STATE OF MICHIGAN

COURT OF CLAIMS

BED BATH AND BEYOND, INC.,

Plaintiff,

v

DEPARTMENT OF TREASURY,

Defendant.
_____/

OPINION AND ORDER

Case No. 18-000220-MT

Hon. Colleen A. O'Brien

Pending before the Court is defendant's motion for summary disposition filed pursuant to MCR 2.116(C)(10). The motion is DENIED. Furthermore, because it appears that plaintiff, as the nonmoving party, is entitled to judgment, summary disposition is GRANTED in favor of plaintiff pursuant to MCR 2.116(I)(2). This matter is being decided without oral argument pursuant to LCR 2.119(A)(5).

I. BACKGROUND

Plaintiff is a retailer that sells domestic merchandise and home furnishings. The issue in this case concerns defendant's Use Tax Act (UTA) audit conducted with respect to certain costs incurred in the production and distribution of newspaper inserts and advertising circulars (hereinafter "advertising materials") sent via the United States Postal Service (USPS). The advertising materials primarily concern what are essentially postcards containing coupons offering customers 20% off from a purchase if the coupon was used by a specific date, or 10% off from a purchase if the coupon was used by a later date. The audit in this case concluded that

the advertising materials were subject to taxation under the UTA because plaintiff "used" the same by retaining control over them during their distribution in this state. As an alternative, defendant's audit concluded that the advertising materials were subject to taxation under the UTA as "direct mail."

As it concerns the production and distribution of the advertising materials, Kevin Holt, an advertising production manager employed by plaintiff, testified at deposition that plaintiff produced its own "art files" for the design of the advertising materials. This design occurred at a facility outside of Michigan. Next, plaintiff purchased paper from an out-of-state supplier and sent that paper, along with the art files, to an out-of-state printing company. After the advertising materials were printed, Harte Hanks Mailing House (Harte Hanks), pursuant to a contractual agreement with plaintiff, arranged to ship the materials to one of its facilities, all of which are located outside of this state. Harte Hanks performed a number of tasks and activities with respect to the advertising materials that ultimately culminated in the materials being mailed out in accordance with scheduled event dates set by plaintiff. Holt testified that Harte Hanks owned and controlled plaintiff's mailing list and that Harte Hanks edited and altered the list at its own discretion. Harte Hanks used this mailing list when it prepared the materials for mailing. Harte Hanks decided which United States Postal Service (USPS) facilities to send the advertising materials to for delivery, and Harte Hanks ensured that all postage and sorting was done in order to effectuate delivery. Holt testified that while Harte Hanks possessed the advertising materials and took a number of actions with respect thereto, plaintiff nevertheless retained ownership of the materials. Holt believed that plaintiff relinquished control over the processing, preparation, and mailing of the circulars by allowing Harte Hanks to handle all mailing responsibilities.

Terry Ahrens,[1] a "Senior Postal Liaison" employed by Harte Hanks, averred that Harte Hanks managed and maintained plaintiff's customer mailing list and that Harte Hanks was responsible for determining which USPS facilities to use in order to ship plaintiff's advertisements to customers. He further averred that Harte Hanks took all the necessary actions in order to qualify plaintiff's advertising materials through USPS requirements, a process he referred to as "Mail Stream Processing." According to Ahrens, "Mail Stream Processing" evaluates and determines the appropriate postage tier and postage rate for mailing materials. This process included printing customer addresses on the advertising materials, and then bundling, shrink wrapping, tagging, and placing the materials onto pallets, separated by destination, as determined by Harte Hanks. According to Ahrens, Harte Hanks could, but rarely did, request the return of materials after they were delivered to USPS facilities.

Under the terms of a February 1, 2002 Services Agreement and subsequent amendments thereto between plaintiff and Harte Hanks, Harte Hanks agreed to "blow-in" advertising circulars to geographic areas selected by plaintiff. Consistent with the deposition testimony and averments noted above, Harte Hanks agreed to create mail routes from the parties' agreed-upon target specifications and to ensure that the advertising materials reached their intended targets.

II. SUMMARY DISPOSITION

This matter is currently before the Court on defendant's motion for summary disposition filed pursuant to MCR 2.116(C)(10). Defendant contends that plaintiff "used" the advertising materials because it exercised the requisite degree of control over them in this state and therefore

[1] Defendant's reply brief protests Ahrens's affidavit because Ahrens was not included on plaintiff's witness list. However, defendant has not asked the Court to strike the affidavit.

is subject to use tax under MCL 205.93(1). Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Dillard v Schlussel*, 308 Mich App 429, 444-445; 865 NW2d 648 (2014).

