are to be resolved in favor of the taxpayer." *Id.*

The UTA provides that "[t]here is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using . . . tangible personal property in this state." MCL 205.93(1). But MCL 205.94(1)(c) provides that "[p]roperty purchased for resale" is exempt from use tax. "[T]he plain meaning of the phrase 'purchased *for resale*' conveys a legislative intent inconsistent with purchase for another purpose." *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000) (emphasis in original). Case law indicates that the purchaser's intent at the time of the purchase is controlling for purposes of determining whether the exemption has been met. See, e.g., *id.* at 468, 473 (concluding that under the above exemption, the defendant would have been exempt from use tax, and, therefore, not guilty of tax evasion, if the jury had believed that he acquired the vehicles in question with the intent of holding them just long enough to do necessary repairs and then selling them); *Betten Auto Ctr, Inc*, 272 Mich App at 20-21 (concluding that the dealerships that had purchased vehicles as inventory for ultimate resale were exempt from use tax under the above exemption).

Here, petitioner purchased supplies and equipment from Supply Pro for the purpose of resale to GM for use by GM's janitorial staff. The supplies were shipped directly from Supply Pro to the proper GM facility. The contract between petitioner and GM provided that petitioner would provide the necessary supplies and equipment, and GM would be billed the cost. Petitioner's invoices to GM differentiated between costs associated with supplies and equipment and costs for petitioner's supervisory services. Respondent can show neither misapplication of the law or adoption of an erroneous principle in this case. The Tribunal's findings of fact are

[3] The law relevant to the instant appeal was affirmed. Our Supreme Court affirmed this Court's "judgment holding that the vehicles in question are exempt from the imposition of a use tax under the resale exemption contained in MCL 205.94(1)(c). The MCL 205.94(1)(c) 'purchased for resale' exemption precludes tax under MCL 205.93(1)." *Betten Auto Ctr*, 478 Mich at 864. Our Supreme Court vacated this Court's opinion as it related to the "exemption for demonstration purposes" and the definition of "consumer." *Id.*

supported by competent, material, and substantial evidence on the record. Property "purchased for resale" is completely exempt from the imposition of use tax "upon the satisfaction of applicable statutory criteria." *Betten Auto Ctr*, 484 Mich at 864. Thus, petitioner's satisfaction of these criteria is dispositive and we need not evaluate respondent's additional arguments advanced on appeal.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot