STATE OF MICHIGAN

COURT OF CLAIMS

ANDRIE, INC.,

Plaintiff,

v

DEPARTMENT OF TREASURY,

Defendants.
_____/

OPINION AND ORDER

Case No. 17-000164-MT

Hon. Colleen A. O'Brien

Pending before the Court are defendant's motion for summary disposition and plaintiff's motion for partial summary disposition. For the reasons that follow, defendant's motion is GRANTED pursuant to MCR 2.116(C)(10), and plaintiff's motion is DENIED.

I. BACKGROUND

This case arises under the Use Tax Act (UTA), MCL 205.91 *et seq*., and involves plaintiff's management of Articulated Tug Barge units (ATBs) owned by Lafarge North America and Occidental Chemical Corporation. The ATB units are two separate vessels that work as a dedicated tandem. The vessels are joined together by what is known as the Bludworth coupling method. In this coupling method, a pivot point is established above the bow of the tug into which a notch on the stern of the accompanying barge fits. High-pressure calipers and hydraulic clamps hold the vessels together while they operate in tandem on the water.

As noted by plaintiff's documentary evidence, the vessels have little, if any, use apart from each other as they are currently configured, given their intended design as a dedicated pair. Nevertheless, the vessels can be decoupled from one another, and they have their own separate certification documents from the United States Department of Homeland Security and the United States Coast Guard. In addition, the vessels each have their own insurance policies, and they are treated separately for purposes of United States Coast Guard inspections.

There are three ATB combinations that are at issue in this case: (1) the *Gary L. Ostrander* tug and the *Integrity* barge, which are owned by Lafarge North America; (2) the *Samuel de Champlain* tug and *Innovation* barge, which are owned by American Transport Leasing, a Lafarge subsidiary[1]; and (3) the *Spartan* tug and *Spartan II* barge, which are owned by Occidental Chemical Corporation. As will be discussed in more detail *infra*, there is no dispute that the tugs in the ATB units are all under the 500-ton threshold required of the UTA's registered-tonnage exemption articulated in MCL 205.94(1)(j). The combined weight of the vessels in the ATB pairings does, however, exceed 500 tons.[2] Plaintiff's second amended complaint asks the Court to look at the vessels' combined weight, because plaintiff seeks to claim the registered-tonnage exemption, through the vessels' owners, with respect to use tax owed on supplies, materials, and fuel used or consumed on the ATBs.

[1] Given its status as a subsidiary of Lafarge, the parties' briefing refers to American Transport Leasing as "Lafarge." For the sake of consistency, this opinion will do the same, unless otherwise noted.

[2] Plaintiff's second amended complaint has not made this assertion with respect to the *Spartan-Spartan II* combination.

As an alternative to claiming the exemption, plaintiff's second amended complaint alleges that plaintiff was a mere purchasing agent of the materials, supplies, and fuel and that, by virtue of its agency status, plaintiff did not "use" the materials. The documentary evidence in this case reveals that plaintiff, in its role managing the ATB units, purchased the materials in its management role and that its employees used or consumed the materials in their operation of the respective ATBs. In general, plaintiff ordered the supplies, materials, and/or fuel, and then sought payment from the vessels' owners (Lafarge and/or Occidental) for the purchase price. After receiving payment from the vessels' owner(s), plaintiff would then remit payment for the supplies, fuel, and/or materials purchased.

Michael Flynn, an accountant employed by Lafarge, testified that plaintiff possessed a superior level of expertise with respect to what was needed to run the vessels and from whom to buy all necessary supplies and materials and as a result, Lafarge trusted plaintiff to make the requisite purchases. Under plaintiff and Lafarge's agreements, plaintiff would make all purchases, at its discretion, and would then seek payment from Lafarge for the items. After receiving payment from Lafarge, plaintiff would remit payment to whichever vendor from whom it placed an order or purchased supplies/fuels/materials. Plaintiff's purchasing power was not unlimited, however, because Lafarge gave plaintiff a budget—which plaintiff helped craft on an annual basis—within which to operate. In addition, while plaintiff generally did not need to seek permission before making a purchase, large purchases over a certain (unspecified) dollar amount would require pre-approval from Lafarge. At Flynn's deposition, the parties admitted invoices listing plaintiff as the purchaser, as well as some listing a combination of "Andrie-Lafarge Midwest" as purchaser.

