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

Michiana Recycling & Disposal Service,
Petitioner,

v

MTT Docket No. 14-000388

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

The Tribunal has reviewed the file in the above-captioned case and finds that the Tribunal entered a Partial Final Opinion and Judgment on November 16, 2015, partially granting the parties' separate motions for summary disposition ("Partial FOJ"). In the Partial FOJ, the Tribunal indicated that there were factual issues remaining with regard to identifying (i) the trucks used solely for the residential services, (ii) the trucks used solely for roll-off services where the customer did not own, and (iii) the trucks used to carry the fiber material under the Dollar Tree contract. In response to the Partial FOJ, the parties filed a Stipulation of Facts on December 4, 2015, purporting to resolve the outstanding factual issues. The Stipulation did not, however, address those issues or, more specifically, the amount of the audit exceptions. Rather, the Stipulation merely proposed an "adjustment" to the assessment at issue based on a "review" of the audit work papers and the "identification" of the audit exceptions. As a result, the Tribunal entered an Order on December 7, 2015, scheduling this case for the conducting of an evidentiary hearing on February 8, 2016. In response to that Order, the parties filed an Amended Stipulation of Facts on January 11, 2016. Although the Amended Stipulation once again proposes to "adjust Assessment Number UB49343 in the amount of $36,666.72," the Amended Stipulation specifically indicates that the proposed adjustment is based on the parties' agreement that "the adjustment to the assessment required by the Proposed Order[1] reduces the audited capital asset exceptions by the amount of $360,567.81" and "the audited expense exceptions by the amount of $250,544.19."[2] As such, the parties have, at least by inference, resolved the outstanding factual issues identified in the Partial FOJ and this case is ripe for entry of a Final Opinion and Judgment ("FOJ"). Therefore,

IT IS ORDERED that the assessment at issue (i.e., Assessment No. UB49343) shall be ADJUSTED by the agreed upon amount of "$36,666.72 in principal tax and the coinciding interest thereon."

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[1] The "Proposed Order" is the Tribunal's Order, albeit mislabeled, entered on September 28, 2015, proposing to partially grant Petitioner's Motion for Summary Disposition, partially grant Respondent's Motion for Summary Disposition and scheduling the case for a status conference.

[2] The parties' Amended Stipulation of Facts reflecting the proposed adjustment is attached hereto and made a part of this Order.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties as adjusted by this FOJ within 20 days of the entry of the FOJ.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes, interest, and penalties shall collect the taxes, interest, and penalties or issue a refund as required by this FOJ within 28 days of the entry of the FOJ.

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

APPEAL RIGHTS

If you disagree with the Tribunal's final decision in this case, you may either file a motion for reconsideration with the Tribunal or a claim of appeal directly to the Michigan Court of Appeals ("MCOA").

A motion for reconsideration with the Tribunal must be filed, by mail or personal service, with the $25.00 filing fee, if applicable, within 21 days from the date of entry of this final decision.[3] A copy of a party's motion for reconsideration must be sent by mail or electronic service, if agreed upon by the parties, to the opposing party and proof must be submitted to the Tribunal that the motion for reconsideration was served on the opposing party.[4] However, unless otherwise provided by the Tribunal, no response to the motion may be filed, and there is no oral argument.[5]

A claim of appeal to the MCOA must be filed, with the appropriate entry fee, unless waived, within 21 days from the date of entry of this final decision.[6] If a claim of appeal is filed with the MCOA, the party filing such claim must also file a copy of that claim, or application for leave to appeal, with the Tribunal, along with the $100.00 fee, if applicable, for the certification of the record on appeal.[7]

By Steven H. Lasher

Entered: January 15, 2016
pmk

[3] See TTR 257 and TTR 267.
[4] See TTR 225.
[5] See TTR 257.
[6] See MCR 7.204.
[7] See TTR 213 and TTR 267.

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
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Michiana Recycling & Disposal Service,
Petitioner,

v

MTT Docket No. 14-000388

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER PARTIALLY GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER PARTIALLY GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

PARTIAL FINAL OPINION AND JUDGMENT

INTRODUCTION

Administrative Law Judge ("ALJ") Peter M. Kopke issued a Proposed Order Partially Granting Petitioner's Motion for Summary Disposition and Partially Granting Respondent's Motion for Summary Disposition on September 28, 2015.

On October 16, 2015, Petitioner filed exceptions to the Order. Petitioner contends that the ALJ improperly made factual findings which is not permitted in ruling on motions for summary disposition and improperly apportions the exemption.

On October 30, 2015, Respondent filed a response to the exceptions. In the response, Respondent contends that the Tribunal's Order was not a Proposed Opinion and Judgment and, therefore, exceptions are premature. In addition, Respondent contends that judicial estoppel prevents Petitioner from changing its position regarding the "liens of business" and apportionment. Further Respondent contends that the ALJ erred in finding that Petitioner is an

interstate fleet motor carrier as it is not in "the business" of carrying others' property but is a garbage disposal company.

The Tribunal has reviewed the exceptions, response, and the evidence submitted and finds that Petitioner has failed to demonstrate good cause to justify modifying the Proposed Opinion and Judgement. As a result, Petitioner's Motion for Summary Disposition is partially granted and Respondent's Motion for Summary Disposition is partially granted.

PETITIONER'S CONTENTIONS

In support of its exceptions, Petitioner contends that the Administrative Law Judge erred in apportioning the exemption and impermissibly making unsupported factual findings. More specifically, Petitioner contends that the use tax exemption applies in full even though there may be a partial nonexempt use. Petitioner further contends that, given the ALJ's finding that it is an interstate fleet motor carrier, all of its rolling stock is entitled to the exemption under the plain language of MLC 205.74k(4).

Petitioner also contends that the ALJ improperly made factual determinations regarding the ownership of the trash. Specifically, Petitioner contends that the ALJ erred in relying on "common sense" with regard to residential customers' intent to transfer ownership to Petitioner upon the disposal of its waste. In addition, Petitioner contends that the ALJ made an improper inference that parties' intent with regard to ownership was the same between residential and commercial customers given that the contracts are different.

RESPONDENT'S CONTENTIONS

In support of its response, Respondent contends that Petitioner's exceptions should be stricken as the Tribunal has not yet issued a Proposed Opinion and Judgment. Respondent also contends that Petitioner is judicially estopped from changing its position that its lines of business

be treated separately for purposes of determining whether the rolling stock exemption applies. More specifically, Respondent contends that Petitioner has "unequivocally and successfully" advocated for the Tribunal to treat its commercial, residential, and roll-off lines of business separately and it cannot change its position to now request a full use tax exemption. Further, Respondent contends that the Tribunal did not err in making improper factual conclusions. First the Tribunal did not merely rely on "common sense" to determine that customers had no desire to retain an ownership interest in the property disposed but referenced the undisputed facts that the trash was comingled with other customer's trash upon pickup, recyclables were sold to third parties, and Petitioner's owners' statements that Petitioner had a right to sell the recyclables, and his belief that customers intended to get rid of their trash. In addition, the nature of Petitioner's services were generally the same between its line of businesses based upon the testimony and evidence, and as such, the ALJ did not err in finding that title passed in residential services the way it did in commercial services.