III. ANALYSIS

The issues raised in this case require the Court to interpret and apply provisions of the UTA. When interpreting a statute, a reviewing court is to begin with the statute's plain language. If that language is unambiguous, this Court must assume that the Legislature intended the plain and ordinary meaning expressed therein and must construe the statute as written. *Burise v Pontiac*, 282 Mich App 646, 650-651; 766 NW2d 311 (2009). Nothing may be read into an unambiguous statute that is not within the statute's plain language. *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217-218; 801 NW2d 35 (2011).

With respect to statutes that impose tax liability, the Court is not to extend statutes "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 v Dep't of Treasury*, 302 Mich App 467, 472-473; 838 NW2d 736 (2013) (citation and quotation marks omitted). To that end, a court interpreting a tax statute "must keep in mind that the authority to tax must be expressly provided." *Ameritech Pub, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008).

A. "USE" UNDER MCL 205.92(B)

Turning to the pertinent statutory provisions, the UTA imposes a 6% tax "for the privilege of using, storing, or consuming tangible personal property in this state . . . ." MCL

205.93(1). The dispute in this case is whether plaintiff's activities within the state satisfy the statutory definition of "use." 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, "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).

B. DISTRIBUTION CASELAW

The purported "use" at issue concerns the delivery of the advertising materials. There are two published Court of Appeals decisions that have interpreted the definition of "use" in the context of the distribution of materials and advertisements. The first was *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698; 550 NW2d 596 (1996), in which the Court of Appeals held that the term "use" in the UTA does not include mere distribution without control over that distribution. In that case, the plaintiff conducted business in this state through mail-order catalogs. *Id*. at 700. The catalogs were produced by a printer in Lincoln, Nebraska, and were shipped by mail to this state from the printer's place of business. *Id*. The facts of that case showed that the plaintiff "retain[ed] no control over" the catalogs once they were delivered to the USPS. *Id*. The issue in *Sharper Image* was whether the UTA's definition of "use" included the distribution of the catalogs. *Id*. at 702. The Court of Appeals held that the plaintiff had not "used" the catalogs in Michigan because the "plaintiff's exercise of a right or power over the catalogs ended when the catalogs were delivered to the postal service in Nebraska." *Id*.

As additional support for its decision, the Court of Appeals looked to cases from other jurisdictions that permitted the taxation of distributions and concluded that the other jurisdictions either: (1) expressly permitted such taxation; or (2) held that such taxation was proper in factual scenarios where "the taxpayer enjoyed indicia of control over the material not present here." *Id*. (citations omitted). These "indicia of control included the power to determine in what publications the advertisements were to be placed and at what time they would be distributed." *Id*. Again, however, those indicia of control were not present in *Sharper Image*. *Id*.

Over a decade after it decided *Sharper Image*, the Court of Appeals revisited the distribution issue in *Ameritech Pub, Inc v Dep't of Treasury*, 281 Mich App 132; 761 NW2d 470 (2008). The *Ameritech Pub* Court rejected the notion that "distribution of tangible personal property can never be a taxable 'use' of the property under the UTA." *Id*. at 139. Instead, and citing the *Sharper Image* panel's focus on control, the *Ameritech Pub* panel held "that under MCL 205.92(b) a distribution of tangible personal property is a 'use' subject to the UTA if the owner of the property exercised 'a right or power . . . incident to the ownership of that property' while the property was in Michigan." *Id*. at 139. The *Ameritech Pub* panel explained that "[a]n owner of tangible personal property no longer exercises a right or power over tangible personal property incident to the ownership of that property when it has ceded total control of the property to a third party." *Id*. at 140 (citation and quotation marks omitted).

Contrary to the plaintiff in *Sharper Image*, the plaintiff in *Ameritech Pub* exercised considerable control over the delivery of the materials at issue in that case. For instance, the plaintiff contracted with a "product development corporation" or PDC for distribution of its telephone directories in Michigan. *Id*. at 134. The plaintiff required the PDC to employ a comprehensive two-stage distribution method—which included a detailed hand-delivery