According to the affidavit of Marty Halliday, plaintiff's former accounting manager, plaintiff kept separate checking accounts for money received from Lafarge and Occidental. These separate funds were used to pay for supplies and materials purchased for the ATBs. Halliday averred that the funds belonged to Lafarge and Occidental, and that plaintiff merely held the same on behalf of Lafarge and Occidental. Furthermore, these funds were kept separate from the management fees plaintiff earned under its contractual agreements with Lafarge and/or Occidental. Halliday also averred that when plaintiff incurred an expense in connection with its management and operation of a vessel belonging to Lafarge or Occidental, plaintiff would record the transaction as a debit on its own accounting records. Any payment received from Lafarge or Occidental would be recorded as a credit.

Leo Mackeller, who worked as an accountant for plaintiff, testified that plaintiff largely followed the same procedure with Occidental as it did with Lafarge. That is: (1) plaintiff made purchases; (2) plaintiff submitted cash requests to Occidental; (3) Occidental would approve the purchase and submit payment to plaintiff; and (4) plaintiff would pay the vendors from whom it made purchases with funds received from Occidental.

II. USE TAX AUDITS

Defendant conducted two audits—pertaining to separate time periods—and concluded that the purchases plaintiff made in its management of the vessels were not exempt from use tax. The audits first noted that the tugs in the ATB combinations at issue were under the 500-ton limit necessary for the registered-tonnage exemption. In addition, the auditor concluded that plaintiff used the supplies, fuel, and materials at issue, such that it was subject to use tax in accordance with the same. The audit also concluded that plaintiff purchased the supplies and materials at its

own expense and at its own discretion while managing, operating, and shipping cargo owned by Lafarge and Occidental.

III. THE INSTANT LITIGATION

As alleged in plaintiff's complaint and as expanded upon in the parties' briefing, there are two overarching issues in this case. The first is whether the ATB units can be considered as a single "vessel" for purposes of the registered-tonnage exemption. The second, which is asserted in the alternative, is whether plaintiff is the appropriate taxpayer with respect to the tax imposed on the materials, supplies, and fuel used and/or consumed on the tugs. Plaintiff contends that it was a mere purchasing agent and that its actions performed pursuant to its contractual obligations do not fall within the ambit of actions that would be subject to taxation under the UTA. This matter is now before the Court on the parties' competing motions for summary disposition.

IV. ANALYSIS

Resolution of the questions presented requires an examination of the UTA. In general, the Court's "objective when interpreting a statute is to discern and give effect to the intent of the Legislature" as can be discerned from the plain language of the statute. *Menard, Inc v Dep't of Treasury*, 302 Mich App 467, 471; 838 NW2d 736 (2013). The Court should give effect to every word and phrase employed in a statute and it should avoid reading anything into a statute that the Legislature has not included. *Id.* at 471-472. And "when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *Id.* at 471 (citation and quotation marks omitted).

As plaintiff points out, issues that pertain to the imposition of tax should not be extended "in scope by implication or forced construction," and any ambiguities in a taxing statute "are to be resolved in favor of the taxpayer." *Id*. at 472-473 (citation and quotation marks omitted). To that end, the Court "may not vary the clear and unequivocal meaning of the words used in the statute and determine tax matters solely on the grounds of unwisdom or of public policy." *Id*. at 473 (citation and quotation marks omitted). Resolution of the issues raised in this case also concern an exemption from taxation—the registered-tonnage exemption. An exemption from taxation is treated differently under the law. *Id*. Indeed, "[t]axation is the rule, and exemptions are the exception." *Id*. "Consequently, statutory exemptions are strictly construed against the taxpayer." *Id*. The taxpayer bears the burden of proving entitlement to a deduction or exemption from taxation. *Id*.