Respondent also argues that if the ALJ erred, it was an error in failing to fully deny Petitioner's exemption and finding that Petitioner is not in *the* business of carrying property as it is a garbage disposal company.

CONCLUSIONS OF LAW

The Tribunal has carefully considered the exceptions, response, and the case file and finds that Petitioner has failed to demonstrate good cause to justify modifying the Tribunal's Proposed Opinion and Judgment. As a result, the Tribunal finds that the ALJ properly partially granted both Petitioner's and Respondent's Motions for Summary Disposition.

First, the Tribunal finds that Respondent's contention that the exceptions are not properly filed is without merit. More specifically, although the ALJ failed to indicate that the Order

issued on September 28, 2015 was a Proposed Opinion and Judgment, it was. More specifically, the ALJ stated that his order "resolves the dispositive legal issues in this case" and partially granted Summary Disposition in favor of each party. As a result, the ALJ's decision was dispositive with regard to those legal issues and was, therefore, a Proposed Partial Opinion and Judgment. Thus, the Tribunal finds that Petitioner's exceptions were properly filed and are considered in this Partial Final Opinion and Judgment.

Petitioner contends that the ALJ erroneously proposes to apportion the exemption even though he properly held that apportionment is improper. The Tribunal finds that Petitioner's new contention that it is fully exempt is not supported. Petitioner relies upon *Michigan Bell v Dep't of Treasury*[1] to support its contention that "once the ALJ correctly determined that [Petitioner] was an intestate fleet motor carrier, even partially, [Petitioner] was entitled to the full use tax exemption for all its rolling stock."[2] However, MCL 205.94k(4) specifically states that "the tax levied under this act does not apply to the storage, use, or consumption *of rolling stock* used in interstate commerce and purchased, rented, or leased by an interstate fleet motor carrier" (Emphasis added.) Thus, the exemption applies to Petitioner's "rolling stock" and not Petitioner as an entity and apportionment is improper with respect to the rolling stock itself. This is clear in the Court's analysis in *Michigan Bell*, as well as it held that:

> it does not appear that the Legislature intended the use tax exemption to be apportioned, such that the exemption applies only to that portion of the *equipment's value* attributable to the provision of services actually consumed or used that are themselves subject to the use tax.[3]

Thus, the Tribunal finds that the ALJ did not inappropriately propose to apportion the exemption when he found that the rolling stock used in the residential line of business is not entitled to an

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[1] *Michigan Bell v Dep't of Treasury*, 229 Mich App 200; 581 NW2d 770 (1998).
[2] Exceptions at 5.
[3] *Michigan Bell* at 208. (Emphasis added.)

exemption even though some of the rolling stock in the roll-off services line of business was used in whole or part for exempt purposes. Similarly, the ALJ did not inappropriately propose to apportion the exemption in the roll-off services line of business. Rather, the ALJ held that there are factual issues remaining with regard to identifying the rolling stock and for what purpose it was used. The ALJ found that any rolling stock that was used, even partially, for an exempt purpose will be fully exempt. Moreover, the equipment at issue is distinguishable from the equipment in *Michigan Bell*. Here, the equipment is numerous individual trucks whereas in *Michigan Bell* the exchange equipment and station apparatus through which telephone calls flow could not be separated and used independently from the entire network. Thus, it would be improper to apportion the exemption on the value of an individual truck but not with regard to the fleet of rolling stock given it is separate and identifiable. As indicated above, apportionment is inappropriate with regard to the equipment, or rolling stock, not with regard to the taxpayer as a whole. Thus, the Tribunal finds that the ALJ properly held that a hearing is necessary to resolve the factual issues regarding the specific use of the rolling stock at issue.

Respondent contends that Petitioner is judicially estopped from now contending that its entire fleet of rolling stock is exempt from use tax under MCL 205.94k as it has already successfully advocated that the rolling stock shall be treated differently based upon the individual "lines of business." The Tribunal finds that Respondent's contention is not supported and the cases cited by Respondent for this proposition clearly indicate that judicial estoppel applies to inconsistent positions in *later proceedings*. Here, Respondent has not cited any prior case in which Petitioner has successfully advocated that the rolling stock shall be treated differently based upon lines of business. Rather, Respondent merely cites to the pleadings in the instant case. Given that there has been no prior proceeding, the Tribunal finds Respondent's

contention on judicial estoppel is without merit. Nevertheless, the Tribunal finds that, as indicated above, Petitioner's new contention regarding a full exemption is not supported.

Petitioner also contends that the ALJ erroneously made findings of fact in the Proposed Order. Specifically, Petitioner contends that the ALJ erroneously made a determination with regard to its residential customer's intent to transfer ownership upon the discarding of the waste. The Tribunal finds, however, that the ALJ's finding was not a factual finding but a legal conclusion relating to the transfer of ownership. Based upon the undisputed facts in evidence, the ALJ properly held that title transferred to Petitioner upon the disposal of waste based upon numerous factors. Specifically, the ALJ relied, in part, upon the affidavit of Mr. Valkema, Petitioner's owner, which stated that customer's intent was "to get rid of the trash" and that Petitioner had a right to sell the recyclables disposed of by the customers.[4] Thus, based upon Petitioner's own evidence the ALJ made a reasonable inference regarding the intent of the customer. As Respondent properly indicates, this inference was supported by the evidence on record and was not an improper factual finding. Petitioner also contends that the ALJ's inference that the residential customer's intent was the same as the commercial customer's intent was improper. The Tribunal again finds this inference to be reasonable based upon Petitioner's evidence, namely Mr. Valkema's affidavit. Overall, the Tribunal finds that the ALJ's legal conclusion that ownership of the waste transferred to Petitioner is supported by the evidence on record. The legal conclusion was only based, in part, upon the customer's intent and also based upon numerous other factors such as the comingling of the waste with other customer's waste upon pick up and Petitioner's right to sell or otherwise dispose of the waste in the manner it saw fit.

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[4] See Proposed Opinion Judgment at 11-12.

Respondent contends that, in the alternative, if the ALJ erred, he erred in finding that Petitioner is in "the business" described in MCL 205.94k(4). More specifically, Respondent contends that Petitioner is a garbage disposal company and is not in *the* transportation business. Respondent's analysis emphasizes the article "the" in contending that Petitioner's business does not meet this statutory exemption. As properly found by the ALJ, waste is tangible personal property as it clearly meets the statutory definition of the same under the Use Tax Act and to dispose of the garbage, Petitioner must transport the waste to the disposal site. As such, Petitioner is in *the* business of transporting personal property.

Given the above, Petitioner has failed to show good cause to justify the modifying of the Partial Proposed Opinion and Judgment or the granting of a rehearing.[5] As such, the Tribunal adopts the Partial Proposed Opinion and Judgment in this case.[6] As indicated in the Partial Proposed Opinion and Judgment, there are factual issues remaining with regard to identifying the trucks used solely for the residential services and the trucks used solely for roll-off services where the customer did not own the container. Also, it must be determined which trucks were used to carry the fiber material under the Dollar Tree contract. The case, therefore, shall be scheduled for an evidentiary hearing on these issues of fact.