scheme—of the directories in this state. In light of the plaintiff's comprehensive delivery and distribution instructions, the Court of Appeals concluded that, unlike the plaintiff in *Sharper Image*, the plaintiff "never lost all control over the directories after the directories were transported from [the] printing facility to the PDC's distribution centers." *Id*. The Court of Appeals held that, although the PDC was charged with distributing the directories in Michigan, the PDC did not have authority over the distribution. *Id*. Rather, the plaintiff retained that authority throughout the process, as evidenced by the plaintiff's: (1) setting of distribution hours and dates; (2) instructing the PDC where to place directories; (3) instructing the PDC when to mail the directories; (4) continually monitoring the PDC's progress; (5) setting minimum requirements for the PDC's staffing and its delivery quality-assurance program; and (6) retaining possession of unused directories. *Id*. at 143-144. "Under these circumstances," explained the Court of Appeals, the plaintiff: "exercised 'a right or possession over [the directories] incident to the ownership of [the directories],' MCL 205.92(b), while the directories were in Michigan. Accordingly, [the plaintiff] 'used' the directories in Michigan." *Id*. at 144.

C. PLAINTIFF DID NOT "USE" THE MATERIALS IN THIS STATE

On the spectrum of *Sharper Image* and *Ameritech Pub*, the Court concludes that the instant case is far more comparable to the factual scenario in *Sharper Image* than it is to *Ameritech Pub*, and that plaintiff did not retain the requisite control over the distribution for plaintiff to have "used" the advertising materials in Michigan under the UTA. Stated otherwise, plaintiff in the instant case, like the plaintiff in *Sharper Image*, only specified that the materials be delivered. Unlike the plaintiff in *Ameritech Pub*, plaintiff in the instant case did not fill in the precise details of when, how, and where the materials were to be delivered. Indeed, plaintiff merely arranged for Harte Hanks—after Harte Hanks arranged for the materials to be shipped to

its location—to ready the advertising materials for mailing as Harte Hanks saw fit. Harte Hanks owned the mailing lists and controlled how the advertising materials would arrive to customers via the USPS. Harte Hanks made arrangements and judgments about how to have the materials delivered in accordance with USPS constraints and postage rates. Plaintiff only provided an annual schedule for delivery, but left all the other details of the delivery and distribution to Harte Hanks. Plaintiff's control ended when it left all pertinent details to Harte Hanks's discretion. Similar to the plaintiff in *Sharper Image*, plaintiff in the instant case "retain[ed] no control over [the materials] once they are delivered to the postal service." *Sharper Image*, 216 Mich App at 700. Also similar to the factual scenario present in *Sharper Image*, there is no evidence in this case suggesting that plaintiff controlled any aspect of the delivery other than specifying that delivery should occur within a general timeframe. For instance, there is no record evidence that plaintiff demanded that the materials be delivered in a specific manner; instead, plaintiff deferred the delivery logistics to Harte Hanks. In short, any actions plaintiff took with respect to the advertising materials, as well as any control over the same, ended before the materials reached this state.

At the same time, the instant case is readily distinguishable from the elaborate and pervasive controlled exercised by the plaintiff in *Ameritech Pub*. Plaintiff in the instant case only directed that the advertising materials be mailed. Plaintiff lacked the detailed, precise delivery plan employed by the plaintiff in *Ameritech Pub*. For instance, there were no instructions in this case comparable to, or even approaching, the plan employed by the plaintiff in *Ameritech Pub* that required the PDC in that case to hand-deliver many of the directories, with specific instructions where, when, and how to leave the directories at customer sites. Here, by contrast, Harte Hanks simply placed the materials in the mail and Harte Hanks alone—contrary

to defendant's suggestions[2]—retained the right to recall the mail at that point. And unlike the plaintiff in *Ameritech Pub*, plaintiff in the instant case did not demand status updates or quality-assurance programs, nor is there any record evidence of plaintiff attempting to retain a possessory interest in the materials in the event they were undelivered. Instead, plaintiff deferred all aspects of delivery to Harte Hanks, which is not a sufficient retention of control so as to constitute "use" under the UTA. See *Ameritech Pub*, 281 Mich App at 140 ("An owner of tangible personal property no longer exercises a right or power over tangible personal property incident to the ownership of that property when it has ceded total control of the property to a third party") (citation and quotation marks omitted).