A. THE REGISTERED-TONNAGE EXEMPTION DOES NOT APPLY

The Use Tax Act (UTA) imposes on every person a 6% tax "for the privilege of using, storing, or consuming tangible personal property in this state . . . ." MCL 205.93(1). The tax applies to any "person," which is defined in pertinent part as "an individual, firm, partnership, joint venture, association, social club, fraternal organization, municipal or private corporation whether or not organized for profit, company, limited liability company . . . ." MCL 205.92(a). The first issue in this case concerns an exemption from use tax set forth in MCL 205.94(1)(j), which exempts from the tax imposed under the UTA:

> *A vessel* designed for commercial use of *registered tonnage of 500 tons or more*, if produced upon special order of the purchaser, and bunker *and galley fuel, provisions, supplies, maintenance, and repairs for the exclusive use of a vessel of 500 tons or more engaged in interstate commerce*. [Emphasis added.]

Plaintiff contends that an ATB unit, although consisting of two different vessels, should be counted as a single "vessel" under the exemption. Defendant takes the contrary position. This question has already been answered by the Court of Appeals in favor of defendant's position. See *Andrie, Inc v Dep't of Treasury*, 296 Mich App 355; 819 NW2d 920 (2012) (*Andrie I*), rev'd in part on other grounds 496 Mich 161 (2014).[3] In *Andrie I*, the Court of Appeals addressed the issue of "whether a tug and barge physically connected and in dedicated service to each other is a single vessel or two distinct vessels for purposes of the Use Tax Act." *Id*. at 364. As a matter of law, the Court held that a tug-barge combination is not a single "vessel" and it does not come within the auspices of the registered-tonnage exemption. *Id*. at 365-366. The Court's analysis began with the plain language of the exemption, which the Court concluded "reveals that the Legislature intended the exclusion to apply to a *single* vessel that is 500 or more tons." *Id*. at 365. In pertinent part, the Court explained the conclusion that the exemption is intended to apply only to a single vessel:

> . . . is evident from the use of the indefinite article "a", which is "[u]sed before nouns and noun phrases that denote a single but unspecified person or thing." *The American Heritage Dictionary of the English Language* (1996). The term "vessel," in turn, is defined by *Random House Webster's College Dictionary* (1997) as "a craft for traveling on water . . . ." Therefore, the plain language of the statute allows for the exemption to apply to supplies of a *single* watercraft that is 500 or more tons. Nothing in the statute allows for multiple vessels *acting as* a single vessel to qualify for the exemption. Instead, only actual, single vessels are covered by the exemption. It is undisputed that the tugs and barges are, in actuality, separate vessels. They are all registered

[3] The Supreme Court's order granting leave in the *Andrie* decision did not address the registered-tonnage exemption, see *Andrie v Dep't of Treasury*, 493 Mich 900; 822 NW2d 798 (2012), nor did the Supreme Court's opinion in *Andrie*, 496 Mich 161. As a result, the Court of Appeals' holding with respect to the registered-tonnage exemption remains binding on this Court under the principles of stare decisis. See MCR 7.215(C)(2). And even if the decision were not binding, the Court finds the reasoning of *Andrie I* highly persuasive.

> individually with their own names and their own tonnage, with each tug having a tonnage of less than 500 tons. [*Id*.]

Furthermore, the Court of Appeals explained that it mattered not whether the vessels worked as a dedicated tandem, because:

> If plaintiff was correct, we would not only have to read "vessel" as including multiple vessels working in tandem, but we also would have to read into the statute that the exemption would only apply if the vessels were in dedicated service to each other. This is taking the plain language of the statute and stretching it too far. We decline to read more into the statute than what it states. [*Id*. at 366-367.]

In light of *Andrie I* and the plain language of the statute, the Court concludes that the ATB combinations cannot, as a matter of law, satisfy MCL 205.94(1)(j), and that the registered-tonnage exemption cannot apply in this case. That is, even acknowledging the factual differences between the vessels at issue in *Andrie I* and the vessels at issue in this case, the Court concludes that the reasoning in *Andrie I* applies in this case because, at its core, the case involves an attempt to turn two vessels into one, and this is not permitted under the plain language of the statute.