JUDGMENT

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

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is PARTIALLY GRANTED.

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[5] See MCL 205.762.
[6] See MCL 205.726.

This Partial Final Opinion and Judgment resolves the legal issues pending in this case; however, it does not close the case as factual issues remain.

By Steven H. Lasher

Entered: November 16, 2015
krb

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

Michiana Recycling and Disposal Service,
Petitioner,

v

MTT Docket No. 14-000388

Michigan Department of Treasury,
Respondent.

Administrative Law Judge Presiding
Peter M. Kopke

ORDER PARTIALLY GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER PARTIALLY GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER SCHEDULING STATUS CONFERENCE

INTRODUCTION

On March 19, 2015, Petitioner filed a motion for Summary Disposition under MCR 2.116(C)(10), claiming that there is no genuine issue of material fact that Petitioner qualifies for the rolling stock exemption from use tax under MCL 205.94k(4) and that Respondent's assessment of use tax must be canceled.

On March 19, 2015, Respondent filed a motion for Summary Disposition under MCR 2.116(C)(10), claiming that there is no genuine issue of material fact that Petitioner does not qualify for the rolling stock exemption under MCL 205.94k(4) and that the assessment must be affirmed.

On April 9, 2015, Petitioner filed a response opposing Respondent's Motion asserting that genuine issues of material fact exist that preclude judgment in favor of Respondent.

On April 9, 2015, Respondent filed a response opposing Petitioner's Motion asserting that genuine issues of material fact exist that preclude judgment in favor of Petitioner.

Both parties requested Oral Argument, which was granted by an Order entered on May 27, 2015, and conducted on June 10, 2015.

The Tribunal has reviewed the Motions, the responses, and case file and finds that Petitioner is entitled to the rolling stock exemption relative to the rolling used to transport the "roll-off" containers or other property owned by others. The Tribunal also finds that Petitioner is not entitled to the rolling stock exemption relative to the rolling stock used to carry residential waste and recyclable materials.

PETITIONER'S CONTENTIONS

In support of its Motion and Response, Petitioner contends that Petitioner is entitled to the rolling stock exemption under MCL 205.94k for the trucks and parts that it used to provide waste transportation services to its residential and roll-off customers and that Petitioner is an "interstate fleet motor carrier" within the meaning of the statute because it was "engaged in the business of carrying . . . property . . . other than their own property, for hire across state lines."[1]

Relative to its residential customers, Petitioner contends that (i) it did not intend to own or take title to the residentially generated waste, as indicated by the deposition testimony of Petitioner's President, (ii) Petitioner's customers considered the waste to belong to them and in one instance Petitioner permitted a customer to search through the discarded garbage for a winning lottery ticket, (iii) Petitioner generally did not enter a written contract with its residential customers, but sometimes used a Standard Residential Contract, which was silent with regard to ownership of the waste.

Relative to its roll-off customers, Petitioner contends that (i) its roll-off containers were owned by the customer or leased from a third party, (ii) the customers that owned their own roll-

[1] See MCL 205.94k(6)(d).

off container are Target, JC Penney, Value City Furniture, Indiana State Prison, Hinsdale Farms, and Wal-Mart and in some instances, roll-off customers may receive revenue from the sale of recyclable materials or a rebate from the sale, (iii) Petitioner's President testified at deposition that Petitioner did not intend to take title to the waste materials generated by the roll-off customers and that the roll-off customers considered the waste material to continue to belong to them because on one occasion a Wal-Mart employee accidentally discarded a $5,000 Telezon inventory scanning device and Petitioner assisted the customer in retrieving the device from the landfill, and (iv) Petitioner transported a waste compactor that was owned by Indiana State Prison across state lines, disposed of the waste, and then returned the container to Indiana State Prison.

Petitioner also contends that (i) there is no dispute that Petitioner's trucks are "qualified trucks"[2] or that the trucks were used in interstate commerce, (ii) Petitioner did not own the waste because it did not generate it and the customers hired Petitioner to pick up their waste and dispose of it, (iii) the customers could always retrieve their waste after Petitioner picked it up and disposed of it, (iii) Respondent cannot bar testimony regarding the course of dealings and the President's statement that Petitioner did not intend to take title to the garbage, as the *parol* evidence rule may not be asserted by a stranger to the contract,[3] (iv) there is no merit to Respondent's "responsibility theory" or its claim that Petitioner took title to the waste under the Natural Resources and Environmental Protection Act,[4] (v) Respondent's Draft RAB 2014-XX supports Petitioner's position by stating that a person who hauls its own property and the property of others is not thereby disqualified from the rolling stock exemption, (vi) the rolling

[2] See MCL 205.94k(6)(i).
[3] See *Denha v Jacobs*, 179 Mich App 545, 550 (1989).
[4] See MCL 324.8904.

stock exemption statute does not permit apportionment between exempt and non-exempt uses and the trucks used for both purposes are exempt, (vii) Petitioner properly calculated and paid the uncontested tax related to the commercial contracts based on percentages of Petitioner's three lines of business that are on a spread sheet created by Respondent's auditor and "the Department may contest the percentages of the revenue that [Petitioner] allocated to each respective line of business"[5] (viii) Michigan law regulates how a person who generates waste must transport and dispose of the waste[6] and the customers hire Petitioner to fulfill this duty, (ix) the rolling stock exemption applies to interstate fleet motor carriers, as stated in the statute, not common carriers or transportation companies as argued by Respondent, and (x) by sorting the recyclable material from the other waste material, Petitioner is complying with Michigan law, and this activity does not demonstrate that it owns the waste.

RESPONDENT'S CONTENTIONS

In support of its Motion and Response, Respondent contends that (i) Petitioner is not an interstate fleet motor carrier engaged in the transportation business within the meaning of MCL 205.94k(4) and (6)(d), but rather, Petitioner is a garbage disposal company, (ii) Petitioner has described itself as being in the garbage disposal business and the statute uses the definite article "the" to describe persons engaged in a specific type of business: common carriers, (iii) the rolling stock exemption originally applied to rail cars and machinery used in the railroad industry, and was later expanded to apply to "qualified trucks" used by common carriers in the transportation industry, (iv) Petitioner's accountant admitted at deposition that Petitioner is not engaged in the transportation business and the accountant, on Petitioner's tax exemption

[5] Petitioner's Brief at 20, 21.
[6] See MCL 324.11527(1).