Defendant contends that plaintiff exercised control over the advertising materials in this state because the advertising materials contained certain terms and conditions with respect to their use by consumers. Defendant notes the coupons specified that they were only redeemable at brick-and-mortar locations, as opposed to being available for use online, and that they afforded customers a greater discount if they were used by the earlier of two dates printed on the coupon. The Court disagrees with defendant's assertions. As an initial matter, defendant has framed this argument by contending that the terms and conditions imposed on the materials evidences plaintiff's control on the *delivery* of the materials in this state. The Court disagrees that any use

[2] Defendant argues that plaintiff exercised control over the advertising materials because it retained the right to recall the mail after it was deposited at a post office. In support of its argument, defendant cites a document entitled "Mailing Standards of the United States Postal Service, Domestic Mail Manual"; the standards of which are incorporated by reference into 39 CFR 111.1 (2019). However, the standards do not support defendant's position. Indeed, § 4.1 of the standards gives the "sender" of mail deposited at a post office the right to recall mail. Here, by all accounts, Harte Hanks was the only "sender" of the mail, given its role in preparing, labeling, and transporting the advertising materials to the pertinent post office facilities.

of the materials by consumers *after* delivery was completed is relevant to whether plaintiff exercised control over the delivery of the materials. Furthermore, by the time the materials were delivered to prospective customers, plaintiff could not control whether a customer threw them away, recycled them, or simply let them sit idle. The Court declines to adopt defendant's argument, because making a customer's use of a coupon pertinent to the question of whether plaintiff exercised control over the delivery of the coupon would amount to a strained interpretation of the UTA, which this Court will not adopt. See *Ameritech Pub*, 281 Mich App at 136.

D. THE UTA'S "DIRECT MAIL" PROVISIONS

Finally, an examination of the UTA's "direct mail" provisions set forth in former MCL 205.103[3] does not change the Court's analysis. A review of this statute reveals that MCL 205.103 contains sourcing or allocation provisions to tax that is otherwise already owed under the act; it does not authorize the imposition of tax. For instance, the statute makes repeated reference to who must pay the "applicable tax" under the act. See, e.g., MCL 205.103(2) (describing a scenario where the direct mail purchaser is "obligated to pay the *applicable tax*" on a direct pay basis) (emphasis added). Critically, however, nothing in the plain language of MCL 205.103 *imposes* or purports to impose use tax; rather, the statute only directs what is to happen *if* such tax is already applicable. Indeed, when the statute is read in context of the UTA as a whole, it should be understood as referring to the only applicable tax under the act, i.e., the tax imposed by MCL 205.93(1) for the privilege of using, storing, or consuming tangible personal

[3] MCL 205.103 was repealed by 2016 PA 160, effective September 7, 2016, and was replaced by MCL 205.103a. However, because the repealed version of the statute was in effect during the tax years at issue in defendant's audit, this Court refers to the repealed version of the statute.

property within this state. See *Macomb Co Prosecuting Attorney v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001) (providing that statutes are to be read in context and as a harmonious whole). This construction also aligns with the manner in which this Court is to construe taxing statutes, which is that the statutes should not be extended "by implication or forced construction" and that "the authority to tax must be expressly provided." *Ameritech Pub*, 281 Mich App at 136. MCL 205.103's reference to "applicable tax" does not expressly provide defendant with the authority to tax. And in the case at bar, there is no "applicable tax," given the conclusion that plaintiff did not "use" the advertising materials in this state. As a result, MCL 205.103 cannot be read as a means of imposing tax on plaintiff.

Nor is the Court convinced by defendant's argument that the Legislature intended to amend the UTA's definition of "use" to include all distributions of direct mail when, in 2004—eight years after the issuance of the *Sharper Image* decision—it added pertinent provisions about direct mail to the UTA. Had the Legislature intended to subject any level of distribution to use tax, regardless of control, the Legislature could have expressly done so. This Court will not speculate about legislative intent apart from the statute's plain language. Nor will the Court incorporate into the UTA's definition of "use" language that the Legislature included elsewhere in the statute, particularly where MCL 205.103 makes no reference to "use" or to the definition of the term. See *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007) (explaining that if a statute defines a term, that statutory definition must control). Furthermore, adopting such a construction would be inconsistent with *Ameritech Pub*, a case that interpreted the term "use" in a similar context after the 2004 amendments were to the UTA regarding "direct mail." In sum, the UTA's direct mail provisions do not provide authority to impose use tax on plaintiff in this case.

IV. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition is DENIED.

IT IS HEREBY FURTHER ORDERED that summary disposition is GRANTED in favor of plaintiff as the nonmoving party pursuant to MCR 2.116(I)(2).[4] As a result, the final assessment issued in this case is invalid and is hereby cancelled and declared to be without effect.

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

Dated: November 13, 2019

Colleen A. O'Brien, Judge
Court of Claims

[4] Given the resolution of this matter, the Court need not address plaintiff's apportionment argument or plaintiff's statute of limitations argument—an issue plaintiff appears to have abandoned in any event.