B. PLAINTIFF "USED" THE MATERIALS AT ISSUE AND IS SUBJECT TO TAXATION

The tax imposed by the UTA is levied "for the privilege of using, storing, or consuming tangible personal property . . . ." The parties first dispute whether plaintiff "used" the materials at issue in connection with its management of the particular vessels. The UTA defines "use" in pertinent part as "the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given." MCL 205.92(b). "The UTA does not explain what a right or power incident to ownership of tangible personal property entails." *Auto-Owners Ins Co v Dep't of Treasury*, 313 Mich App 56, 70; 880 NW2d 337 (2015). However, caselaw counsels that "the key feature in

determining whether a party exercised a right or power over tangible personal property is whether the party *had some level of control over that property*." *Id*. (emphasis added).

On the documentary evidence presented, the Court concludes that, assuming plaintiff acted as an agent in the pertinent transactions, plaintiff nevertheless had "some level of control" over the property and that plaintiff "used" the same for purposes of the UTA. As noted by the various operating agreements and the deposition testimony presented in the parties' briefing, plaintiff had discretion about purchasing supplies, fuel, and materials and it purchased the same in accordance with that discretion, albeit within the confines of previously approved budgets. Plaintiff generally did not have to seek prior approval for purchases, but only had to seek confirmation after having made the purchases. Under this arrangement, plaintiff had "some level of control" over purchasing the materials, supplies, and fuel. Additionally, and significantly, plaintiff exercised a degree of control over the fuel, material, and supplies by deciding when, how, and where the same were to be used in operating and maintaining vessels for Lafarge and Occidental. Indeed, Lafarge and Occidental deferred nearly all aspects of operating and maintaining the vessels to plaintiff, given plaintiff's expertise in tug/barge maintenance and operation. This deference and hands-off approach left plaintiff free, albeit within the confines of the parties' agreements, to exercise control over the supplies, fuel, and material. Plaintiff was not, contrary to its assertions, a mere purchasing agent of the same. Rather, plaintiff was intentionally and deliberately afforded deference to operate the vessels as plaintiff saw fit.

In advocating for a contrary result, plaintiff contends that it could not have "used" the materials at issue because it did not have the right to possess them permanently. This argument misconstrues caselaw such as *Auto-Owners*, 313 Mich App at 70, however, which only required "some level of control" of property. And on this point, the Court finds support for its decision in

the *Auto-Owners* opinion, particularly with respect to the examples that were determined to be subject to use tax in the *Auto-Owners* decision. In that case, the Court of Appeals held that where the plaintiff received copies of software from vendors and was able to download the software and access it from plaintiff's computers, plaintiff "exercised an ownership-type right or power" of the same because "the software was installed on plaintiff's computers and plaintiff was able to control when and how the software was used." *Id*. at 76-77. Similarly in the instant case, plaintiff had an "ownership-type right or power" over the fuel, supplies, and materials because plaintiff possessed the same on the vessels and decided when, where, and how to use the materials in the operation of the vessels. See *id*. at 77 (explaining that the plaintiff in *Auto-Owners* exercised "an ownership-type right or power" over software when plaintiff installed it on its computers "and used the software at its own will.").

Another UTA decision, *WPGP1, Inc v Dep't of Treasury*, 240 Mich App 414; 612 NW2d 432 (2000), provides additional support for the conclusion that plaintiff "used" the materials, supplies, and fuel at issue. In *WPGP1*, the plaintiff was an entity that purchased two airplanes and leased them to Southwest Airlines for the latter to use as commercial passenger planes. *Id*. at 415. The issue in that case was whether the plaintiff "used" the planes within the meaning of the UTA by leasing them to Southwest. *Id*. at 416. The Court of Appeals held that the plaintiff did not "use" the airplanes because, under the parties' lease agreements in that case, Southwest, rather than plaintiff, controlled flight schedules and maintenance, and was also held responsible for certain matters involving the airplanes. *Id*. at 417. In other words, the leases at issue in that case gave Southwest "exclusive authority over the use, storage, and consumption of the airplanes during the duration of the leases" such that the plaintiff in that case "ceded control of the airplanes to Southwest, and therefore could not have 'used' the airplanes for purposes of use tax

liability under the UTA." *Id*. at 418. The Court refused to attribute the actions of the lessee (Southwest) to the lessor (the plaintiff). *Id*. at 418-419.