certificate, checked the box for "Other" and wrote in "Rubbish Hauler" rather than check the box for "Transportation," (v) the property at issue (i.e. garbage) becomes the property of Petitioner when it takes possession, (vi) all of Petitioner's contracts that address title provided that Petitioner acquires title to the waste materials when loaded and "[t]hus even where the contracts are silent, it can be presumed that this is the standard expectation within the business as [Petitioner] has not produced even one contract saying the opposite,"[7] (vii) Petitioner carries its own property, (viii) under the law of abandonment, Petitioner owns the property upon pickup, as the "'[a]bandonment' of property or a right is the voluntary relinquishment thereof by its owner or holder, with the intention of terminating his ownership, possession, and control, and without vesting ownership in any other person,"[8] (ix) placing property in a garbage can is the archetypal example of abandoned property,[9] (x) Petitioner's President stated at deposition that garbage generally has negative economic value and Petitioner's residential customers want to get rid of the trash so they pay Petitioner to dispose of it, (xi) the customers intend to abandon the garbage, and Petitioner owns it by operation of law, (xii) Petitioner insures itself against property damage caused by the garbage, (xiii) Petitioner is responsible for any littering violations if trash falls off the truck, (xiv) Petitioner is legally responsible for its trash that it hauls, (xv) Petitioner asserts ownership rights by sorting, marketing, and selling recyclable materials, making between $500,000 to $1.3 million annually from these sales, (xvi) Petitioner does not pay its residential or commercial customers for the recyclable material, (xvii) Petitioner pays fees to the landfill to accept the trash, (xviii) Petitioner's annual report filed with the U.S. Department of Transportation states that Petitioner was a "Private Property" carrier and not an "Authorized For-

[7] Respondent's Brief at 14.
[8] See *Rudnik v Mayers*, 387 Mich 379, 385 (1972).
[9] See 1 Am Jur 2d, Abandoned, Lost, and Unclaimed Property, § 5.

Hire" carrier and according to the federal annual report form, a "Private Property" carrier is "a company that transports its own cargo,"[10] (xix) an "Authorized For-Hire" carrier is one that "receives compensation for transporting . . . goods that are owned by others,"[11] (xx) both Petitioner's president and accountant certified on the federal form that Michiana was a "Private Property" carrier that carries its own property, and (xxi) courts in Illinois, Ohio, and Indiana have ruled consistently with Respondent's position.[12]

Respondent further contends that (i) Petitioner owns hundreds of roll-off containers and in a few instances the customer or a third-party owns the container and the fact that Petitioner sometimes hauled waste in a container owned by someone else does not mean they are engaged in the business of transporting waste containers, as the containers are incidental to the waste hauling business, (ii) Petitioner is not listed by the Michigan Public Service Commission as a for-hire motor carrier regulated under the Motor Carrier Act, (iii) under the Motor Carrier Act, a "motor common carrier of property" is a person "who holds himself or herself out to the public as being engaged in the business of a for hire common carrier . . . in the transportation by motor vehicle from place to place upon or over the highways of this state, the property . . . of others who may choose to employ the person,"[13] (iv) the Motor Carrier Act does not apply to persons who may carry the property of others, where the transportation is incidental to a commercial enterprise of the person other than transportation,[14] (v) Petitioner is a waste disposal business that incidentally carry property belonging to others in rare instances and therefore not a motor

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[10] Respondent's Exhibit I at 4; Also see 49 USC 13102(15)(b).
[11] Respondent's Exhibit I at 4.
[12] See *XL Disposal Corp v Zehnder*, 304 Ill App 3d 202(1999); *Rumpke Container Service, Inc v Zaino*, 94 Ohio St 3d 304 (2002); and *Meyer Waste Systems v Indiana Dep't of Revenue*, 741 NW2d 1 (2000).
[13] See MCL 475.1(i) [This section was amended by 2014 PA 493, which took effect April 1, 2015].
[14] *Id.*

common carrier of property, (vi) the *parol* evidence rule applies to tax cases,[15] (vii) under the *Danielson* Rule, "[a] party can challenge the tax consequences of his agreement as construed by the Commissioner only by adducing proof which in an action between the parties to the agreement would be admissible to alter that construction or to show its unenforceability because of mistake, undue influence, fraud, duress, etc.,"[16] (viii) a taxpayer cannot avoid the tax consequences of the plain language of a contract that it negotiated, (ix) the Department of Treasury's draft RAB 2014-XX is a non-binding draft that does not represent Respondent's official position, and furthermore, Petitioner mischaracterizes the position stated in that document, (x) case law has held in other contexts that waste materials are not property, and (xi) the Rule in *Toaz*[17] requires dismissal, as Petitioner paid the uncontested portion of the tax along with this amended Petition, but did not pay any of the accrued interest as required under MCL 205.22(1), and the case must be dismissed.

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition and, as such, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[18] In the instant case, both parties indicate that their Motions are being filed under MCR 2.116(C)(10).

A motion under MCR 2.116(C)(10) tests the factual support for Petitioner's claim and, when ruling on such motions, the Tribunal must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties "in the light most

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[15] See *Mid America Mgmt Corp v Dep't of Treasury,* 153 Mich App 446 (1986).
[16] See *Comm'r v Danielson*, 738 F2d 771, 775 (3d Cir 1967).
[17] See *Toaz v Dep't of Treasury*, 280 Mich App 457 (2008).
[18] See TTR 215.

favorable to the party opposing the motion."[19] Further, the Tribunal may only grant such motions if the parties' submissions show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.[20] If it is, however, determined that an asserted claim can be supported by evidence at trial, the motion under (C)(10) must be denied.[21]

The Michigan Supreme Court has also 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.[22] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[23] Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving 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.[24] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[25]

CONCLUSIONS OF LAW

The Tribunal has reviewed the Motions and the case file and finds both parties are entitled to partial summary disposition. More specifically, Petitioner's rolling stock is not entitled to the rolling stock exemption with regard to its residential waste removal business because, when engaged in that line of business, the rolling stock was not used to carry property

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[19] See *Maiden v Rozwood*, 461 Mich 109, 120 (1999).
[20] See *Smith v Globe Life Insurance Co*, 460 Mich 446, 454-55 (1999).
[21] See *Arbelius v Poletti*, 188 Mich App 14 (1991).
[22] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362 (1996) (citing MCR 2.116(G)(5)).
[23] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420 (1994).
[24] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115 (1991).
[25] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237 (1993).

owned by others, and thus Petitioner was not engaged in business as an "interstate fleet motor carrier" within the meaning of MCL 205.94k. There is no genuine issue of material fact that Petitioner, when engaged in the business of residential waste hauling, did not carry "property, *other than . . . their own property*, for hire" as required by MCL 205.94k(6)(d). The same is true with regard to the commercial or residential "roll-off" container services in most cases. The property at issue, common household and commercial waste, became the property of Petitioner at the time it took possession of the waste. However, there may remain genuine issues of material fact with regard to rolling stock that may have been used for both exempt and non-exempt purposes and rolling stock that may have been used solely for non-exempt residential purposes.

It is further concluded that Petitioner's rolling stock is entitled to the exemption to the extent that the rolling stock was used in the transportation of property that was owned by others (certain roll-off containers and recyclable fiber materials), as discussed later in this Order.

Petitioner is subject to the Michigan Use Tax "for the privilege of using, storing, or consuming tangible personal property in this state . . . ." The issue in this case is whether Petitioner qualifies for the "rolling stock" exemption:

> (4) For taxes levied after December 31, 1992, the tax levied under this act does not apply to the storage, use or consumption of rolling stock used in interstate commerce and purchased, rented, or leased by an interstate fleet motor carrier.

There is no dispute that Petitioner's trucks are rolling stock used in interstate commerce. In order to qualify for the exemption, Petitioner must be an "interstate fleet motor carrier" that used rolling stock in interstate commerce. The question is whether Petitioner is an "interstate fleet motor carrier" for purposes of the exemption, which is defined in the act as follows:

> "Interstate fleet motor carrier" means a person engaged in the business of carrying persons or property, other than themselves, their employees, or their own property, for hire across state lines, whose fleet mileage was driven at least 10% outside this state in the immediately preceding year.[26]

In order for Petitioner to qualify as an "interstate fleet motor carrier," it must be engaged in the business of carrying property *other than their own property* for hire. The Tribunal must determine whether there are any genuinely disputed material facts as to whether someone other than Petitioner owned the property at issue. In order to answer this question, the Tribunal must examine the facts regarding Petitioner's business activity and the ownership of the waste material or other property that it carried in its trucks. Petitioner describes itself as a waste hauler that provides waste removal services.[27]

Residential Services

With regard to the residential services at issue in this case, Petitioner states that,

> Michiana Recycling and Disposal Service is Southwest Michigan's and Northwest Indiana's leading recycling and garbage collection company. . . . Our residential services allow your garbage, recycling and yard waste to be picked up together using our ONE STOP ONE CONTAINER ONE TRUCK system. This unique comingle system offers our customers more bang for their buck! They're able to receive all of our services at the same time, on the same day, with the same truck making Michiana Recycling & Disposal Services the most convenient and efficient garbage company around.[28]

During the years at issue (2008 to 2012) Petitioner's residential customers put their trash and recyclable materials out for pick up by Petitioner's trucks. The trash was comingled in the truck and compacted.[29] In some cases, customers placed recyclable materials in a yellow bag provided by Petitioner. The trucks proceeded to Petitioner's recovery facility and dumped the trash on conveyors that moved the trash and recyclable material. Petitioner's employees sorted

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[26] See MCL 205.94k(6)(d).
[27] Respondent's Motion for Summary Disposition, Exhibit A3, "R-A3."
[28] Respondent's Motion for Summary Disposition, Exhibit 3, "R-A1."
[29] R-A at 24.

the recyclable material, such as cardboard, rigid plastic, aluminum cans, tin, and clear glass.[30] The recyclable materials were baled and sold to a final end user. Petitioner received a check in payment for the recyclables that it sold to others. Petitioner's residential customers received no remuneration from Petitioner's sale of the recyclables.

In the absence of a mistake or a change of heart, when the customer discarded its trash it intended to part with it forever. The customer abandoned the waste on the road side and minutes later the trash was thrown into a garbage truck along with other trash, and compacted. Common sense dictates that the customer had no desire to retain any ownership interest in the trash or recyclable material.[31] Furthermore, Petitioner retained all discretion in the sorting process to determine which waste materials went to the landfill and which waste materials were to be recycled (and sold to others). Had a market existed for all of the trash, Petitioner would be at liberty to sell all of it. Because Petitioner had the power to sell it, the most logical conclusion is that Petitioner owned all of the trash, consistent with the common law maxim, *nemo dat quod non habet*[32] *[no one can give what one does not have].* At deposition, Petitioner's President and 100% owner, Henry Valkema, answered "Yes" when asked "[w]ould you agree that Michiana has a right to sell the recyclables to the persons to whom the materials are marketed and sold?"[33] When asked whether Petitioner was the owner of the recyclable materials, Mr. Valkema

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[30] R-A at 22, 41.
[31] The term "trash" is used herein to describe all materials discarded by the customer. From the customer's perspective, the waste and recyclable materials are all "trash."
[32] "No one in general can sell personal property and convey a valid title to it unless he is the owner or lawfully represents the owner. *Nemo dat quod non habet.* Persons, therefore, who buy goods from one not the owner, and who does not lawfully represent the owner, however innocent they may be, obtain no property whatever in the goods, as no one can convey in such a case any better title than he owns, unless the sale is made in market overt, or under circumstances which show that the seller lawfully represented the owner." See *Mitchell v Hawley*, 83 US 544, 550 (1872).
[33] Valkema Deposition, R-A at 50.

answered, "I don't know."[34] He also stated that it was not Petitioner's *intent* to take title to the trash. Nevertheless, the ownership of the waste is ultimately a legal question for the Tribunal and Mr. Valkema's lay opinion on issues of legal title is not controlling. Petitioner transported the waste material (non-recyclables) to the landfill. Petitioner paid fees to dump the trash at the landfill.[35] Mr. Valkema, stated at deposition that the customer's intent is "to get rid of the trash" and that customers do not request that the trash be transported to any particular location.[36]

Mr. Valkema denied that the commercial contracts are accurate, where one contract says, "Contractor shall acquire title to waste materials unloaded in the contractor's waste vehicle provided."[37] The assertion by the President contradicting Petitioner's own commercial contracts is insufficient to create a genuine issue of material fact regarding the ownership of the waste in relation to a commercial contract. All commercial contracts submitted for the present motions specify that title to the solid waste passes to Petitioner when it is loaded onto Petitioner's trucks. Petitioner has conceded its claims related to the commercial contracts, and argues that the commercial contracts are irrelevant to the remaining claims pertaining to the residential services. The Tribunal finds, however, that the commercial contracts are relevant to Petitioner's other waste disposal and transportation activities. There is no parallel provision in any agreement or contract with residential customers. Petitioner generally does not enter formal, written contracts with its residential customers. Rather, based on the provisions in the commercial contracts, it is reasonable to infer that the party's respective interests in the passage of title are the same for both residential and commercial services. This, in concert with other factors discussed herein

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[34] R-A at 51.
[35] R-A at 26.
[36] R-A at 42-4.
[37] R-A at 56.

lead to the conclusion that Petitioner's residential business did not involve the carriage of property "other than . . . their own property" within the meaning of MCL 205.94k(6)(d).

Roll-Off Services

A "roll-off" container is a large vessel with wheels that is used when a customer needs to dispose of a large amount of trash. As asserted by Respondent "[t]he distinction between commercial, residential, and roll-off is based on the type of customer that is serviced, the type of truck that is used, and the container that is utilized," citing to the Valkema Deposition. [38] And further, that "the general nature of the business is the same: collecting, hauling, and disposing of waste and recyclables."[39] Petitioner describes the roll-off services as follows:

> Michiana provided waste transportation and disposal services to companies using "roll-offs" – i.e., open-top containers, compactors, and compactor receiver containers – to accumulate typically large volumes of waste. [Citations omitted]. These containers were collected by "roll-off trucks" that were specifically designed to haul the type of roll-off container being used. [Citation omitted]. In providing these services, Michiana would pick up the roll-off container itself with a roll-off truck and transport the container to Michiana's material recovery facility or directly to the disposal facility. [Citation omitted.] Michiana would then return the container to the customer after emptying, unless the customer did not want it returned. [Citation omitted.] Some roll-off containers . . . were owned by the customer and, therefore were not Michiana's property. [Citation omitted]. Indeed, ownership of containers varied during the tax periods in issue depending on who provided the container – Michiana may have provided the container or customer may have provided its own container. During the tax periods in issue, the following Roll-Off customers provided their own containers, and these containers cross state lines: Target, JC Penney, Value City Furniture, Indiana State Prison, Hinsdale Farms, and Wal-Mart. [Citations omitted.][40]