Similar to *WPGP1*, the owners of the vessels at issue ceded control over all aspects of operating and maintaining the vessels to plaintiff. This included ceding control over fuel, supplies, and materials to plaintiff; indeed, as noted above, plaintiff had discretion over what to purchase, when to purchase, and where to purchase the same. Plaintiff was also given sole discretion over the manner in which the vessels were operated on a day-to-day basis. Hence, by virtue of the pertinent management contracts, Lafarge and Occidental ceded control over the use of the materials, supplies, and fuel to plaintiff. And under *WPGP1*, ceding control in this manner demonstrates that plaintiff "used" the pertinent materials, supplies, and fuel. See *id*. In accordance with *WPGP1*, the Court will not attribute plaintiff's actions to Lafarge and Occidental.

In arguing for a contrary result, plaintiff stresses that it acted as a purchasing agent for the vessel owners, and that the vessel owners, not plaintiff were the true "users" of the materials, because any actions plaintiff took were merely on behalf of the vessel owners. This Court disagrees with that proposition, as plaintiff did more than merely purchase the items at issue. Rather, as noted above, plaintiff had discretion and authority to use items purchased in fulfillment of its contractual obligation to manage and operate the vessels. Additionally, plaintiff overlooks that the Use Tax Act does not contain an exemption for acts performed in an agency capacity. See, generally, MCL 205.94 (listing UTA exemptions). This can be contrasted with other taxing statutes, such as the Michigan Business Tax Act, which allowed for a reduction in an entity's modified gross receipts tax base for amounts received by an agent solely on behalf of a principal. See MCL 208.1111(1)(b). In general, where the Legislature omits from one

statutory section language included in other statutes, the Court is to construe the omission as intentional. *Menard, Inc*, 302 Mich App at 471. In addition, courts are not free to add language to statutes that the Legislature did not see fit to include. See *id*. at 471-472. Here, plaintiff, at least at some level, is asking the Court to adopt an agency exemption to the UTA. This Court is not free to do so. Hence, under the UTA, it matters not whether plaintiff's use was on behalf of another entity. All that matters is whether plaintiff "used" the materials, supplies, and fuel. Here, plaintiff "used" the materials, but it seeks to discount the same because its actions were on behalf of others. The plain language of the UTA does not permit plaintiff to escape liability under this scenario.

The Court is also unmoved by plaintiff's attempts to advocate for its position by drawing on the manner in which courts are to construe taxing statutes. For instance, plaintiff notes that taxing statutes are not to be extended "in scope by implication or forced construction," and any ambiguities in a taxing statute "are to be resolved in favor of the taxpayer." *Menard Inc*, 302 Mich App at 472-473 (citation and quotation marks omitted). Plaintiff argues that because the UTA does not clearly cover the issue of agency, this Court should not sanction defendant's attempts to impose use tax on it in this case. However, the Court notes that the caselaw plaintiff cites generally pertains to the threshold question of whether a certain situation or scenario is subject to taxation in the first instance. Here, the instant case involves materials that are plainly subject to use tax; the only question is *by whom* the tax can or should be paid. Furthermore, plaintiff overlooks the fact that it is asking the Court to find that a different taxpayer is liable. In other words, plaintiff is asking the Court to resolve any doubt in its favor *and against other taxpayers*, i.e., Lafarge and Occidental. The canons of construction plaintiff cites do not provide a means of prioritizing certain taxpayers over others, and this is essentially what plaintiff has

asked the Court to do in the instant case. Accordingly, plaintiff's contentions about its status as an agent—assuming for purposes of discussion that it was an agent—do not change the outcome in this case.

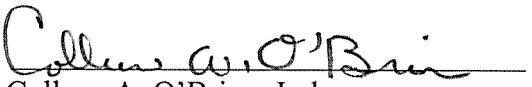
V. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(10).

IT IS HEREBY FURTHER ORDERED that plaintiff's motion for partial summary disposition is DENIED.

This order resolves the last pending claim and closes the case.

Dated: November 8, 2019



Colleen A. O'Brien, Judge
Court of Claims