Petitioner completed and filed with the United Stated Department of Transportation, Federal Motor Carrier Safety Administration, a "Motor Carrier Application Report (Application

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[38] R-A at 7:4-8:1.
[39] R-A at 7:1-3, and 17:22 – 18:17). See also Respondent's Exhibit C, Corak Dep at 29:13, and 31:11-15.
[40] Petitioner's Brief in Support of Motion for Summary Disposition at 7.

for U.S. DOT Number) Form MCS 150 (Rev. 3-24-2005)."[41] On that form, which is signed by Henry Valkema, President, and Lynne Corak, Accountant, Petitioner certified that it was an "Interstate Carrier" and that its "operation classification" was "Private Property." The form instructed the applicant to "circle all that apply" and Petitioner did not circle the box that it carried property "for hire." The cargo classification was certified to be "Garbage, Refuse, Trash." Respondent submitted a copy of the instructions for form MCS 150, which states that the selection of the "Operation Classification is based on the type of business the company is engaged in and will help determine the FMCSA regulations the company is subject to."[42] The instructions state that a "for-hire carrier" is a carrier that receives compensation for transporting passengers, or *goods* that are *owned by others*. In contrast, a carrier of "private property" is one that *transports its own cargo*. Petitioner represented to the United States Federal Motor Carrier Safety Administration that is was an interstate carrier of "Private Property." That means, it carried its own property.

Petitioner also described its business on a document entitled "Company Snapshot" as a carrier of private property (garbage/refuse).[43]

Petitioner completed an exemption certificate, signed by its accountant, Lynn Corak, stating that it was in business as a "rubbish hauler."[44]

The fact that Petitioner represented on certain forms that it carried its own property for federal or state regulatory purposes is relevant but not controlling in all circumstances. The Tribunal has determined as matter of law that Petitioner carried its own property when it took possession of waste generated by its residential customers, which is consistent with Petitioner's

[41] R-H1.
[42] R-I.
[43] R-J.
[44] RO.1.

representations on the forms. The above representations also apply to Petitioner's commercial waste hauling business, where its contracts plainly state that Petitioner owns the waste. For the great majority of its roll-off services, Petitioner did not transport property owned by others. This however, does not change the fact that it did carry property belonging to others (certain roll-off containers, a compactor, and fiber material).

The Tribunal shall now specifically address arguments raised by Petitioner, which are summarized in italics below:

"In some instances roll- off customers would retain revenue" from the sale of recyclables by agreement.

This happened very rarely, and never with any residential customers. Even if Petitioner reimbursed a few customers for some of its revenues from the sale of recyclables, this does not prove that the customer owned the property. There is no evidence that Petitioner sold the property as an agent of the customer. The facts indicate that Petitioner sold the property to others and the Tribunal has concluded that Petitioner owned the property that it sold.

Michiana did not generate the waste and "did not intend to own or accept title to any of its Residential customer's solid waste."[45]

Petitioner clearly exhibited its intent to own the waste generated by commercial customers when it entered contracts that specifically provided that it acquired title when it took possession. Petitioner has admitted that the general nature of its three lines of business is the same. The bare assertion regarding Petitioner's lack of intent to own the waste is insufficient to create a genuine issue of material fact. As stated above, in all respects Petitioner exercised rights

[45] Petitioner's Brief at 6.

over the waste consistent with ownership, including the power to sell the waste. This objective demonstration of ownership rights cannot be so easily disavowed.

"Michiana's customers considered the waste to continue to belong to them. For example . . . a Wal-Mart employee accidentally threw away a co-worker's $5,000 Telezon scanning device."[46]

In this instance, there was a mistake. The customer obviously did not *intend* to discard or abandon the valuable item and therefore, title to that device did not pass to Petitioner under the common law of abandonment.[47] Even if title did pass by contract or otherwise, merely because Petitioner assisted the customer to retrieve that device does not mean that the customer intended to retain ownership of all the garbage that it actually intended to discard. Petitioner was not engaged in the business of carrying Telezon devices accidentally dropped into a waste container.

The waste did not belong to Michiana because Michiana did not generate the waste.

This argument lacks merit and is unsupported by any legal authority. Undoubtedly, the customer owned the waste at the time it was generated, but title passed after the residential customer abandoned the property at the curb and when Petitioner took possession.

The waste did not belong to Michiana because the customers designated Michiana to pick up the waste and dispose of such waste.

This assertion only applies to the period of time before the waste was picked up. Clearly the customer owned the waste when it generated it and put it out for pick up. The fact that the customer gave it to Petitioner to transport it away says nothing about its ownership once Petitioner took possession.

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[46] Petitioner's Brief at 8.
[47] See *Rudnick*, supra at 385.

Further, the waste did not belong to Michiana because the customers could always retrieve their waste after Michiana picked up the waste and sent it for disposal.

This argument is not consistent with the undisputed facts. The residential waste was comingled and compacted with other waste, before it was either recycled or dumped in a landfill. The customer consented to the compaction, which means in many cases, the destruction of anything of value that the customer might want back. Second, Petitioner sold the recycled items, so it is unlikely that they could retrieve the items that Petitioner sold. Finally, the only anecdotal evidence of this is when a customer accidentally put something in the garbage, in which case there was no actual intent to discard it. They did not abandon it, or did so under a mistake of fact. This same argument regarding the ability to retrieve garbage was rejected by the Indiana Tax Court.[48]

Valkema testified at deposition that Petitioner did not intend to take title or that it was not part of the dealing that they would take title.

There is generally no written agreement with the residential customer, although it sometimes used a standard contract, which was silent regarding title. The issue of who took title to the property is a legal determination that can be made based on undisputed, objective facts, without the need to consider the lay opinions of Petitioner's president and presumably its customers regarding title. In *VJ Foods* v *Dep't of Treasury*,[49] the Tribunal rejected the taxpayer's argument that the explicit terms of a contract should be disregarded and that the Tribunal should look to the economic reality of the transaction. In that case, the taxpayer argued that certain payments were compensation for services and not royalties, notwithstanding that the

[48] See *Meyer Waste, supra.*
[49] See MTT Docket No. 295871.

parties expressly designated such amounts as royalties under an unambiguous contract. The Court of Appeals upheld the Tax Tribunal, ruling that the Tribunal had no duty to look beyond the express terms of a clear and unambiguous contract.[50] Nevertheless, this is a legal question for the Tribunal and the following definitions are relevant to the discussion:

"Title. 1. The union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property . . . ."[51]

"Ownership. The collection of rights allowing one to use and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent and inheritable."[52]

From the above definitions, the terms "ownership" and "title" are closely related if not synonymous. It can be concluded that Petitioner acquired title to the waste and the recyclables because upon taking possession, it had "the legal right to control and dispose of" the property. Petitioner had the right to sort the trash and to determine whether some or all of it had commercial value. It could sell some *or all* of the property if a market existed. There is no evidence that the customer had any legal right to the property once it abandoned it for Petitioner to haul it away. Given this legal reality, based on undisputed, objective facts, the lay opinion of Mr. Valkema and speculation about the state of mind of the customers is irrelevant and insufficient to create a genuine issue of material fact for trial. Even accepting his testimony as true (that the President did not *consider* that Petitioner became the owner) this does not change the fact that Petitioner had the right to sell it, which means Petitioner owned it.

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[50] See the unpublished opinion *per curiam* issued by the Court of Appeals in *VJ Foods* v *Dep't of Treasury* on May 23, 2006 (Docket No. 259460).
[51] Black's Law Dictionary, 7th ed at 1206.
[52] Black's Law Dictionary, 7th ed at 906.

Draft RAB 2014-XX

This RAB is entitled to no consideration or weight because it is a draft that does not purport to reflect the position of the Department of Treasury. Furthermore, Petitioner's selective quotation does not support its position. The Tribunal interprets the RAB to mean that an interstate fleet motor carrier who is engaged in the business of transporting the property of others does not lose the exemption merely because it also transports its own property.

Because some of Petitioner's customers owned their own roll-off container, Petitioner was engaged in the business of carrying property other than their own property across state lines for hire.

This argument only applies to property used to carry a waste in a roll-off container owned by Petitioner's customers. Petitioner would be entitled to the exemption for any qualified rolling stock that was used to carry the roll-off container that was owned by the customer. In one sense, Petitioner was not *engaged in the business of* transporting roll-off containers back and forth from the customer's business to the landfill. The customer did not hire Petitioner for the purpose of taking its roll-off container for an interstate journey. Rather, the customer hired Petitioner to transport and dispose of waste.

It is concluded that Petitioner took title to the waste generated by its roll-off customers. Respondent submitted copies of roll-off contracts that state that title to the waste transfers when it is loaded onto Petitioner's truck. Respondent's Exhibit G.1 is a purchase order with a five page agreement governing roll-off waste removal services, entitled "Terms and Conditions - - Waste Services." It appears to be a standard agreement that Petitioner's customer ("Tegra Consulting and Services, Inc.") entered into with its vendors, which in this agreement, is Petitioner and Tegra are the Generators of the Waste. The agreement has been customized with

specific provisions governing the waste removal services. The purchase order specifies that the "Terms and Conditions" constitute the final agreement between Tegra and Petitioner, and cannot be modified except in writing. With regard to the dispositive issue in our case, the agreement states:

> TITLE AND LIABILITY: At the time VENDOR accepts the Waste and takes possession and control thereof, the risk of loss and all other incidents of ownership to the Waste shall be transferred from Generator and vested in Vendor, subject to the provisions of Article 13, VENDOR shall dispose of the Waste at the disposal site specified in the Order . . . .[53]

That agreement also states that in the event Petitioner transports "non-conforming Waste," meaning waste of a type not contemplated by the agreement, that "title to and liability for" non-conforming waste shall remain with TEGRA, but that title will transfer to Petitioner upon entering an agreement regarding the proper disposal of that waste. This contingency does not make Petitioner a person engaged in the business of transporting the property of another for hire. The reason this provision exists is to discourage the customer from placing "non-conforming waste" into the disposal container, and how to deal with it if this occurs. Also, Petitioner has the right to reject any non-conforming waste. Under certain circumstances, Petitioner may revoke acceptance of non-conforming waste (re-vest title in TEGRA). These provisions do not change the character of Petitioner's business activity.

The agreement is very specific on transfer of title:

> Title to and ownership of the Waste shall transfer from Generator to VENDOR when the loading operation of Waste onto vehicles provided by or on behalf of VENDOR has been completed and said vehicles are ready to leave the Generator's Facility, or, for Waste delivered by TEGRA's subcontractors to VENDOR's facility, when such Waste is unloaded at VENDOR'S facility, whichever is applicable.[54]

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[53] R-G.1, Exhibit A, page 2 of 5, paragraph 9.
[54] R-G.1, Exhibit A, page 2 of 5, paragraph 9.

Other "roll-off" agreements are in accord. "Vendor shall acquire title to the Waste Material when it is loaded into Vendor's truck."[55] In most cases, the containers are Petitioner's property. The agreement with AutoZone also provides that Petitioner "shall take full and lawful title to all solid waste material, other than Hazardous Substances deposited into the containers by Autozone . . . ."[56] The roll-off contracts make it clear that Petitioner took title to the waste.

However, Respondent has not genuinely disputed that six customers owned the roll-off containers (Target, JC Penney, Value City Furniture, Indiana State Prison,[57] Hinsdale Farms, and Wal-Mart). Part of Petitioner's business activity involved carrying these containers across state lines for hire and the containers were "other than their own property" within the plain meaning of MCL 205.94k(6)(d). As described by Petitioner, it was engaged in three major lines of business: commercial, residential, and roll-off services. After filing its original petition, Petitioner conceded that the property that it used to perform the commercial contracts was not exempt. The commercial contracts expressly state that title to the waste transfers to Petitioner, and therefore, the rolling stock used for that purpose is not exempt. However, the rolling stock used to perform roll-off contracts for the customers that owned the containers is exempt. This requires the resolution of factual issues as necessary to identify rolling stock used to service any of the six customers that owned the container. The parties agree that any truck that was used for both exempt and non-exempt purposes is 100% exempt, because the statute does not provide for apportionment.[58]

Although Respondent makes cogent arguments regarding the presumed legislative intent to grant the exemption only to common carriers, the plain language of the statute is controlling

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[55] R-G.2.
[56] R-R.5.
[57] Petitioner also asserts that it carried a "waste compactor" owned by the Indiana State Prison.
[58] See *Michigan Allied Dairy Ass'n v Auditor General*, 302 Mich 643 (1942).

and no further interpretation is required or permitted.[59] The Legislature created its own definition of "interstate fleet motor carrier"[60] for purposes of this exemption, and did not tie the definition to any federal or state definitions or classifications pertaining to common carriers. Therefore, with regard to the roll-off contracts for which the customer or a third party held title to the container, Petitioner was "engaged in the business of carrying . . . property . . . other than . . . their own property."[61] Any rolling stock used in that business activity is exempt.

The Dollar Tree Contract – Petitioner Did Not Acquire Title to Fiber Material

An agreement with Dollar Tree states that "Vendor shall acquire title to the Waste Material when it is loaded into Vendor's truck."[62] Petitioner also agreed to deliver Dollar Tree's recyclable fiber material to "RockTenn Waste Services." This agreement also provides that recyclable "fiber material" shall be shipped to a third-party recycler and that Petitioner "shall acquire **no title or interest in the Fiber.**" Petitioner did transport property *other than their own property* when it carried the fiber material owned by the customer. Therefore, Petitioner "engaged in the business of carrying . . . property . . . other than . . . their own property, for hire" within the meaning of MCL 205.94K(6)(d). "Engage" means "[t]o employ or involve oneself; to take part in; to embark upon."[63] "Engaged" as an adjective, means "[e]mployed, occupied or busy."[64]

There is no doubt the agreement with Dollar Tree was business activity. The contract took effect on February 1, 2012, and remained in effect for an indeterminate period. Therefore,

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[59] See *Sun Valley Foods Co v Ward*, 460 Mich 230, 236 (1999).
[60] Respondent has cited no other state or federal law where the term "interstate fleet motor carrier" is used. It is reasonable to conclude that this term is unique to Michigan's rolling stock exemption.
[61] See MCL 205.94k(6)(d).
[62] R-G.4.
[63] Black's Law Dictionary, 4th ed at 434.
[64] The American Heritage College Dictionary, 4th ed at 464.

with regard to this line of business, as with the customer-owned roll-off containers, Petitioner was an "interstate fleet motor carrier" that was "engaged in the business of transporting . . . property, other than . . . their own property, for hire . . . ."[65] Any rolling stock used to perform this service is exempt.

Is Waste Property?

Respondent argues that "[i]ndeed, many courts have held that for some purposes, including for the U.S. Department of Transportation's regulation of interstate 'motor carriers,' trash is *not property*."[66] If the Tribunal were to adopt this as rule of law, it would be dispositive. However, there is no need to look beyond the Michigan Use Tax Act to answer this question. Although the Act does not define "property" for purposes of the rolling stock exemption, it does define "tangible personal property" for purposes of the entire Use Tax Act as "personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software."[67] This definition is properly considered when discerning the meaning of the word "property" as used in MCL 205.94k. The word "including" as used in the definition is a term of expansion and not of limitation in this context. The definition is all-encompassing and applied to the waste and recyclable materials involved in this case.

The Supreme Court of Ohio ruled that certain waste was not "property" and that the taxpayer was not entitled to the Ohio rolling stock exemption. However, the primary basis for the ruling was that the Ohio statute applies only to "persons engaged in highway transportation

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[65] See MCL 205.94k(6)(d).
[66] Respondent's Motion for Summary Disposition at 16, citing *Rumpke, supra*; *Wilson v IESI NY Corp*, 444 F Supp 2d 298, 304-08 (2006).
[67] See MCL 205.92(k).

for hire"[68] which was defined as applying to the "*holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration . . . .*"[69] In that case, the taxpayer argued that it held a USDOT number which was a "permit or certificate" as described in the exemption statute. The court ruled that the taxpayer was classified under federal law as a private motor carrier that transported its own property, and was not a for-hire carrier of property belonging to others. The USDOT identification number was not a certificate or permit that authorized the taxpayer to engage in the transportation of property. Where the Ohio statute expressly relied upon federal law, the court ruled that Petitioner did not meet that statutory requirement. This is distinguishable from our case, where the Michigan statute makes no reference to federal law, notwithstanding that it uses similar terminology. Although the court's ruling on this issue was dispositive citing federal case law,[70] the court also held that the taxpayer did not prove that the non-recyclable waste that it transported was *personal property.*

In one federal case,[71] the taxpayer, a waste disposal business, conceded that it was engaged in the private transportation of property or that the transportation was merely incidental to its main business activity under federal law. The dispositive question was whether waste was *property* under federal law. The waste at issue was "non-radioactive hazardous wastes, elemental and chlorides of mercury."[72] Upon a close reading of the authorities cited on this issue, it is concluded that the various rulings that waste is not property for purpose of regulation by the Federal Interstate Commerce Commission are not persuasive, are distinguishable, and are

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[68] See *Rumpke Container Service, supra* at 305 citing R.C. 5739.02(B)(32).
[69] *Id*, citing R.C. 5739.01(Z)(1) [Emphasis added].
[70] See *Interstate Commerce Comm v Browning-Ferris Industries, Inc*, 529 F Supp 287 (1981).
[71] *Id.*
[72] *Id.* at 289.

not applicable to Michigan's rolling stock exemption. These federal cases involved the jurisdiction of the ICC to regulate for-hire motor transportation of property and the reasoning does not carry over to the Michigan Use Tax Act.

No Apportionment

The ruling in this Proposed Order does not result in unlawful apportionment of the exemption. In *Michigan Allied Dairy Ass'n v Auditor General* [73] the court ruled that property that was put to both taxable and exempt uses qualified for the industrial processing exemption and that the exemption could not be apportioned based on the percentage of exempt use. That case involved milk containers that were used in industrial processing and also served as delivery containers, where the latter use fell outside the scope of the exemption.[74] In the absence of express statutory authority to apportion the exemption, the property was 100% exempt. In our case the parties agree that the rolling stock exemption cannot be apportioned. As in *Michigan Allied Dairy*, any property in this case that was used for an exempt purpose is entitled to a 100% exemption from use tax.

Petitioner is engaged in business as an "interstate motor fleet motor carrier" as that term is defined in MCL 205.94k(d) for purposes of the rolling stock exemption, but only in relation to the lines of business that involve carrying property of others.

Jurisdiction

The Tribunal finds that it has acquired jurisdiction and that Petitioner has complied with the requirements to pay the uncontested portion of the assessment as prerequisite to appeal as required by MCL 205.22(1).

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[73] See *Michigan Allied Dairy Ass'n v Auditor General,* 302 Mich 643 (1942).
[74] *Id.* at 650.

Conclusion

During years at issue, Petitioner was a waste hauler that engaged in three lines of business: commercial, residential, and roll-off services. After contesting all three lines of business in its original petition, Petitioner conceded that property used to perform the commercial contracts is not exempt, but continued in its Amended Petition to claim the exemption for rolling stock used for the residential and roll-off services. For the reasons stated above, the Tribunal concludes that the rolling stock used to perform the residential services is not entitled to the exemption because there is no genuine issue of material fact that Petitioner was not engaged in the business of carrying property *other than its own property*. Likewise for a majority of the roll-off contracts, Petitioner did not carry waste that was owned by others – Petitioner took title to the waste. However, Respondent has failed to create a genuine issue of material fact to dispute that there were six customers that owned the roll-off container that Petitioner carried for hire across state lines. Therefore, Petitioner was engaged in the business of carrying these containers across state lines and is entitled to the exemption for any rolling stock so used.

This Proposed Order resolves the dispositive legal issues in this case. However, there now remain factual issues with regard to identifying the trucks used solely for the residential services and the trucks used solely for roll-off services where the customer did not own the container. Also, it must be determined which trucks were used to carry the fiber material under the Dollar Tree contract. The Tribunal encourages the parties to stipulate to these facts. However, if the parties are unable to so stipulate, the case shall be scheduled for an evidentiary hearing on these issues of fact.

JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition is PARTIALLY GRANTED, as indicated herein.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is PARTIALLY GRANTED, as indicated herein.

IT IS FURTHER ORDERED that Assessment Number UB49343 shall be adjusted consistent with this Proposed Order, subject to a resolution of issues of fact by stipulation or after an evidentiary hearing, if necessary.

IT IS FURTHER ORDERED that the parties shall appear at the Tribunal's Lansing courtrooms for a Status Conference commencing on October 19, 2015, at 9:00 a.m. The parties may participate in the conference by telephone if they submit a written request and telephone number to the Tribunal. The purpose of the Status Conference is to discuss the possibility of settlement or to stipulate to the facts necessary to adjust the assessment in conformity with this Order. In the alternative, a hearing date shall be scheduled in order to resolve remaining issues of fact prior to entry of a Proposed Opinion and Judgment.

By Peter M. Kopke

Entered: September 28, 2015
TAH/pmk